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THE Clergy-Man's LAW:

OR, THE

Complete Incumbent,

COLLECTED

From the 39 Articles, Canons, Proclamations, Decrees in Chancery and Exchequer, as alſo from all

ACTS of PARLIAMENT,

AND

COMMON-LAW CASES,

Relating to the

Church and Clergy

OF

ENGLAND;

Digeſted under proper Heads for the Benefit of **Patrons** of **Churches**, and the **Parochial Clergy**.

And will be Uſeful to all STUDENTS, and PRACTITIONERS of the LAW.

By *WILLIAM WATSON* L.L.D. late Dean of *Battel.*

With a Table of the Contents of the Chapters, and another of the Principal matters therein Contained.

To which is Added, the Names of the preſent Biſhops, and other Chief Dignitaries of the Church of *ENGLAND.*

LONDON:

Printed by the Aſſigns of *Richard* and *Edward Atkins*, Eſquires; for **John Place**, at *Furnivals-Inn Gate* in *Holborn*, 1701.

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TO THE

READER.

THE Learned Author of this *Work*, was a perſon by Nature, Education and Experience qualified to Write on this Important Subject. He had a quick *Apprehenſion* and a ſedate *Judgment*, that gave him a large *Senſe* of things and a true *Underſtanding* of 'em: His courſe of *Studies* had long been in the Dictates of *Nature*, the Rules of *Reaſon*, the Precepts of *Morality*, the Foundations of *Property*, the Diſtinctions of *Right* and *Wrong* and whatever elſe we call the CIVIL LAW, in which Honorable *Profeſſion* he was duly admitted to the *Higheſt Degree* L. L. D. and inſtead of borrowing a noiſe from that *Title*, he gave a Reputation to it. But declining *Courts* and Judicial *Clamours*, he devoted his future Services to *God* and to *Religion*, and choſe rather to wait at the *Altar*, and to watch for the Salvation of *Souls*.

Here in Peace and Retirement, he engag'd himſelf in an Elaborate Courſe of *Divinity*, in the Proſecution whereof, he found his Preceding Studies of mighty Advantage to him; his Knowledge in the Laws of Original *Nature*, and in the wiſe Inſtitutions of Humane *Policy*, did rightly prepare him to comprehend the Divine *Oeconomy*, and to interpret all thoſe *Oracles* of God. For as all *Arts* and *Sciences* are neceſſary Hand-maids to *Divinity*, ſo is none more Subſervient, than the Noble Faculty of *Civil Law*, which lays the true Foundations to build upon, the *Foundations* of Nature, Reaſon, Equity, Inſtitution, Cuſtom and all theſe ſprings of *Humane Action*, that muſt be well underſtood, before the *Divine* can be a *Caſuiſt*, or indeed a *Scholar*.

Our Author being thus Piouſly imployed in a Dignified Parochial Cure, the Deanry of *Battel* in *Suſſex*, he was ſoon conſulted by his Neighbors, as a Man able to adviſe 'em in the many Doubts and Difficulties that daily occurr'd to 'em. When finding many of his *Brethren* moleſted by dubious Titles, and exercis'd with a multitude of vexatious Diſputes; he thought it *Charity* and *Juſtice* to ſpend ſome vacant Hours in Stating

the Tenure of Eccleſiaſtical *Beneſices*, the legal Capacity of *Incumbents*, and in ſhort the whole Conſtitution of this *Church* and *Kingdom* relating to the Rights and Properties of our *Engliſh Clergy*.

He had conſidered many Tracts of Sir *John Dodderidge*; of Sir *Simon Deggs*, Dr. *Godolphin*, and others upon this Argument of *Eccleſiaſtical Rights:* But he found 'em either ſo Tedious in *one* reſpect, or ſo Imperfect in *another*, that he could not deny the Labour of drawing up a more Methodical and Abſolute Account of theſe matters, in a Plain Method, and clear a Stile, with ſuch a full Reference to all Statutes, Common Law Caſes, and other binding Authorities, as to make it a Complete Body of the CLERGY-MAN'S LAW.

It muſt be confeſt, that tis ſome Prejudice to the *Work*, and ſome diſadvantage to the World, that the Writer died in the 51 year of his Age, 1689, before he had Revis'd and ſupplied it in ſo perfect a manner, as he ſeems to have projected for the Standing uſes of Poſterity. But in ſome meaſure to compenſate that loſs; his Copy has been ſubmitted to the Review of ſome *Lawyers* and *Divines*, who have in ſeveral places amended and Explained the *Original*, and in many *others*, have inſerted on juſt occaſion ſome proper *Additions*, that muſt needs give Authority to the *Book*, and Satisfaction to the *Reader*.

It is certain, that no performance of this Nature can be a Full and Conſummate Piece in any *One Edition*, or indeed in any *One Age*, but it muſt admit of continual *Alterations* and *Improvements*, becauſe every *Reign*, and almoſt every *Year*, may a little reſtrain or amplifie, the Rights and Cuſtoms of this Church and Nation. So as every *Caſe in Law*, (tho' never ſo nicely ſtated) as new Declarations may ariſe, muſt be capable of ſucceſſive *Corrections* and *Enlargments*.

But as this Treatiſe is now adapted to the preſent Conſtitution, we may without Vanity recommend it, as the moſt Painful and Perfect *Work* of this kind, and the moſt Beneficial of all others, to the Biſhops and their Clergy, to the Magiſtrates and their People, to the Patrons and their Clerks, to the Common Lawyer, Civilian and Divine; to all *Profeſſions* and *Degrees* of Men, whoſe Intereſt or Inclination can direct 'em to underſtand the *Conſtitution* of the CHURCH of ENGLAND as by LAW ESTABLISHED.

On the Occaſion of Inſtitutions, Inductions, *and many other Applications to Eccleſiaſtical* Ordinaries; *It is very neceſſary for the Clergy to know the Names and Titles of the preſent Archbiſhops and Biſhops, Governours, and chief* Dignitaries *in the Church of* England. *For which Reaſon the enſuing Table may be very uſeful.*

Province of CANTERBURY.

Dioceſs of CANTERBURY.

LOrd Archbiſhop, Dr. *Thomas Teniſon*, Primate and Metropolitan of All *England*, tranſlated from the See of *Lincoln*, *Jan.* 16. 1694.
Dean of *Canterbury*, *George Hooper*, D. D.
Archdeacon of *Canterbury*, *John Batteley*, D. D.
Vicar General, *George Oxenden*, L. L. D.

Dioceſs of LONDON.

Lord Biſhop, Dr. *Henry Compton*, tranſlated from the See of *Oxford*, *December* 18. 1675.
Dean of St. *Pauls*, *William Sherlock*, D. D.
Archdeacon of *London*, *William Stanley*, D. D.
Archdeacon of *Middleſex*, *Robert Corey*, D. D.
Archdeacon of *Eſſex*, *Charles Alſton*, D. D.
Archdeacon of *Colcheſter*, *William Beveridge*, D. D.
Archdeacon of S. *Albans*, *John Cole*, A. M.
Chancellor of the Dioceſs, *Henry Newton*, L. L. D.

Dioceſs of WINCHESTER.

Lord Biſhop, Dr. *Peter Mew*, tranſlated from the See of *Bath* and *Wells*, *Novem.* 22. 1684.
Dean of *Wincheſter*, *John Wickart*, D. D.
Archdeacon of *Winton*, *George Fulham*, D. D.
Archdeacon of *Surry*, *Thomas Sayer*, D. D.
Chancellor of the Dioceſs, *Peter Mew*, L. L. B.

Dioceſs of ELY.

Lord Biſhop, Dr. *Simon Patrick* tranſlated from the See of *Chicheſter*, *July* 2. 1691.
Dean of *Ely*, *John Lamb*, D. D.
Archdeacon of *Ely*, *Richard Bentley*, D. D.
Chancellor of the Dioceſs, Sir *John Cook*, L. L. D.

Dioceſs of LINCOLN.

Lord Biſhop, Dr. *James Gardiner*, conſecrated, *March* 10. 1694.
Dean of *Lincoln*, *Abraham Campion*, D. D.
Archdeacon of *Lincoln*, *John Cawley*, D. D.
Archdeacon of *Leiceſter*, *Byrom Eaton*, D. D.
Archdeacon of *Huntingdon*, *White Kennett*, D. D.
Archdeacon of *Bucks*, *John Gery*, L. L. D.
Archdeacon of *Bedford*, *John Skelton*, A. M.
Archdeacon of *Stow*, *John Hutton*, A. M.
Chancellor of the Dioceſs, *William Oldys*, L. L. D.

Dioceſs of LICHFIELD *and* COVENTRY.

Lord Biſhop, Dr. *John Hough*, tranſlated from the See of *Oxford*.

Dean of *Lichfield*, *Lancelot Addiſon*, D. D.
Archdeacon of *Coventry*, *Idem.*
Archdeacon of *Derby*, *Francis Aſhenhurſt*, A. M.
Archdeacon of *Stafford*, *Nathaniel Elliſon*, A. M.
Archdeacon of *Salop*, *Griffith Vaughan*, A. M.
Chancellors of the Dioceſs, *Henry Raines* and *William Walmiſley*, L. L. B. B.

Dioceſs of SALISBURY.

Lord Biſhop, Dr. *Gilbert Burnet*, conſecrated, *March* 31. 1689.
Dean of *Sarum*, *Robert Woodward*, L. L. D.
Archdeacon of *Sarum*, *Joſeph Kelſey*, B. D.
Archdeacon of *Berks*, *Jonas Proaſt*, A. M.
Archdeacon of *Wilts*, *Cornelius Yeates*, A. B.
Chancellor of the Dioceſs, *Edmund Spenſer*, A. M.

Dioceſs of BATH *and* WELLS.

Lord Biſhop, Dr. *Richard Kidder*, conſecrated, *Auguſt* 30. 1691.
Dean of *Wells*, *Ralph Bathurſt*, M. D.
Archdeacon of *Wells*, *Edwin Sandys*, A. M.
Archdeacon of *Taunton*, *Edward Waple*, B. D.
Archdeacon of *Bath*, *William Clement*, A. M.
Chancellor of the Dioceſs, *William Hughes*, L. L. D.

Dioceſs of EXETER.

Lord Biſhop, Dr. *Jonathan Trelawney*, tranſlated from the See of *Briſtol*, *April* 13. 1689.
Dean of *Exeter*, The Right Honourable *Richard* Lord *Altham*, D. D.
Archdec. of *Exeter*, *Edward Lake*, D. D.
Archdeacon of *Cornwall*, *Edward Drew*, A. M.
Archdeacon of *Totnes*, *Francis Atterbury*, D. D.
Archdeacon of *Barnſtaple*, *William Read*, A. M.
Chancellor of the Dioceſs, *John Edisbury*, L. L. D.

Dioceſs of NORWICH.

Lord Biſhop, Dr. *John Moor*, conſecrated, *July* 5. 1691.
Dean of *Norwich*, *Henry Fairfax*, D. D.
Archdeacon of *Norwich*, *John Jeffery*, D. D.
Archdeacon of *Norfolk*, *Charles Trimnel*, D. D
Archdeacon of *Sudbury*, *Nicholas Clagett*, A. M.
Archdeacon of *Suffolk*, *Humphrey Prideaux*, D. D.
Chancellor of the Dioceſs, *Thomas Tanner*, A. M.

Dioceſs of WORCESTER.

Lord Biſhop, Dr. *William Lloyd*, tranſlated from the See of *Lichfield* and *Coventry*.
Dean of *Worceſter*, Lord Biſhop of *Oxford*.
Archdeacon of *Worceſter*, *John Fleetwood*, A. M.
Chancellor of the Dioceſs, *John Price*, L. L. B.

Dioceſs of HEREFORD.

Lord Biſhop, Dr. *Gilbert Ironſide*, tranſlated from the See of *Briſtol*, *July* 29. 1691.
Dean of *Hereford*, *John Tyler*, D. D.
Archdeacon of *Salop*, *Adam Ottley*, D. D.
Archdeacon of *Hereford*, *Thomas Fox*, A. M.
Chancellor of the Dioceſs, *Charles Baldwin*, Eſq;

Dioceſs of CHICHESTER.

Lord Biſhop, Dr. *John Williams*, conſecrated, *December* 13. 1696.
Dean of *Chicheſter*, *William Haley*, D. D.
Archdeacon of *Chicheſter*, *Joſias Pleydel*, A. M. Arch-

Archdeacon of *Lewes*, *Richard Bowchier*, B. D.
Chancellor of the Dioceſs, Mr. *Wright*.

Dioceſs of ROCHESTER.

Lord Biſhop, Dr. *Thomas Sprat*, conſecrated, *Novem.* 2. 1684.
Dean of *Rocheſter*, *Henry Ullock*, D. D.
Archdeacon of *Rocheſter*, *Thomas Plume*, D. D.
Chancellor of the Dioceſs, Sir *Charles Hedges*, L. L. D.

Dioceſs of OXFORD.

Lord Biſhop, Dr. *William Talbot*.
Dean of Chriſt Church, *Henry Aldrich*, D. D.
Archdeacon of *Oxford*, *Timothy Halton*, D. D.
Chancellor of the Dioceſs, *Thomas Ayloffe*, L. L. D.

Dioceſs of GLOCESTER.

Lord Biſhop, Dr. *Edward Fowler*, conſecrated *July* 5. 1691.
Dean of *Gloceſter*, *William Jane*, D. D.
Archdeacon of *Gloceſter*, *Thomas Hide*, D. D.
Chancellor of the Dioceſs, *Robert Parſons*, L. L. D.

Dioceſs of PETERBOROUGH.

Lord Biſhop, Dr. *Richard Cumberland*, conſecrated *July* 5. 1691.
Dean of *Peterborough*, *Samuel Freeman*, D. D.
Archdeacon of *Peterborough*, *Thomas Woolſey*, D. D.
Chancellor of the Dioceſs,

Dioceſs of BRISTOL.

Lord Biſhop, Dr. *John Hall*, conſecrated *Aug.* 30. 1691.
Dean of *Briſtol*, *George Royſe*, D. D.
Archdeacon of *Dorſet*, *Robert Cooper*, A. M.
Chancellor of the Dioceſs.

Dioceſs of St. DAVID.

Precentor, *Hugh Powel*, A. M.
Archdeacon of *Brecknock*, *Timothy Halton*, D. D.
Archdeacon of S. *Davids*, *Arnold Bowen*, A. M.
Archdeacon of *Caermarthen*, *Thomas Stainoe*, D. D.
Archdeacon of *Cardigan*,
Chancellor of the Dioceſs, *Henry Falconbridge*, L. L. D.

Dioceſs of LLANDAFF.

Lord Biſhop, Dr. *William Beaw*, conſecrated *June* 22. 1679.
Archdeacon of *Landaff*, *George Bull*, D. D.
Chancellor of the Dioceſs, *Henry Jones*, L. L. D.

Dioceſs of BANGOR.

Lord Biſhop, Dr. *Humphrey Humfreys*, conſecrated *June* 30. 1689.
Dean of *Bangor*, *John Jones*, D. D.
Archdeacon of *Bangor*, } *Humphrey* Ld.
Archdeacon of *Angleſey*, } Bp. of *Bangor*.
Archdeacon of *Merioneth*, *Francis Lloyd*, A. M.
Chancellor of the Dioceſs, Dr. *Penington*.

Dioceſs of St. ASAPH.

Lord Biſhop, Dr. *Edward Jones*, tranſlated from the See of *Cloney* in *Ireland*, *December* 13. 1692.
Dean of St. *Aſaph*, *Daniel Price*, D. D.
Archdeacon of St. *Aſaph*, *Edward* Lord Biſhop.
Chancellor of the Dioceſs, Dr. *Wynne*.

Province of YORK.

Dioceſs of YORK.

LOrd Archbiſhop, Dr. *John Sharp*, Primate and Metropolitan of *England*, conſecrated *July* 5. 1691.
Dean of *York*, *Thomas Gale*, D. D.
Archdeacon of *York*, *Knightley Chetwood*, D. D.
Archdeacon of *East Riding*, *William Breary*, L. L. D.
Archdeacon of *Clereland*, *John Burton*, D. D.
Archdeacon of *Nottingham*, *William Pearſon*, A. M.
Vicar General, Dr. *Watkinſon*.

Dioceſs of DURHAM.

Lord Biſhop, *Nathaniel* Lord *Crew*, tranſlated from the See of *Oxford*, *October* 22. 1674.
Dean of *Durham*, *Ralph Mountague*, D. D.
Archdeacon of *Durham*, the Honourable Mr. *Booth*.
Archdeacon of *Northumberland*,
Chancellor of the Dioceſs, Dr. *Brookbank*.

Dioceſs of CARLISLE.

Lord Biſhop, Dr. *Thomas Smith*, conſecrated *June* 29. 1694.
Dean of *Carliſle*, *William Graham*, D. D.
Archdeacon of *Carliſle*, *William Nicholſon*, A. M.
Chancellor of the Dioceſs, *Thomas Tully*, B. D.

Dioceſs of CHESTER.

Lord Biſhop, Dr. *Nicholas Stratford*, conſecrated *December* 15. 1689.
Dean of *Cheſter*, Dr. *Fogg*.
Archdeacon of *Cheſter*, *Edmund Entwiſtle*, D. D.
Archdeacon of *Richmond*,
Chancellor of the Dioceſs, Dr. *Wainwright*.

THE

CONTENTS

OF THE

Several Chapters

Contained in this

BOOK.

CHAP. I. *Benefices, by what means they become void. Of Voidance, by the Act of God. From what Time Lapse shall incur upon such Avoidance.*

CHAP. II. *Voidance by Cession, by Canon, and by Statute Law; and of the several Effects of such Avoidances. Benifices incompatible.*

CHAP. III. *Of Pluralities, Qualifications, Dispensations and Commendams.*

CHAP. IV. *Of Resignations, and Exchange of Benefices.*

CHAP. V. *Church void by Act of Law. Of Simony,* &c.

CHAP. VI. *Church void by taking Orders, Admission, Institution,* &c. *Simoniacally; or for not Subscribing the Articles,* &c. *And of Deprivation.*

CHAP. VII. *Of Advowsons, and Right of Patronage, Appendant and in Gross.*

CHAP. VIII. *Of the Right of Patronage, to whom it shall be said to belong. Of Coparceners, and Tetants in Common.*

CHAP. IX. *Right of Presentation, by what means it may pass from one person to another, and how it may come to the King.*

CHAP. X. *Advowsons and Right of Presentation, how granted over from one person to another. What Grants are good, or not.*

CHAP. XI. *Right of Presentation, by what means forfeited.*

CHAP. XII. *Of Lapse.*

CHAP. XIII. *Of Usurpation, and the several Consequences thereof; and of the Writ of Right of Advowson.*

CHAP. XIV. *Of Ordination: The taking of what Orders necessary to make one capable of a Benefice. Deacons, what Preferments they are capable of.*

CHAP. XV. *Of Presentations, Nominations, Collations, Election, Institution and Induction; and of Donatives.*

CHAP. XVI. *Of Unions of Churches.*

The Contents of the Chapters.

CHAP. XVII. *Of Appropriations; and of Vicarages and their Endowments.*

CHAP. XVIII. *Of Commendams.*

CHAP. XIX. *Of Curates and Lecturers.*

CHAP. XX. *Of Presentations and Admission of Clerks presented; what Presentations are good; and what are Causes sufficient for the Bishop to refuse to admit; of* Jure Patronatus *and* Caveats.

CHAP. XXI. *What Remedy for a Clerk Presented, if the Bishop refuse to admit him,* &c. *Of* Duplex Querela, & Jure Patronatus.

CHAP. XXII. *Of the Writs of* Quare Impedit, *and Assise of* Darrein Presentment, *for what, and for whom they are maintainable, and upon what Seisin,* &c.

CHAP. XXIII. *Writs of* Quare Impedit, *and* Darrein Presentment, *how to be brought.*

CHAP. XXIV. Quare Impedit, *and* Darrein Presentment; *by whom, against whom, and in what County to be brought; and what shall be sufficient Cause to abate such Writs.*

CHAP. XXV. *Declarations in* Quare Impedit, &c. *in what manner to be framed, and what ought to be alledged therein.*

CHAP. XXVI. *Of Process, and Pleas in* Quare Impedit, *and* Darrein Presentment, *what Pleas are proper and ought, or may be pleaded by the Ordinary, Patron and Incumbent respectively; and of what Matters a Jury in* Quare Impedit *ought to inquire.*

CHAP. XXVII. *Judgments in* Quare Impdit, *&c. and of Writs to be awarded to the Bishop upon such Judgments.*

CHAP. XXVIII. *The Effects of a Judgment in* Quare Impedit, *and* Darrein Presentment, *and of the Writ awarded to the Bishop,* &c. *to admit,* &c. *grounded thereupon. What is to be done upon such Writ, and what Return the Bishop may make thereunto.*

CHAP. XXIX. *Of Writs of Error upon Judments in* Quare Impedit, *and Assize of* Darrein Presentment.

CHAP. XXX. *Of Induction:* Vi laica removenda, *and Spoliation.*

CHAP. XXXI. *The Ministers Duty in Reading the Common Prayers, Administering the Sacraments,* &c.

CHAP. XXXII. *Statutes for Uniformity of Prayers. Of Holydays to be observed. Ministers bound by Tenure, or Covenant to say Divine Service in a Chapel,* &c.

CHAP. XXXIII. *Ministers Duty in Preaching.*

CHAP. XXXIV. *Disturbances in the Church in time of Divine Service, or Striking, Brawling,* &c. *in the Church or Church-yard, how punished.*

CHAP. XXXV. *The Duty of Ministers in reading some particular Acts of Parliament, and Proclamations of the King: As likewise Briefs, Citations,* &c.

CHAP. XXXVI. *Spiritual persons not to take Farms, or buy or sell for Lucre or Profit,* &c.

CHAP. XXXVII. *Of Residence, and Non-residence.*

CHAP. XXXVIII. *Of Corporations, Sole and Aggregate, and of the Statutes concerning Mortmain.*

CHAP. XXXIX. *Freehold of the Church, and Church-yard, in whom. Interest in, and disposing Seats in the Church,* &c. *Endowment of Vicarages, and of the distinct Rights of the Parson and Vicar.*

CHAP. XL. *Fruits and Profits of Benefices in time of Vacation, to whom they belong, and the Remedies how to recover them, if detained. What Charges Parsons are liable to in respect of their Glebe or Tithes; and of the Temporalties of Bishops, in time of Vacation,* &c.

CHAP. XLI. *What Estates Ecclesiastical Persons might have made at Common Law, and how their Power*

The Contents of the Chapters.

Power is enlarged or leſſened by Acts of Parliament relating thereunto.

CHAP. XLII. *What Leaſes and Eſtates Biſhops,* &c. *may make, and the Rules to be obſerved in making ſuch Leaſes and Eſtates, and what Offices,* &c. *they may grant.*

CHAP. XLIII. *Leaſes by Parſons, Vicars and others of their Eccleſiaſtical Benefices.*

CHAP. XLIV. *Leaſes by Eccleſiaſtcal Perſons, by whom to be confirmed, and what Confirmations are good. Of Variances in Leaſes,* &c. *and miſnaming Corporations.*

CHAP. XLV. *Leaſes void and voidable. Voidable Leaſes how made good or actually void. Entries how to be made. Diſcontinuance, and Aid Prayer. Judgments in Real Actions, to whom binding.*

CHAP. XLVI. *Tithes of what due. Tithes in* London *how payable. Tithes of Houſes.*

CHAP. XLVII. *The ſeveral ways and means Lands may be diſcharged of Tithes at Comm on Law. Of Real Compoſitions.* Modus Decimandi, Non Decimandi, &c. *and if Glebe Lands ſhall pay Tithes.*

CHAP. XLVIII. *Lands how diſcharged of Tithes by ſeveral Acts of Parliament. What Abbies were diſcharged of Tithes. A Catalogue of Abbies above* 200 l. per Annum *value diſſolved by Statute* 31 H. 8. *Unity of Poſſeſſion, and Barren Land.*

CHAP. XLIX. *Predial Tithes, what and in what manner payable, and what* Modus Decimandi *in diſcharge of ſuch Tithes is good.*

CHAP. L. *Mixt Tithes, as of Cattle, Fowles, Agiſtment* &c. *when, and in what manner Payable. and what* Modus, &c. *good to diſcharge ſuch Tithes.*

CHAP. LI. *Perſonal Tithes, what; by whom, and in what manner payable.*

CHAP. LII. *Mortuaries, Offerings, Oblations and Obventions.*

CHAP. LIII. *Tithes, Mortuaries, Oblations and other Church duties, in what Courts to be Sued for.*

CHAP. LIV. *Statutes* 32 H. 8. *and* 2 *and* 3 E. 6. *for the Payment of Tithes: What ſhall be a ſufficient ſetting forth of Tithes: Double or treble value, for not ſetting forth Tithes, in what Courts to be ſued for.*

CHAP. LV. *Small Tithes, and other Church Duties, how to be recovered. Suggeſtions to obtain Prohibitions, how made and proved.* Modus Decimandi *if Suable for in the Spiritual Court.*

CHAP. LVI. *Cuſtom or Preſcription, if tryable in Spiritual Court. Prohibitions, if to be granted to prevent ſuch Trials.*

CHAP. LVII. *Where, and by what Plea the Spiritual Court ſhall be ouſted of Juriſdiction, and upon what Suggeſtions Prohibitions are granted.*

CHAP. LVIII. *Actions upon the Statute of* 2 & 3 Ed. 6. cap. 13. *for not ſetting forth of Tithes, by whom, and againſt whom to be brought. Of Declarations, Pleas, Evidences, Verdicts, and Judgments in ſuch Actions.*

ERRATA.

ERRATA.

PAge 10. Line 6. for *of Cure* read *with Cure*, p. 16. l. 18. *tho' it be made* r. *if a Diſpenſation be made*, p. 17. l. 25. *good Title* r. *no good Title*, p. 18. l. 49. after *found* r. *by Verdict*, p. 19. l. 38. *Car.* r. *Cap.* p. 20. l. 27. 36 r. 31. p. 25. l. ult. *wherein all Caſes* r. *in all Caſes where*, p. 41. l. 36. for *a Rectory* r. *Advowſon of a Vicarage*, p. 45. l. ult. 555. r. 55. p. 51. l. 39. *Haſſo* r. *Huſſey*, p. 55. l. 25. *or* r. *of*, p. 61. l. 26. after 339. r. *contra*, p. 110. l. 35. 159. r. 44. l. 36. dele 6 *Co.* 41. p. 131. l. 14. dele *and*, p. 139. l. 5. 106. r. 18. p. 142. l. 1. *entertain* r. *enter into*, p. 146. l. 40. dele *if*, p. 149. l. 20. *Keib.* r. *Keil.* p. 150. l. 14 *in* r. *but in*, p. 156. l. 37. *to* r. *appear to*, p. 162. l. 6. *Amicus* r. *Amias*, p. 142. l. 28. dele *but I conceive that he continues to be*, p. 156. l. 37. after *made* r. *appear*, p. 170. l. 20. *no* r. *the*, p. 162. l. 3. *Common Law* r. *Canon Law*, p. 163. l. ult. dele *intended*, p. 209. l. 18. for 4. r. 5. p. 212. l. 2. *is* r. *be*, p. 217. l. 6. dele *in*, p. 226. l. 14. *ſuch* r. *in ſuch*, p. 226. l. 47. dele *add f.* 228. p. 233. l. 4 d *to*, l. 39. *in officiate* r. *officiate in*, p. 237. l. 2. *and be it further Enacted by the Authority aforeſaid*, r. *it is Enacted*, p. 247. l. 40. *if this Act had never inflicted any* r. *altho this Act hath inflicted a*, p. 247. l. 46. dele *as*, p. 341. l. 33. for 43. r. 13. p. 360. l. 15. *orderly* r. *ordinarily*, p. 361. l. 25. dele *be*, p. 377. l. 4. 2 *Bendlow* r. *Bendlow* 2. p. 379. l. 10. *Mary* r. *Marſh*, p. 379. l. 24. *this* r. *the*, p. 381. l. 7. for 41. r. 42. p. 382. l. 41. *as* r. *but*, p. 392. l. 1. *that it* r. *if that*, p. 406. l. 1. *return* r. *retain*, p. 407. l. 8. *Tithes* r. *Titles*, p. 422. l. 10. after *Lewis* r. *Abbey of Clunn*, p. 433. l. 36. *included* r. *yielded*, p. 444. l. ult. *ſue* r. *ſhew*, p. 448. l. 28. *Tithe* r. *no Tithe*, p. 461. l. 34. after *are* r. *Mills*, p. 480. l. 46. for 31. r. 32.

THE

THE

Clergy-Man's LAW:

OR,

The Complete Incumbent.

CHAP. I.

Beneſices, by what Means they become void. Of Voidance, by the Act of GOD. From what Time Lapſe ſhall incur upon ſuch Avoidances.

THE Law relating to Eccleſiaſtical Benefices, is ſuch only, which ſerves largely to reſolve theſe Two General Queſtions: Firſt, By what Means a Perſon may make himſelf complete Incumbent of an Eccleſiaſtical Benefice? Secondly, What are the Effects of a complete Incumbency? In ſpeaking to the Firſt, of which (before I ſpecifie the ſeveral Ways, by which a Perſon may take a Title to an Eccleſiaſtical Benefice) I ſhall ſhew, what Things are to be known and done, in order thereunto.

Firſt then: A Perſon that would be Beneficed with an Eccleſiaſtical Preferment, ſhould be inſtructed, by what Means ſuch Preferments do become void; to the end, that he may find out ſome vacant or void Place, worthy his acceptance. Now Voidances of all Eccleſiaſtical and Spiritual Preferments, do happen, either by the Act of God, by the Act of the Party incumbent thereof, or by the Act of the Law.

The moſt uſual and known Means, by which any Spiritual Promotion doth become void, is by the Act of God, *viz.* the Death of the Incumbent thereof; and ſuch Avoidance doth commence from the Day of the Death of ſuch Incumbent; and the Patron is obliged to take Notice of it at his peril, and not to expect an Intimation from the Ordinary, *Mich.* 15 *El.* 3 *Leon.* 46. *Jenk. Cent* 6. *Caſe* 92. *Mich.* 15. & 16. *El. Dyer* 327. The Law, I find, hath been holden to be, that the Six Months for lapſe, upon ſuch an Avoidance, ſhould not be accounted, but from the time the Patron could reaſonably be ſuppoſed to have Notice of the Incumbent's Death, eſpecially if the Patron, or Incumbent, ſhould happen to be beyond the Seas, or in ſome remote County within the Realm, at the time of ſuch Avoidance. And there hath been alſo a Canon made to that purpoſe, *Rols* 2 *Abr.* 363. But by the Common Law of *England*, the Six Months ſhall, I ſuppoſe, be accounted from the time of the Death. *Catesby's Caſe*, 6 *Co.* 62. *Dr. and Student*, *cap.* 31. *f.* 116. *Degge's Parſ. Counſellor*, *f.* 10.

CHAP. II.

Voidance by Ceſſion, by Canon, and by Statute Law; and of the ſeveral Effects of ſuch Avoidances. Benefices Incompatible.

THE next Means by which a Church-Preferment doth become void, is, by the Act of him that is the Incumbent thereof; which is either by his Ceſſion, or Reſignation: A Church-Preferment is ſaid to be void by Ceſſion, when the Incumbent thereof doth take a ſecond Benefice that is incompatible; (what Benefices are incompatible, will afterwards appear in this Chapter.) And firſt, if an Incumbent of a Benefice, with Cure of Souls, doth take a ſecond Benefice with Cure, *Hil.* 41 *El. Digby's Caſe, Co. f.* 79. *a. Paſch.* 9 *Jac. Davis, f.* 68. In which Caſe, his firſt Benefice was either of leſs, or greater Value than Eight Pounds *per Annum*; if of leſs Value, yet by his Acceptance of a ſecond with Cure, it is at this Day in *Jure* void, by the received Canon Law, *Hil.* 22 *Jac. Evans & Aſcough's Caſe, Latch* 243. And there needs not any Sentence Declaratory in the Spiritual Court, to make way for the Patron's Preſentation: For he may immediately thereupon (without either Deprivation, or Reſignation) preſent a new Incumbent to the ſaid Church, and require his Admiſſion, 25 *E.* 3. 55. *b. Dr. & Stud.* 126. *b.* 26 *E.* 3. 1. *Trin.* 14 *Car. B. R. King*, v. *Baldock*, 2 *Rolls Abr.* 360. 5 E. 3. 9. *Hil.* 22 *&* 23 *Car.* 2. *Shute*, v. *Higden. Vaughan* 131 *Hil.* 24 E. 3. 30 *&* 33. 9 E. 3. 22. 10 E. 3. 1. 11 *H.* 4. 37. *b. &* 60. 12 *H.* 8. 6. 14 *H.* 8. 17. *Fitz. N. B.* 34. *Trin.* 39 *El. Armiger* v. *Holland, Moor* 542. *&* *Holland's Caſe*, 4 *Co.* 75. *Hil.* 22. *Ja. Evans & Lun.* v. *Aſcough, Palmer* 470. And if the Biſhop doth refuſe the Patron's Clerk, a *Quare Impedit* lies for the Patron, *Trin.* 14 *Car. the King*, v. *the Biſhop of* London, *&* *Baldock, Jones* 405. yet there ought to be a Sentence Declaratory of the Deprivation in the Court Chriſtian, that Notice may be given thereof, as *Popham* ſaid, *Hil.* 43 *El. Robins* v. *Prince. Goldsborough* 166. *Hil.* 9 *Car. King*, v. *Priſt. Jones* 336. And it is ſaid, 10 E. 3. 1. that in ſuch Caſes, both Churches ſhall be void; that is, if the Clerk continue as Incumbent of the firſt, after he hath taken a ſecond without Diſpenſation (as in that Caſe was done) for the ſpace of two Months; or however, if he contend in Law to retain the firſt: *See Robins Caſe* v. *Glover & Prince, Hil.* 38 *El. Moor* 434. And by *Perning*, in 10 E. 3. 1. *a.* the Conſtitution of Plurality, is a general Judgment, and ſtronger binds upon Deprivation, than particular Judgment of any Perſon: For a particular Deprivation may be avoided by Appeal, the other not; and it is ſaid, *per Cur'*, that the Council of *Lateran* was a general Law received in *England*, and is as forceable as an Act of Parliament, which concludes all Parties, *Paſch.* 1657. in *Scaccar. Stavely* v. *Ullithorn, Hardres Rep.* 101. But ſome Opinions are, that the Church is not void, but by Deprivation, 5 E. 3. 9. 11 *H.* 4. 37. 17 E. 3. 59. And that the taking of a ſecond Benefice with Cure in ſuch Caſe, until Deprivation, is no Ceſſion, *Paſch.* 26 *El. Godbolt* 23. But this is to be underſtood to the diſadvantage of the Patron; that is, to the making of a Lapſe run from the Ceſſion, no Notice being given to the Patron thereof, *Trin.* 39 *El. Armiger* v. *Holland, Moor* 542. *Hil.* 41 *El. Digby's Caſe*, 4 *Co.* 79. *& Jones* 404. For until after ſuch Clerk is actually deprived of his firſt Benefice, and Notice thereof given to the Patron, he (tho' he may) yet need not preſent. But then, after ſuch Deprivation, it is void in *Facto & Jure*; ſo that he muſt at his peril preſent, and ſo all the Books are well reconciled, ſaith *Coke, Trin.* 14 *Car.*

14 *Car. B. R. in Baldock's Caſe by Jones and Barkly, Rolls Ab.* 2. 364. *&* 365: *Trin.* 39 *El. Co.* 4. *Holland's Caſe.* 75 *Hil.* 19 *Car. the King* v. *Priſt,* 1 *Croke* 39. *&* 40. *El. Armiger* v. *Holland,* 3 *Croke* 601. the ſame Caſe in *Moor* 542 *Hil.* 22 *&* 23 *Car.* 2. *Shute* v. *Heigden, Vaughan* 131.

And if an Incumbent of a Church with Cure, under Eight Pounds *per Annum,* doth take a ſecond Benefice with Cure, in which he is alſo Inſtituted and Inducted, no Diſpenſation being obtained for the holding of them both, by which the firſt is void againſt the Patron; ſo that he may preſent (as is before ſhew'd): But before the Patron doth preſent upon ſuch Avoidance, the Arch-Biſhop by force of the Statute of the 25 *H.* 8. doth grant to him a Licenſe *perinde valere,* to hold the firſt with the ſecond Benefice, this is not a good Licenſe, altho' confirmed according to the Statute, to take away the Patron's Preſentment, altho' his Church was only void by force of a Canon, and not by the Statute of the 21 *H.* 8. for by the Canon, the firſt Benefice was ſo void, that the Patron might have preſented before any Deprivation; and after the Patron hath Title to preſent, this Title cannot be taken away from him by a ſubſequent Licenſe, unleſs ſuch a Licenſe could make a void Church full, *Trin.* 14 *Car. Baldock's Caſe* v. *the King.* and upon a Writ of Error affirmed, *Roll's Abr.* 2. 359. *Intrat.* 13 *Car. Rot.* 1259. *&* 11 *H.* 4. 38. *b. &* 59. *b. &* 78. *b. Hil.* 19 *Car.* 2. *Henry Edes* v. Walter *Biſhop of* Oxon, *Vaughan* 21.

But if any Perſon having one Benefice with Cure of Souls, being of the yearly Value of Eight Pounds, or above, (that is, according to the Valuation in the King's Books of Firſt-fruits and Tenths, as I think the general Opinion at this Day is; ſo is *Humphreys* v. *Knight, Croke Car.* 456. *Degge's Parſons Counſellor* 29, Sir *Tho. Jones Rep.* 19. But *Dyer* 237. & *Bennet* & *Tinket's* Caſe, 3 *Cro.* 853. & *Noy* 38. *Contra*) accept and take another Benefice with Cure of Souls, and be Inſtituted and Inducted in poſſeſſion of the ſame, (altho' that the laſt Benefice be but of Three Pounds value) immediately after ſuch poſſeſſion had thereof, the firſt Benefice is not only void in Law, but in *Facto* alſo, *Stat.* 21 *H.* 8. *c.* 13. *Trin.* 38 *El. Dyer* 351. *Mich.* 4 *Car. King* v. *Priſt. Hetley* 125. *Hil.* 9 *Car. King* v. *Priſt.* 1 *Croke* 357. *&* *Jones* 337. So that the Patron thereof muſt preſent to a Living of ſuch value, ſo void, within Six Months (without expecting Notice from the Ordinary) to avoid a Lapſe; it being then not only void by Canon Law, but alſo by Act of Parliament, in which all Men are Parties, *Trin.* 39 *El. Holland's Caſe,* 4 *Co.* 75. *Jones* 404. *Hil.* 41 *El. Digby's Caſe,* 4 *Co.* 79. *Hil.* 9 *Car. King* v. *Priſt. Jones* 337. *Mich.* 9, *&* 10 *El. Dyer* 255. But he need not (unleſs Notice ſhould be duly given) preſent, till ſuch time as his Clerk is Inducted into another Benefice, 7 *El. Dyer* 237. *Jenk. Caſe* 92. *Cent.* 6. For tho' by his Inſtitution he hath *Curam Animarum,* 33 *H.* 6. 13. and the Church is full to ſeveral purpoſes; yet the Words of the Statute are: --**And be Inſtituted and Inducted, in poſſeſſion of the ſame,** &c. So that until he be Inducted, there is no Ceſſion by that Statute, but only by the Canon Law; by which, in ſuch Caſe alſo, he may be deprived, *Hil.* 38 *El. Robins* v. *Gerrard & Prince, Moor* 447. *Hil.* 41 *El. Digby's Caſe,* 4 *Co.* 79. *Trin.* 1. *&* 2 *Phil. & Mary. Agar* v. *Biſhop of* Peterborough *& Denn, Moor* 12.

But the Patron, if he pleaſe, may preſent ſo ſoon as his Clerk is Inſtituted into another Benefice incompatible, altho he hath no Notice from the Ordinary of any Ceſſion, or Deprivation, made of the firſt Benefice, by reaſon of his Acceptance of another by Inſtitution, *Jenkins Ca.* 92. *Cent.* 6. and altho' he was only Inſtituted into the firſt Benefice, and not Inducted, *Digby's Caſe,* 4 *Co.* 79. Or elſe, if he pleaſes, he may ſue ſuch Perſon in the Court Chriſtian, to have him deprived by Sentence, in this, as well as in any other Caſe, where the Living is void by Canon Law only. But then it is beſt, that he either pro-

cure the Ordinary to proceed to Deprivation, *Ex mero Officio*; or, that he proceed only as a Promoter of the Office of the Judge, without ſetting forth his Intereſt as Patron: For if he ſhould ſo do, and the Clerk ſhould plead, that the Plaintiff is no Patron; but that ſuch an one is, he may have a Prohibition from the King's Court to ſtop him, if he proceed after ſuch Plea, *Paſch.* 31 *El. Underhil* & *Savage's Caſe.* 1 *Leonard* 316. In regard, that he may preſent, tho' no Sentence be given, and try his Title at Common Law. Yet it is ſaid, *Paſch.* 21 *Jac. in Thornton's Caſe*, *Winch* 63, that whether a Church be void by Ceſſion, doth properly belong to the Tryal of the Common Law. But that is not generally true, but only at the moſt in this Caſe: When a Church being ſuppoſed to be void by Ceſſion, the Patron thereof doth preſent his Clerk, who is Inſtituted, and alſo Inducted: For after the Induction, (becauſe it is a Temporal Act) 'tis ſaid, that nothing ought to be queſtioned in the Eccleſiaſtical Court. And yet even in this Caſe, when Induction is had, 'tis ſaid, that the firſt Incumbent may have a *Spoliation* againſt the new Incumbent, when he retains the firſt by Diſpenſation, and that thereby the Plurality ſhall come into Debate in the Spiritual Court; becauſe by the Diſpenſation, the old Title remains, *Fitz. N. B.* 36. 38 *H.* 6. 20. See *Robin v. Gerrards* & *Prince Moor* 438. And if Voidance by Ceſſions, ſhould not be tryable by the Eccleſiaſtical Judge, the Ordinary could not give Notice of an Avoidance thereby (as he is bound to do in all Caſes out of the Statute); and ſo Lapſe would never run by the Patron's Negligence, nor Cures be duly provided for, if the Patrons did not pleaſe to preſent without Notice.

It is not material to the making of a Ceſſion, that the ſecond Benefice, with Cure, be in another Church, than that in which the firſt is: For where there are two Incumbents of one Church, and each of them hath the entire Cure of the Pariſh, (whereof there are ſome Inſtances in this Kingdom) if the one of them dying, the other doth accept his Benefice, his firſt is void thereby; and if the firſt was of the Value of Eight Pounds by the Year, it is void by the Statute, *Mich.* 36 & 37 *El.* 3 *Croke* 351. & by *Walmſley* & *Beaumont. Paſch.* 37 *El. C. B. Cooper* v. *Beauchamp. Parſon's Counſellor*, but *Anderſon* doubted. But if it was under that Value, tho' the ſecond was of greater Value than Eight Pound, yet it is only void by Canon. And ſo in other Caſes, by the Words of the Statute, 21 *H.* 8 *c.* 13. See *Robins* v. *Gerrard*, *Moor* 440.

In all Caſes when a former Benefice is ſaid, by the Acceptance of a ſecond, to be void by Canon Law only, before any Deprivation, this is to be underſtood as to the Patron, and for his Advantage only; ſo that he may, if he pleaſe, preſent; but not as to Strangers: For if the Clerk, before Deprivation, doth ſue for Tythes of the firſt Benefice, it is not any Barr againſt him, to ſay, That he hath taken a ſecond Benefice, as was ſaid, *Trin.* 13 *Car. B. R.* by Juſtice *Barkely*, which Juſtice *Yelverton*, in his Argument of the Caſe of *Priſt*, ſaid was ſo adjudged, *Rolls Abr.* 2. 361.

As Benefices with Cure, of what Value ſoever, are incompatible, ſo are Dignities, and alſo a Dignity and Benefice with Cure. By Dignity that Promotion is underſtood, to which Juriſdiction is annexed, 7 *H.* 6. 27. Therefore, an Arch-Deacon, and a Dean, (becauſe he was wont to take the Confeſſions of the Chapter, and may viſit them) 15 E. 3. 7. are ſaid to be Dignitarians, 5 *E.* 3. 9. *Hil.* 22. *Ja.* in *Evans* & *Aſcough's Caſe*, *Latch* 236. *Quere*, But a Parſon is not a Name of Dignity, 11 *H.* 4. 40. nor a Provoſt, 17 *E.* 3. 31. nor a Chaplain, 27 *H.* 6. 3. nor a Goſpeller, *Paſch.* 41 *El. Broughton* v. *Gonſley*, 3 *Cro.* 663. nor a Prebendary, *Evans* and *Aſcough*'s Caſe, *Latch* 236. See 7 *H.* 6. 27. 27 *H.* 6. 5. 25 *Ed.* 3. 41. 24 *Ed.* 3. *Br. Noſme* 25. Therefore, if any one having a Benefice with Cure, doth take a Dignity, his Cure is void by Ceſſion,

Ceſſion, 5 *E.* 3. 9. *Paſch.* 9 *Jac. Davis* 68. *King* v. *Horsfall* & *Wale. Paſch.* 31 *El.* in *Underhil* and *Savage*'s Caſe, 1 *Leon.* 316. But a Benefice with Cure, and a Benefice without Cure, being no Dignity, do not void each other. And therefore, the taking of a Prebend, doth not make a Ceſſion of a Parſonage, or Vicarage; for a Prebend is a Benefice without Cure, 29 E. 3. 44. *Paſch.* 30 *El. Moor* 261. And yet it is ſaid, That if one that is a Prebendary, takes a Deanry, his Prebend is void by Ceſſion, 5 E. 2. *Fitz. Brief* 800. *Hil.* 22 *Jac. Evans* & *Aſcough*'s Caſe, *Latch* 263. But Quære, If both Promotions are not then to be in the ſame Church? For 'tis ſaid, That if a Dean accept of a Prebend in the ſame Church, his Deanry is void: Which Caſe need not be ſo put, if the Rule was general, 12 & 13 *El. Walrond* v. *Pollard*, *Dyer* 293 & 10 *El.* 233. And ſo the taking of a Deanry, voids a Provoſtſhip had before in the ſame Church, 5 E. 3. 9. 10 E. 3. 1. And accordingly, when the Biſhop of *Durham* had preſented a Clerk, to a Prebend of the Church of St. *Andrew*, and afterwards had preſented the ſame Perſon to the Deanry of the ſame Church, it was adjudged, that the King ſhould recover his Preſentation to the Prebend aforeſaid, upon this Account; that it is not lawful to any one to poſſeſs two Prebends in one and the ſame Collegiate Church, *Hil.* 11 E. 3. *B.R. Rot.* 21. *Rolls Abr.* 2. 361. by which Caſe it appears, that if the Church void by Ceſſion, upon the Account of the Canon Law, be of the Gift of the Biſhop, and within his Dioceſs, it may go in Lapſe by the Biſhop's neglect to Collate, tho' no Deprivation be made of the Incumbent, or Notice given of the Avoidance.

This Incompatibility, as to Dignities and Benefices without Cure, is made only by Canon Law, and not by the Statute 21 *H.* 8. *c.* 13. againſt Pluralities, which extends only to Benefices with Cure; and therefore declares, **That no Deanry, Arch-deaconry, Chancellor-ſhip, Treaſurer-ſhip, Chanter-ſhip, or Prebend in any Cathedral, or Collegiate Church, nor Parſonage, that hath a Vicar indued, nor any Benefice perpetually appropriate, ſhall be taken or comprehended under the Name of Benefice having Cure of Soul, in any Article of that Statute,** (which they would have been, as it is ſaid, if no ſuch Proviſo had been added.) From which it is, I ſuppoſe, that *Coke* ſaith, That it appeareth, Archdeaconries, Prebends, Appropriations, *&c.* are Benefices with Cure of Soul, 3 *Inſt. ch.* 71. But Quære, For it is held by ſome, notwithſtanding what is ſaid by *Coke*, that a Deanry, Arch-deaconry, Prebend, *&c.* are not Benefices with Cure of Souls, nor had they been comprehended under the Name of Benefices with Cure of Souls within the Statute, altho' the Proviſo had been omitted; for there is no ſuch Exception out of the Statute, 13 *El. cap.* 12. concerning reading the Articles; and yet, if a Dean, Arch-Deacon, or Prebend, read not the Articles within the time limited by 13 *El.* his Promotion is not void by that Statute: The Reaſon is, becauſe 'tis not a Benefice with Cure of Souls; and a Lay-man might have been preſented to a Prebend; *Cawley*'s *Laws concerning Recuſants* 233. And ſo *Hobart* ſaith, That a Benefice appropriated, doth not by the Appropriation ceaſe to be a Benefice with Cure, at the Common Law, altho' it be not taken to be ſo within the Statute, *Colt* & *Glover*'s Caſe, *Hobart* 158. And altho' it be ſaid, if there be a Rectory that is preſentable, and a Vicar endowed out of the ſame that is preſentable, that the Vicar, and not the Parſon, hath the Cure of Souls, 5 E. 2. *Fitz. Quare Impedit* 165; yet I conceive, that tho' the Vicar be in *Subſidium Rectoris*, and to perform the Duties, yet that the Parſon hath alſo the Cure, at leaſt habitually, for by his Inſtitution, the Cure is by the Biſhop committed to him, 2 *Croke* 518. and therefore ſuch Rectory, by taking a Benefice after, incompatible, without Diſpenſation, will be void at the Canon Law, tho' not by the Statute 21 *H.* 8. *c.* 13. as is there expreſſed; and I have heard, that it was lately adjudged, that ſuch Rectories

are

are Benefices with Cure, in the Caſe of *Clarke* and *Heath*, *Mich.* 21 *Car.* 2. *B. R.* where it was ſaid, that there were ſeveral Churches in *England*, which have Vicars endowed with Cure, and yet the Parſon had a concurrent Cure with them, and both of them took the Oath of Canonical Obedience to the Ordinary, 1 *Siderfin*, 426. It was alſo agreed in that Caſe, by all the Court, that Inſtitution and Induction was an undeniable Evidence of Cure of Souls, 2 *Keble* 556.

If a Church be void by Ceſſion, and the laſt Incumbent keeps poſſeſſion, and takes up the Tythes, as if entitled to them, 'till ſuch time as the Church is lapſed to the King; and then comes a general Pardon, in which is pardoned and remitted, all Titles, and Actions of *Quare Impedit*, which the King hath, or might have, by reaſon of any Lapſe incurred; for, or concerning any Benefice, whereof any Incumbent was at the making thereof in actual poſſeſſion, by the Preſentation of any Patron, or Collation of any Ordinary; yet ſuch Poſſeſſor is not thereby re-entitled to a Benefice ſo void by Ceſſion: For, if ſo, the Words ſhould (as they are not) be ſufficient to make a Plenarty of a Church abſolutely void, and to make void a ſecond Church really full; or elſe, not only make the firſt full, but alſo be a ſufficient Diſpenſation for a Plurality, to hold them both. But ſuch Words only ſettle him that is poſſeſſed, upon a Preſentment made by the Patron, or Collation made by an Ordinary, that had uſurped upon the King's Title, that was come to him by Lapſe. Neither can any ſpecial Pardon, after ſuch abſolute Avoidance of a Church, with Words that he may retain it, or with any other the like words, make him again Incumbent thereof, *Trin.* 4 *Car. King* v. *Priſt*, 1 *Cro.* 357. & *Jones* 339. But otherwiſe it is, if the Church was not abſolutely void, but only voidable by Deprivation, or otherwiſe, *Hil.* 9 *Car. King* v. *Priſt*, *Jones* 339.

CHAP. III.

Of Pluralities, Qualifications, Diſpenſations, and Commendams.

THis Rule, That the accepting of a ſecond Benefice, that is incompatible, doth make a Ceſſion, or abſolute Avoidance of the former, hath its Exceptions. As Firſt: If a Perſon having a Benefice incompatible, be admitted, inſtituted, and inducted into a ſecond Benefice incompatible alſo, but doth not ſubſcribe the Articles of Religion according to the Statute, 13 *El. c.* 12. his firſt Benefice is not void, 23, & 24 *El. Dyer* 377. Becauſe, by reaſon of that neglect, he was never Incumbent of the ſecond; (yet in declaring upon a Voidance, by Acceptance of a ſecond Living, it need not be alledged, that he ſubſcribed the Articles, *&c.* 3 *Keb.* 152. 1 *Anderſ.* 62.) the like Law ſeems to be; if a Man having obtained a ſecond Benefice, incompatible with his former, by a Simoniacal Contract; for in ſuch Caſe alſo, his Preſentation, or Collation, Inſtitution, and Induction, are utterly void, and of none effect in Law, *Stat.* 31 *El. c.* 6. However, the Canon Law (without a Pardon prevent) will reach him, in this Caſe of Simony; for by that he may be deprived. But if he that had one Benefice, doth accept of another incompatible, and at his admittance to the ſecond, did ſubſcribe the Articles, but did not within two Months after his Induction read them, his ſecond Benefice is *ipſo facto*, immediately void, *Stat.* 13 *El. c.* 12. But then he cannot revert to his former Benefice, becauſe having at his Admiſſion to the ſecond, ſubſcribed the Articles, his Admiſſion, Inſtitution, and Induction to the ſecond, were good for

for two Months, and ſo made a Ceſſion as to the firſt: For the Statute is not, That all Admiſſions, Inſtitutions, and Inductions, to Benefices, where any Perſon is deprived by Virtue of this Act, ſhall be void, as if they never were: For then, by not reading the Articles, only his ſecond Benefice had been void, and his Title to the firſt had been revived: But the Clauſe is, That all Admiſſions, Inſtitutions, and Inductions, made contrary to the Proviſion of the Act, ſhall be void, as if they never were; but where the Articles are ſubſcribed in the preſence of the Ordinary, the Admiſſion, Inſtitution, and Induction, are not contrary to the Proviſion of the Act, *Hil.* 22 & 23 *Car.* 2. *Shute* v. *Higden*, *Vaughan* 131. Which ſeems to be warranted alſo by the Opinion of *Hobart*, in the Caſe of *Winchcomb* v. Biſhop of *Wincheſter* & *Pulleſton*, Hob. 167. See the Caſe of the *Queen* v. Biſhop of *Lincoln* & *Cock*, 1 *Anderſon*, Caſe 136.

But Note, That tho' a Clerk at his Admiſſion to a ſecond Benefice, did ſubſcribe the Articles; yet, if the Subſcription was only made in the Preſence of the Biſhop's Chaplain, or Secretary (which I have ſometimes ſeen), and not in the preſence of the Ordinary himſelf, the Admiſſion, *&c.* is void, and the former Benefice remains full: For the Statute is expreſs, that the Subſcription ſhall be in the preſence of the Ordinary.

A ſecond *Exception* from the aforeſaid Rule is, if he that hath one Benefice incompatible, before he takes another, being duly qualified, doth obtain a ſufficient Diſpenſation, to hold at one and the ſame time, more than one of ſuch Benefices as are incompatible: For by Diſpenſation, a Man, at this Day, with us, (tho' he be not qualified by Degree in the Univerſity, Retainer, or Birth) may hold as many Benefices without Cure, of what Value ſoever, as he can get; and likewiſe, as many with Cure as he can get, all of them, or all but the laſt, being under the Value of Eight Pounds *per Annum*: (That is, if the Perſon to be diſpenſed withal be not uncapable thereof; for 'tis ſaid, That a Diſpenſation to an Alien, to take a Benefice, that knows not our Language, is void, *Jenkins* Caſe 66. *Cent.* 7. *Hob.* 148. *Stat.* 25 E. 3. of Proviſors: For before the making of the Statute againſt Pluralities, Diſpenſations were granted to hold Dignities, yea Benefices, with Cure of any Value, and to any Number, as appears by the ſaid Statute; by which it is enacted for ſuch Pluraliſts: -----**That they may retain four of their Benefices with Cure, that were really entitled to them at the time of the making thereof, that Statute notwithſtanding; and that thoſe that had more than four with Cure, ſhould reſign the reſt, or the Patron might preſent to them; any Licenſe, Union, or other Diſpenſation, to the contrary, before obtained, notwithſtanding.** By which 'tis clear, that by Licenſe, Union, or other Diſpenſation, Men held many Benefices; yea, with Cure, before that Statute; and by that Statute, the Law is only altered as to Benefices with Cure of, or above the yearly Value of Eight Pounds, and in theſe Words: ------**That if any Perſon, or Perſons, having one Benefice with Cure of Soul, being of the yearly Value of Eight Pounds, or above, accept and take another with Cure of Soul, and be Inſtituted and Inducted in poſſeſſion of the ſame, that then, and immediately after ſuch poſſeſſion had thereof, the firſt Benefice ſhall be adjudged in the Law to be void.** Which is the ſame that the Canon Law ſpeaks, but not ſo general. And after it is enacted, -----**That every Licenſe, Union, or Diſpenſation hereafter to be obtained, contrary to this Act, of what Name, or Names, Quality, or Qualities ſoever they be, ſhall be utterly void and of none effect. And that if any Perſon, or Perſons, contrary to this preſent Act, procure and obtain at the Court of** Rome, **or elſewhere, any Licence, or Licences, Union, Toleration, or Diſpenſation, to receive and take any mo Benefices with Cure, than is above limited; that then every ſuch Perſon, or Perſons,**

ſons, ſueing for himſelf, or receiving, or taking ſuch Benefice, by force of ſuch Licence, or Licenſes, Union, Toleration, or Diſpenſation, ſhall for every ſuch Default, incur the Danger, Pain, and Penalty, of Twenty Pounds Sterling; and alſo, loſe the whole Profits of every ſuch Benefice, or Benefices, as he receiveth, or taketh by force of any ſuch Licence, or Licences, Union, Toleration, or Diſpenſation: The one half of which Forfeiture to be to the King, our Sovereign Lord; and the other half thereof, to him that will ſue for the ſame, by Original Writ, Bill, Plaint of Debt, or Information, in any of the King's Courts; in which Action and Suit, no Wager of Law, Eſſoin, or Protection for the Defendant ſhall be admitted, or allowed, *Stat.* 21 *H.*8. *c.* 13. See *Mich.*15 *&* 16 *El. Dyer* 327. (And Note, that it hath been reſolved, That this Statute of 21 *H.* 8. is a general Statute, 4 *Co.* 76. *Holland*'s Caſe, *Roll*'s Abr. 2. 466.) Notwithſtanding what is thus enacted by this Statute, it ſeems to be plain, that the Courſe of the Canon, or Common Law, before this Statute uſed, may, and is to be obſerved, for Benefices without Cure, and with Cure, where the former is under the yearly Value of Eight Pounds; and that this Act doth only forbid him that hath a Benefice of ſuch Value, from taking and holding a ſecond therewith, by Vertue of any Diſpenſation made, according as formerly they were, *viz.* to any Perſons, and for any Number of Benefices, without reſpect to the new Qualifications ſet up by this Act; and makes void only ſuch Diſpenſations as are contrary thereunto: Which Qualifications come next to be conſidered.

A Spiritual Perſon that hath one Benefice with Cure, of the yearly Value of Eight Pound, or above, may be qualified to hold, by Diſpenſation, one other Benefice with Cure, (or more, as the Caſe may be) without making a Ceſſion of the former: But then ſuch Perſon, for that purpoſe, muſt be qualified, either by Birth, or Relation, by Univerſity Degree, by Office, or Great Employment, or laſtly, by Retainer. If by Birth, or Relation, he muſt be the Brother, or Son, of a Temporal Lord, born in Wedlock; or the Brother, or Son, of ſome Knight, born in Wedlock, and then he may purchaſe Licence, or Diſpenſation, and receive, take, and keep two Parſonages, or Benefices with Cure of Soul. But note, that the Baſtard of ſuch Perſons are not qualified, nor the lawful Son of any Biſhop, (Biſhops at the making of this Act not being permitted to marry) nor the Son of any Baronet, that Dignity not being then created. If by Univerſity-Degree, he muſt be either Doctor, or Batchellor of Divinity, Doctor of Law, or Batchellor of Law Canon, and admitted thereto by one of the Univerſities of this Realm, and not by Grace only, and then by Diſpenſation he may hold two Benefices as aforeſaid. If by Office, or Great Employment, he muſt be either a Biſhop Suffragan, that doth exerciſe the Office of a Biſhop, by Commiſſion of a Biſhop, and then he may have two Benefices with Cure of Soul, any former Act made to the contrary notwithſtanding, *Stat.* 26 *H.* 8. *c.*14. or elſe be a Perſon ſworn of the King's Council, and then he may by Diſpenſation hold three Benefices with Cure. If by Retainer, he muſt be duly retained to be a Chaplain, either to the King, Queen, Prince, or Princeſs, or to one of the King's Children, Brethren, Siſters, Uncles, or Aunts, all which may retain as many Chaplains as they pleaſe, to hold two Benefices with Cure, of whoſe Gift ſoever they be; and moreover, if he be the King's Chaplain, and it ſhall pleaſe the King's Highneſs to give him any Benefices, or Spiritual Promotions, to what number ſoever they be, it is lawful for him to accept and take the ſame, without incurring the Danger, Penalty, or Forfeiture, in this Statute compriſed, any thing in the ſaid Act to the contrary notwithſtanding. But it is a Queſtion, Whether theſe Benefices of the King's Gift muſt not be alſo taken by Diſpenſation, *Hil.* 8 *Jac. Wallop* v. Biſhop of *Exeter*, &c. *Brownlow*

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& *Gouldsborough*, 1 *Part* 162. & 2 *Part* 45. Or elſe he muſt be Chaplain to an Arch-Biſhop, who may qualifie eight, or of a Duke, or Biſhop, who may qualifie ſix; or of a Marqueſs, or Earl, who may qualifie five; or of a Viſcount, who may qualifie four; or of the Lord Chancellor for the time being, or of a Baron, or Knight of the Garter, who may qualifie three; or of a Ducheſs, Marchioneſs, Counteſs, Baroneſs, (being Widows, or having taken Huſbands under the Degree of a Baron) or of the Treaſurer, or Comptroller of the King's Houſe, the King's Secretary, the Dean of his Chappel, his Almoner, or Maſter of the Rolls, each of which may qualifie two; or of the Chief Juſtice of the King's Bench, or Warden of the Five Ports, which may qualifie one: The Chaplains of all which (being legally retained) may purchaſe Licenſe, or Diſpenſation, and take, receive, and keep two Parſonages, or Benefices with Cure of Soul, *Stat.* 21 *H.*8.*c.*13. Altho' the former be above the Value of Eight Pounds.

Tho' a Duke, Earl, or the like, be but a Minor, or not above ten Years of Age, in the Cuſtody, and in the Family of another Noble-man, who may, and doth retain Chaplains; yet he may qualifie Chaplains, to be diſpenſed withal to hold two Benefices with Cure, in like ſort, as if he was of full Age, *Paſch.* 44 *Eliz.* the Queen *v.* Biſhop of *Salisbury*, &c. 4 *Coke* in *Acton*'s Caſe, *fol.* 119.

If a Spiritual Perſon be retained by Word only to be a Chaplain, by ſuch Perſon as may retain, and qualifie, by the Statute, and doth abide and ſerve as Chaplain in his Family; or if he hath alſo obtained Letters Teſtimonial, ſigned only, or under the Seal only of his Maſter, witneſſing, that he hath retained him; yet if ſuch Letters Teſtimonial be not under both Sign and Seal, he is not a Chaplain, within the Statute, to hold a Plurality, *Trin.* 28 *El.* the Queen v. *Savacree*, *Godb.* 41. However, when the Queſtion (to avoid a Leaſe) was, Whether the Queen's Chaplain, retained by Parol only, might have a Plurality by the Statute? It was adjudged, That in regard that the Chaplain (concerning whom the Queſtion was) died thirty Years before, and whilſt living, was reputed to be the Queen's Chaplain, and exerciſed the Place of Chaplain in her Cloſet, and elſewhere, and had all the Benefits of her Chaplain, it ſhould be intended that he was her Chaplain, and well retained, *Mich.* 37 & 38 *Eliz.* *Whetſtone* v. *Higford*, 3 *Croke* 424. See the ſame Caſe in *Savil*, *p.* 135. So where a Counteſs having retained one Chaplain without Patent, that was thereupon advanced to a Plurality, did afterwards by Patent retain two others: The firſt Retainer was held good; becauſe the Patent is not of neceſſity, but only in caſe where he hath cauſe to ſhew it; and here he hath no cauſe to ſhew it, for the Retainer is good without it, *Paſch.* 31 *El.* the Queen *v.* Biſhop of *Lincoln*, & *Skiſling*, *Moor* 277. But this Reaſon begs the Queſtion, which is, Whether a Retainer by Parol, be good to qualifie for a Plurality? The Words of the Statute are: **Provided, that the ſaid Chaplains ſo purchaſing, taking, receiving, and keeping Benefices with Cure of Soul, as is aforeſaid, ſhall be bound to have, and exhibit, where need ſhall be, Letters under the Sign and Seal of the King, or other their Lord and Maſter, teſtifying whoſe Chaplains they be; and elſe not to enjoy any ſuch Plurality of Benefices, by being ſuch Chaplain, any thing in this Act notwithſtanding,** *Stat.* 21 *H.* 8.*c.* 13. And where an Incumbent pleaded, That he was retained Chaplain to the Counteſs of *Derby*, and had a Diſpenſation to take two Livings, being qualified by the Statute; it was replied, That the ſaid Counteſs had retained two Chaplains before ſhe retained the Defendant; and Iſſue taken upon the Retainer of one of thoſe two: And to prove the Retainer, a Copy of the Retainer, entred in the Court of Faculties, was offered to be given in Evi-

dence; but the ſame was not allowed by the Court; who ſaid, That the Oath of any who had ſeen the Retainer under the Hand and Seal of the Counteſs, would have been good Evidence in that Caſe, by reaſon the Plaintiff was a Stranger to it, *Hil.* 2 *Car.* 1. *C. B.* The King, *v. Frankwell*, *Lit.* Rep. 1.

None of the Honourable Perſons aforeſaid, may advance above the Number appointed, to receive and keep any more Benefices of Cure of Soul, than one: And if they do, then every Spiritual Perſon ſo advanced above the ſaid Numbers, do incur the Pains and Penalties in the ſaid Statute, *Stat.* 21 *H.* 8. *c.*13.

The Act againſt Pluralities is to be conſtrued ſtrictly; and therefore, if a Biſhop be made an Arch-Biſhop, and doth hold both Dignities; or a Baron, (that may qualifie three) be created an Earl, who may qualifie five; and then is made Warden of the five Ports, who may qualifie one; yet they can qualifie only in their beſt Capacity, *viz.* eight as Arch-Biſhop, and five as Earl, and ſo of all the reſt, *Trin.* 43 *Eliz. Drury*'s Caſe, 4 *Coke* 89. *Hill.* 43 *Eliz. Acton*'s Caſe, 4 *Coke* 117.

If a Baron (that can qualifie but three Chaplains) retains four at one and the ſame time, none of them are qualified, *Jenkins* Caſe 91. *Cent.* 6. But where there is a Priority in Time, as to their Retainer, thoſe of them ſhall be the qualified Chaplains, that are firſt advanced, *Co.* 4. 90. *a. Dyer* 312. *p.*88.

If any Perſon hath retained more than the Number he may have by the Statute, altho' they be all Chaplains at the Common Law; yet when he hath retained ſo many as the Statute doth allow him, the Statute is executed, and only thoſe that firſt make up the Statute-Number are qualified to hold a Plurality; and tho' not any of that Number of Chaplains, that are allowed to any Perſon by the Statute (being retained according to the ſame) be advanced to a Plurality, before others that are after retained by their Maſters have taken Pluralities, yet their Qualifications remain good, and the firſt Benefices of ſuch ſupernumerary Chaplains are void, notwithſtanding ſuch their Retainer, *Trin.* 43 *El. Drury*'s Caſe, 4 *Co.*90. *Trin.* 27 *El.* the Queen v. Biſhop of *Gloucester*, & *Sa.aker*, 1 *Anderſon* 200. *Mich.* 41 *El.* the Queen, *v. Drury*, in 3 *Cro.* 723. & in *Moor* 561. *Trin.* 43 *El. Drury* v. the Queen, 3 *Cro.*839. 4 *Co.*89. & 45 *El.* the Queen *v. Bp of* Peterb. *Moor* 678. *Paſch.* 31 *El.* the Queen, v. Preſident and Scholars of *Magdalen*-College, *Moor* 277. ſame Caſe, *Savil. p.* 101. And yet it was the Opinion of *Catlyn*, *Saunders*, and *Dyer*, ---That if a Baron (who is allowed but three Chaplains) retain ſix by his Letters Teſtimonial, and all ſix are preferred to ſix ſeveral Pluralities, the three that are firſt promoted, are only warranted by the Statute, *Trin.* 14. *Eliz. Dyer* 312. And to this purpoſe, *Walmſly* held in the Caſe of the Queen againſt *Drury*. *Mich.* 41 *Eliz.* 3 *Croke* 723. Alſo *Hearn Serjeant* ſaid, That it was ſo reſolved in the Queen's Bench, in the Caſe of the Lady *Bridges*. But the former Opinion, (as I take it) is the better.

If a Baron (that can have but three Chaplains) doth qualifie three accordingly, and they being advanced to Pluralities, he upon diſpleaſure, or for other cauſe, doth diſmiſs them from their Attendance, yet they are his Chaplains at large, and may hold their Pluralities for their Lives: And (tho' he may entertain as many other as he will) yet he cannot qualifie any of them to hold a Plurality, whilſt the firſt three are living, And ſo of others, *Mich.* 37 & 38 *Eliz. Savacres* Caſe, *Owen*, *Trin.* 42 *Eliz. Drury*'s Caſe, 4 *Coke* 90. *Paſch.* 28 *Eliz. Savil, p.*79. *Trin.* 28 *El.* the Queen v. *Savacre Hughes*. But as any of the three firſt die, he may qualifie others, the Queen v. *Savacre Owen*. if ſo be he retain them anew after the Death of the firſt; for if during the Lives of the aforeſaid three firſt Chaplains, he hath retained by Letters Teſtimonial, ſigned and ſealed a fourth, yet by the Death of one of the three firſt, that Retainer will not

not be good to qualifie him for a Plurality, *Trin.* 43 *El.* the Queen v. *Drury*, 3 *Croke* 723. For it is a Rule, That the Perſon retaining, muſt be capable to retain at ſuch time when he ſigns and ſeals the Qualification, to give his Chaplain benefit thereby. And therefore, if the Son and Heir Apparent of a Duke, Earl, or Baron, retains a Chaplain, ſuch Retainer doth not make him a Chaplain to hold a Plurality after the Death of the Baron, tho' he continue in the Service of the Son, when he is the very Baron that is without an After-Retainer, *Jenkins*'s Caſe, 91. *Cent.* 6.

As the Perſon retaining to qualifie his Chaplain for a Plurality, muſt be capable thereof, when he Signs and Seals for him an Inſtrument of Retainer, ſo to give him the Benefit thereof, generally he muſt continue capable of Qualifying, 'till ſuch time as his Chaplain is advanced: For the Validity of a Qualification not executed, for the moſt part determines with the Power of Qualifying, in him that made it. And therefore, if a Perſon hath any Office that gives him Capacity to qualifie a Chaplain, and he qualifieth one accordingly, by his being removed from his Office, the Qualification is ſo voided, that the Chaplain cannot afterwards take a ſecond Benefice by Virtue of that Qualification, *Acton*'s Caſe, *Hil.* 45 *Eliz.* 4 *Coke* 117. So if a Perſon hath duly qualified a Chaplain, and then dieth, by his Death his Chaplain is barred from taking a ſecond Benefice upon ſuch Qualification; yet not from retaining a Plurality taken in the Life-time of the Qualifier, *Trin.* 14 *El. Dyer* 312. And tho' a Nobleman doth continue in Life, yet the like Law is, if he be Attainted, which is a Death in Law; for by the Judgment he loſeth his Quality, and becomes Ignoble, *Stamford's Pleas of the Crown*, & 4 *Co.* 118. *b.* 119. *a.* in the ſame Caſe of *Acton*, *Mich.* 44 & 45 *El.* the Queen v. *Biſhop of* Peterborough, *Moor* 678. And yet, by the ſame Caſe, if a Baroneſs, *&c.* hath retained two Chaplains, and after taketh to Husband one of the Nobility, and thereby loſeth her Capacity of retaining Chaplains during that Coverture; yet the Retainer of her former Chaplains doth remain, ſo that they may after the Marriage, take two Benefices with Cure, without a new Retainer: So is *Hil.* 45 *Eliz. Acton*'s Caſe, 4 *Co.* 118. *Jenkins* Caſe, 91. *Cent.* 6. But otherwiſe it is if the Lord that marrieth ſuch Baroneſs, doth, after Marriage, diſcharge her Chaplains before their Advancement, *Mich.* 44 & 45 *El.* the Queen v. *Biſhop of* Peterborough, *Moor* 678. But if the Husband doth not diſcharge them during his Life, and dies before ſuch his Lady, the Chaplains that ſhe had before her Marriage retained and qualified, remain'd her Chaplains, and are by ſuch her firſt Retainer qualified to take two Benefices with Cure, *Mich.* 44 & 45 *El.* the Queen v. *the Biſhop of* Peterborough, *Moor* 678. And ſo, I conceive, that if any other Perſon capable of qualifying a Chaplain to hold a Plurality, doth diſcharge his Chaplain before he hath taken the Benefit of his being qualified, he cannot afterwards lawfully thereupon hold two Benefices within this Statute.

Let the Qualification be never ſo good, yet that alone doth not enable any Perſon to take a ſecond Benefice, without making a Ceſſion of the former, but a Diſpenſation for that purpoſe muſt alſo follow. It hath indeed been a Queſtion, *Hil.* 8 *Jac. Brownlow & Gouldsborough*, *2d Part* 45. & *Whetſtone & Hickford*'s Caſe, *Savil* 135. which I do not find reſolved; If the King's Chaplain having one Benefice of the Preſentation of a common Perſon, accept another of the Preſentation of the King, without any Diſpenſation, both being of, or above the yearly Value of Eight Pounds, whether the firſt be void by the Statute againſt Pluralities, by reaſon of the Clauſe therein, ----**That it ſhall be lawful to every Spiritual Perſon, or Perſons, being Chaplains to the King, to whom it ſhall pleaſe his Highneſs to give any Benefices, or Promotions Spiritual, to what Number ſoever it be, to accept and take the ſame,**

without incurring the Danger, Penalty, and Forfeiture in this Statute compriſed? And ſo it hath been ſaid, That if the Chaplain of a Lord takes a ſecond Benefice with Cure, without ſpecial Diſpenſation, his firſt is not void by the Statute of 21 *H.* 8. becauſe the Words are not, that he ought to ſue for a Licenſe; but that he may ſue for one: But in this laſt Caſe 'tis there ſaid, that the firſt is void by Spiritual Law, *Trin.* 14 *Eliz. Dyer* 312. And ſo, I ſuppoſe, it is in the former Caſe: For by that Statute the Canon Law (which makes a firſt Benefice with Cure, of what Value ſoever, void, by the acceptance of a ſecond) is affirmed, as to Benefices with Cure, where the firſt is of the yearly Value of Eight Pounds; nor doth the Clauſe aforeſaid look like a Repeal thereof, as to this Caſe, but only is an Addition to a former Clauſe, that gives the King's Chaplains Power to purchaſe Diſpenſations, and take two Benefices with Cure; which otherwiſe they could not do, by reaſon of what was before enacted, *viz.* **That a ſecond Benefice with Cure, ſhould avoid a former of Eight Pounds** per Annum, **as to all Perſons; that all Diſpenſations to the contrary ſhould be void; and that the Perſons obtaining and uſing them, ſhould be ſubjected to Puniſhment.** And if that Clauſe be not a Repeal of the Canon Law in this point, then thereby a former Benefice, when the King's Chaplain accepts a ſecond of the King's Gift, is as much void by Canon Law, as when a Lord's Chaplain accepts a ſecond, no Diſpenſation being had by either; and ſo in both Caſes the Queſtion comes to be one: If a qualified Perſon takes two Benefices with Cure, without Diſpenſation, the firſt being of the yearly Value of Eight Pounds, whether the firſt be as well void by the Statute as Canon Law? So that the Patron to prevent a Lapſe, muſt preſent without Notice from the Ordinary: And I rather think, that it is void alſo by the Statute; for tho' the Words of the Statute are not, that he ought to ſue, or that he ſhall ſue for a Licenſe, but that he may ſue for one, (which makes the Doubt) yet they need not occaſion any: For when 'tis ſaid, that they may purchaſe Licenſe, and receive and keep two Benefices; it is by way of Exception, as to two Clauſes, that went before; (the firſt) That a former Benefice with Cure, of the yearly Value of Eight Pounds, ſhould be void by taking a ſecond: (the other) That he that obtains a Diſpenſation to hold a former with a ſecond, ſhould be puniſhed; ſo that the Sence ſeemeth to be this: That tho' it be enacted, That if any Perſon having one Benefice with Cure, of the yearly Value of Eight Pounds, accepts another, the firſt ſhall be void; and alſo, the Perſon that obtains a Diſpenſation to hold them, ſhall be puniſhed; yet he that is qualified according to this Statute, may purchaſe a Diſpenſation to hold two Benefices with Cure, without Puniſhment, altho' the firſt be of the yearly Value of Eight Pounds; and may take, receive, and keep the ſame, notwithſtanding what is before enacted: From which it followeth, that if he doth not purchaſe Licenſe, he may not keep them both, by that general Prohibition, from which this is an Exception; and the Words *may purchaſe*, are moſt proper to expreſs this Sence. Nor is there any reaſon why a former Living ſhould not be voided for want of a Diſpenſation by a Statute-Law, as well as by a Canon, both being poſitive, when it may in ſome Caſes continue full, notwithſtanding both, by Virtue of ſuch Diſpenſation; neither can it be ſuppoſed, but that the ſaid general Clauſes do extend to Perſons qualified for Pluralities, if they be not diſpenſed with as well as to others, ſeeing no ſuch Pluralities before that Statute, could have been without Diſpenſations; the Statute all along makes Diſpenſations the Means, and only Means, by which they may be held, and did not repeal the Canon Law, by which no Perſon may hold them, tho' he be qualified according to that Statute. And as to this I have Serjant *Moore*'s Opinion to juſtifie me in what I ſay, in his Argument of the Caſe

Caſe of *Robins* v. *Gerrard* & *Prince*, *Moor* 440. which Caſe is reported in 4 *Co.* 78. by the Name of *Digby*'s Caſe.

A Diſpenſation however is certainly neceſſary, to prevent a Ceſſion by the Canon Law: But to make it valid for that purpoſe, it is not of neceſſity, that the Word *Diſpenſamus* be contained therein; for it hath been adjudged, that a Diſpenſation with theſe Words, *Unimus*, *anneximus*, *& incorporamus*, the ſecond Benefice to the firſt, without the word *Diſpenſamus*, was good, and did enure to a temporary Union, which the Arch-Biſhop might make without the immediate Ordinary and Patron, the Clerk being qualified according to the Statute, *Mich.* 41 *El.* the Queen v. *Page*, and Biſhop of *London*, 3 *Cr.* 719. And it was then alſo ſaid, That where a Diſpenſation was to retain a ſecond Benefice, *De Donatione*, *Diſpoſitione*, *ſeu Præſentatione cujuſcunque*; And a College having an Advowſon, to which they uſed by Election to make a Nomination, preſented him who had this Diſpenſation, who was alſo Inſtituted and Inducted; the Diſpenſation was not good, for want of the word *Electione* therein.

If a Diſpenſation be for an Incumbent of a Church to hold another Living therewith, *Modo ſit infra*, ten Miles of the former; and he thereupon accepts of one that is more than ten Miles diſtant from the firſt, yet the Diſpenſation is good to hold both Benefices: For Civilians being called, ſhewed, That by their Law, *Modo & dummodo*, are expreſs Proviſo's in ſuch Licenſes; but do not make a Condition, unleſs it had been added, That if he doth otherwiſe, then it ſhall be void: But is only as an Admonition, or Caution, that he ſhall be puniſhed by Eccleſiaſtical Cenſures, if he doth otherwiſe: And affirmed, that this had been always the Expoſition in granting ſuch Licenſes; and therefore, tho' *Modo*, *dummodo*, *ita quod*, make a Condition by the Expoſition of the Common Law; all the Court reſolved, That the uſual Expoſition as to theſe Licenſes ſhould take place, to prevent the Inconveniency of unſettling many Mens Titles, and making their Livings to be in Lapſe, *Trin.* 13 *&* 14 *Car. Dodſon* v. *Lin.* 1 *Croke* 475. ſame Caſe, *Jones* 394. If an Incumbent hath a Diſpenſation to hold a Benefice, altho' he be deprived, this ſhall not prevent an Avoidance, if he be after deprived; becauſe, it ſeems, that this is repugnant, and is as much as to ſay, that the Benefice ſhall be full, when it is void, *Rolls Abr.* 2. *p.* 359. *Contra* 11 *H.* 4. 60. *b.*

For the preventing of a Ceſſion, by taking a ſecond Benefice, 'tis not enough that the Diſpenſation be truly made, but alſo that it be had in due time: For if an Incumbent of a Church incompatible, be Preſented, and Inſtituted, or Collated into another, and then obtaineth Diſpenſation to hold them, and afterwards is Inducted, his Diſpenſation comes too late, and his firſt Benefice by his Inſtitution into his ſecond is void, his Diſpenſation notwithſtanding, *Hil.* 41 *El. Digby*'s Caſe, 4 *Coke* 79. *Hil.* 43 *El. Robins* v. *Prince*, *Gouldsborough* 162. *Mic.* 10 *Jac. Colt* & *Glover* v. Biſhop of *Litchfield*, *Hobart Hil.* 38 *El. Robins* v. *Gerrard*, *Moor* 434. All the doubt hath been, becauſe the Statute againſt Pluralities doth not void the Church before Induction: But at the Canon, or Common Law, Inſtitution to a Benefice doth fill the ſame, and makes the Inſtituted *Rector Eccleſiæ* before Induction, againſt himſelf, and all other Perſons, but the King, and in the King's Caſe, and complete Incumbent as to Cure of Souls, 22 *H.* 6. 27. *a.* 44 *E.* 3. 3. 11 *H.* 4. 9 *a.* 33 *H.* 6 13 *a.* 11 *H.* 7. 29. *Hil.* 14 *&* 15 *Jac. Hutchins* v. *Glover*, 2 *Croke* 463. *Dyer* 360. *Mich.* 19 *&* 20 *Eliz. Digby* v. *Fitzherbert*, *Trin.* 14. *Jac. Gouldsborough*, 163. And therefore it hath been adjudged, That if he that hath a next Turn, doth preſent his Clerk, and he be Inſtituted, and not Inducted, it ſhall ſerve for his Turn, *Mich.* 16 *&* 17 *Eliz. Rot.* 4. And if Inſtitution did not fill the Church,

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a Man by being Inſtituted into many Churches, might bar all others from being Preſented to them, and by getting Sequeſtration of the Profits of them, wholly fruſtrate the Act and Canons againſt Pluralities. And if the ſecond be full by Inſtitution, the firſt after ſuch Inſtitution cannot be full alſo; and ſo Diſpenſation after the ſecond Inſtitution muſt come too late, unleſs it was ſufficient to make that full, which was once void. Beſides, by the Act, he can only purchaſe Licenſe to receive, have, and keep two Benefices; and therefore, his ſecond Church being full by his Inſtitution, he cannot afterwards purchaſe Licenſe to receive, or have that which he had before; and ſo the firſt being voided by the ſecond Inſtitution, a Diſpenſation will not enable him to retain that which he had loſt before, and which he cannot receive, 4 *Coke* 79. *b. Digby*'s Caſe.

If any Perſon having two Benefices with Cure, by a good Diſpenſation doth afterwards take a third, *Heron* ſaid, That it had been adjudged, that both of them ſhould be void, *King* v. *Biſhop of* Chicheſter, *Noy* 149. And yet 'tis ſaid, to have been adjudged *per Curiam*, that the firſt Benefice is only void, *Mich.* 5 *Jac. Hughes* 153. But the reaſon of the Judgment in the firſt Caſe might be, that the Diſpenſation was to hold together two certain Benefices therein expreſſed: For then, I ſuppoſe, that the taking of a third, without other Diſpenſation, doth void both the two firſt: And the Reaſon of the ſecond Judgment might be, becauſe the Diſpenſation was general, to hold any two Benefices with Cure, and ſo both Judgments may be well given; but in the laſt Caſe, 'tis good that he who hath two Benefices with Cure, by ſuch general Diſpenſation, or by Diſpenſation, *Cum clauſula permutationis*, doth before he accepts a third, determine his Choice of the two firſt, by his Reſignation of one of them, eſpecially if he deſign to retain that of the two which he took laſt.

When the Diſpenſation is made to hold three Benefices with Cure, whereof the firſt is of the yearly Value of Eight Pounds, (unleſs in the Caſe of the King's Chaplains, when the laſt is of his Donation) the Diſpenſation is void, and he cannot thereby have two Benefices, as *Hobart* held, in the Caſe of *Colt* and *Glover* v. Biſhop of *Litchfield* and *Coventry*, *Hobart* 158. And 'tis ſaid, that divers Juſtices and Serjeants were of this Opinion, and that the Forfeiture of Twenty Pounds, and the Profits of the third Benefice, did, by taking and uſing ſuch Diſpenſation, fall upon the Incumbent, according to the Statute, 21 *H.* 8. 13. *Mich.* 15 & 16 *El. Dyer* 327.

As by not ſubſcribing the Articles at the taking of the ſecond Benefice; and by Diſpenſation the firſt Church is not voided by a ſecond, as hath been here ſhewed; the ſame may be ſaid of Union, Appropriation, and *Commendam recipere*: But of theſe in their more proper place.

Not only a Benefice with Cure, or Dignity, may be ſaid to be void by Ceſſion, when the Incumbent thereof accepts of another Benefice, or Dignity, as before is ſhewed (where by Dignities, inferiour Dignities only are not to be underſtood), but alſo, when ſuch Incumbent is made a Biſhop, for thereby all his Eccleſiaſtical Preferments which he had before, whether with, or without Cure, are actually void, *Paſch.* 19 *Car.* 2. *Kerry Edes* v. *Walter* Biſhop of *Oxford*, *Vaughan* 19. 29 *E.* 3. 44. *a.* 11 *H.* 8. 11 *H.* 4. 37, 38, 60, 67. 41 *E.* 3. 5. *b. Paſch.* 9 *Jac. King* v. *Horsfall*, & *Wale*, *Davis* 68. 7 H. 4. 25 *b.* 24 *E.* 3. 26. *b.* Doctor and Student 126. *b. Hil.* 20 *Jac. B. R. Palmer*, *p.* 344. But it is not the Election of him, and Confirmation thereof, that doth void his former Preferment, until Conſecration be alſo had, 20 *E.* 3. *Brief* 250. 5 *E.* 2. *Fitz. Breve* 800. 41 *E.* 3. 5. *b.* 11 H. 4. 37, 38, 59, 60. *Hil.* 17 *Jac. B. R. Palmer p.* 344. And therefore, if an Incumbent of a Prebend, be elected Biſhop of the Biſhoprick, that

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is Patron of the Prebend; and after that, and before Conſecration, the King doth grant to him the Temporalties of the Biſhoprick, yet thereby his Prebend is not void; for before Conſecration he is no Biſhop, and may refuſe the Biſhoprick, 41 *E.* 3. 5. *b.* Nor doth Conſecration only void ſuch Eccleſiaſtical Preferments, which the new Biſhop had within the Dioceſs of which he is made Biſhop; but alſo all others, of what Dioceſs, or Kingdom ſoever they be: And therefore, if a Clerk, who hath one or more Benefices here in *England*, be conſecrated a Biſhop of ſome Dioceſs in *Ireland*, all his Preferments here, are, *ipſo facto*, without any Deprivation, void, *Manwaring & Woodley*'s Caſe, vouched in *Evans & Aſcough*'s Caſe, *Palmer* 78. Becauſe they are not void by the Statute againſt Pluralities, in *Colt* & *Glover*'s Caſe, *Hobart* 157. but by Canon Law, which is one and the ſame throughout the whole Church, 10 *E.* 3. 1. 19 *E.* 3. *Tryal* 57. 5 *E.* 3. 9. *Hil.* 22 *Jac. Evans* & *Kiffith* v. *Aſcough*, *Palmer*, *p.* 457. *Noy* 93. & *Latch* 31. & 233. the ſame Caſe by *Jones* 158. The ſame Law is, if a Clerk be created Biſhop of *Man*, as was reſolved, 15 *Jac.* & *Hil.* 17 *Jac. B. R. Palmer* 334. But if a Man be made a meer titular Biſhop, as of *Chalcedon*, *Utopia*, *Jeruſalem*, (*Banks*) ſaid, no Benefice is voided thereby, in *Evans* & *Aſcough*'s Caſe, *Latch* 223. So if one of our Clergy be created a Biſhop Suffragan of *England*, not any (as I conceive) of the Preferments he had before, do become void; but on the other hand, if he exerciſe the Office of a Suffragan by Commiſſion, he is thereby qualified to hold at one time two Benefices with Cure, *Stat.* 26 H. 8. *c.* 14. However, his Benefices with Cure, taken after he is Suffragan, may (unleſs Diſpenſation prevent) void any Dignity he had before.

This Rule, That all Benefices become void, when the Incumbent of them is made a Biſhop, admits of an Exception: For by Diſpenſation of Retainer, a Biſhop may retain ſome, or all of thoſe Preferments he was entitled to before he was Biſhop, 11 H. 4. *f.* 60, 170, 213, 229. Biſhop of St. *David*'s Caſe, 41 *E.* 3. 5. 27 H. 8. 15. *b. Hil.* 39 *El. B. R. Armiger & Holland*'s Caſe, *Rolls Abr.* 2. *p.* 359. *Mich.* 6 & 7 *El. Dyer* 233. *Paſch.* 9 *Jac. King* v. *Horsfall & Wale*, *Davis* 68. *Mich.* 22 *Jac. Woodly* v. Biſhop of *Exeter*, 2 *Croke* 691. And a Diſpenſation to hold a Benefice in *England*, with a Biſhoprick in *Ireland*, under the Great Seal of *England* only is good; becauſe *Ireland* is ſubordinate to *England*, and governed by the ſame Law; for otherwiſe it ought to be under the Great Seal of both Kingdoms, *Trin.* 3 *Car. B. R. Evans & Kiffin* v. *Askwith*, *Palmer* 457. But without ſuch new Diſpenſation, his former Diſpenſations, tho' one was to hold Benefices with Cure, another to hold Dignities with them, will not ſerve his turn, as is held by *Hobart*, in *Colt & Glover*'s Caſe, *Hobart* 157. Nor will his Diſpenſation avail him any thing, when of a Clerk he is made a Biſhop, unleſs it be obtained before his Conſecration, 11 H. 4. 38. *b.* 59. *b.* 78. *b.* Biſhop of St. *Davids* Caſe. Neither in the Caſe of his being tranſlated to another See, can he by Virtue of ſuch Diſpenſation of Retainer, hold thoſe Benefices he enjoyed with his firſt Biſhoprick, but muſt for that purpoſe ſue out a new Diſpenſation *Retinere*, and that to avoid a Scruple, before he and the King have conſented to the Election. However, before his Election to ſuch other Biſhoprick be ſeconded by the Confirmation thereof, for otherwiſe it will work nothing, as coming too late, in *Evans & Kiffin*'s Caſe *v. Aſcough*, in *Noy* 93. and in *Latch*, *p.* 31 & 233. and in *Jones* 158. and in *Palmer* 470. *Jenkins* Caſe 91. *Cent.* 6. *Paſch.* 19 *Car.* 2. *C. B. Henry Edes* v. *Walter* Biſhop of *Oxford*, *Vaughan* 20.

A Diſpenſation *Retinere*, former Benefices may be made either for Years, or for the Life of the Biſhop; and therefore a Clerk having a Faculty from the Arch-Biſhop of *Canterbury*, to retain a Benefice he poſſeſſed, for three Years after

ter he ſhould be created a Biſhop, and Reſigning after his Creation, it was held, That his Church was not void by his Creation, but only by his Reſignation, *Mich. 6 & 7 El. Dyer* 233. And *Hobart* ſaid, in *Colt* and *Glover*'s Caſe, *Hobart* 156. That when the three Years are paſt, the Benefice voids. And ſo *Vaughan* in *Henry Edes*, and *Walter* Biſhop of *Oxford*'s Caſe, *Vaughan* 24. But it was held by *Hutton* and *Winch*, That tho' a Diſpenſation of Retainer be made, to retain a Church with a Biſhoprick but for ſix Years, yet the Commendatory hath thereby Power to hold it during his Life, *Mich. 22 Jac. Woodly* v. *Manwaring*, 2 *Croke* 692. And their Reaſon might be, becauſe the Diſpenſation for ſix Years, preventing his Conſecration from making his Church void, which is that only Act by which, in Law, all former Acts are voided in this Caſe; ſo that he remaining Incumbent of his Benefice, at ſuch time when he was complete Biſhop, the Plenarty of ſuch Benefice would not, without ſome other Act afterwards, as Reſignation, Tranſlation, or Death, be determined.

If a Diſpenſation be *Retinere Dignitatem Decanatus*, it is good for the Deanry, and he is Dean both in Title and Fact, and may confirm Leaſes, and do all other Acts as Dean: In *Evans & Aſcough*'s Caſe, in *Latch.* 233. and in *Noy* 94. and in *Jones* 158. And tho' it be made by the words *Retinere in Commendam*, yet the Commendatory is thereby full Incumbent, and may plead as Incumbent, *Woodley*'s Caſe *v. Manwaring*, 2 *Croke* 691. and muſt ſue, and be ſued, by the Name of Parſon, or Vicar, as the Caſe requireth, by *Hobart*, in *Colt & Glover*'s Caſe, *Hobart* 163. And where ſuch Diſpenſation of Retainer is had, if the Patron (after the Biſhop is Conſecrated) doth preſent another, that is Inſtituted and Inducted, the Biſhop may have a Spoliation in the Spiritual Court, againſt this new Incumbent, becauſe by Diſpenſation his old Title remaineth, for that both claim by the ſame Patron: *Henry Edes & Walter* Biſhop of *Oxford*'s Caſe, *Vaughan* 24.

CHAP. IV.

Of Reſignations, and Exchange of Beneſices.

AS by Ceſſion, ſo by Reſignation, a Church is ſaid to become void by the Act of the Party Incumbent. That a Church may be voided by Reſignation, the Inſtrument of Reſignation muſt be duly made; the word *Reſignare* is not good; for *Reſignare* is not in Law a Term of Reſignation, but *Renunciare, cedere, dimittere*, are the uſual Terms. 12 & 13 *El. Dyer* 29 *a.* But if a Prebendary doth give, grant, render, and confirm to the Ordinary, *Totam Prebendam ſuam de C. ac omnia maneria, terras, tenementa, proficua, Poſſeſſiones, jura & Hæreditamenta quæcunque tam Spiritualia quam Temporalia ac omnem & omnimodam plenam & liberam facultatem, diſpoſitionem, authoritatem & poteſtatem dictæ Præbendæ pertinentem ſpectantem appendentem ſive Incumbentem, aut ut parcell', &c. Habend' & tenend':* To him the ſaid Ordinary, and his Succeſſors, in Fee; and after the *Habendum* doth ſay, *Cui in hac parte ad omnem Juris effectum qui exinde ſequi poterit aut poteſt dictæ Præbendæ ac omnia jura mihi ratione ejuſdem qualitercunque acquiſita ut decet ſubjicio & ſubmitto*, &c. Theſe Words be ſufficient, and amount to a Reſignation, altho' the more proper Words are not uſed, *Mich.* 12 & 13 *El. Dyer* 293.

If

If a Reſignation be made to the uſe of another Perſon; that is, with Condition, That if one of two Perſons named, be admitted to the Benefice reſigned within ſix Months, the Reſignation ſhall be void and of none effect, ſuch Reſignation is abſolutely void: For every Reſignation ought to be abſolute, *Sponte, Pure & Simpliciter*, Mich. 33 & 34 El. Gayton's *Caſe*, Owen 12.

Two Perſons by one Inſtrument, in Writing, do agree to exchange their Benefices, which are both Spiritual, (for a Lay Preferment, as an Hoſpital, cannot be exchanged, or go for a Prebendary, or other Spiritual Benefice, *Rolls Abr* 1. 811.) And in order thereunto, reſign them into the Hands of the Ordinary, ſuch Exchange being executed, the Reſignations are good; but tho' the one is Inſtituted and Inducted into the other's Benefice, yet if the Exchange be not executed on both parts, the Clerk on whoſe part the Exchange was not executed, may have his Benefice again, 45 *E.* 3. *Fitz. Exchange* 20. For in this Caſe of Exchange, the Law doth annex this Condition to a Reſignation, if it be fully executed: But a collateral Condition may not be annexed thereunto, no more than an Ordinary may admit upon Condition, or a Judgment be confeſſed upon Condition, which are Judicial Acts, *Gayton*'s Caſe, *Owen* 12. And ſo if two, upon ſuch Agreement, reſign, as aforeſaid, and the Patrons according to their Agreement preſent croſs *de Novo*, (as they muſt do, if the Exchange be executed, *Mich.* 18 & 19 *El. Grendon* v. Biſhop of *Lincoln*, *Plouden*, 3 *E.* 3. *c.* 18. and the one is Admitted, Inſtituted, and Inducted, into the other's Benefice; and the other is likewiſe Inſtituted into his, and dieth before Induction, (altho' the Induction of the firſt was abſolute) yet becauſe it was directed by the precedent Agreement, which ought to be executed on both parts, in the Life-time of the Parties, he hath good Title to the Benefice he had by exchange. 45 *E.* 3. *Fitzherb. Exchange* 10. but may revert to his former, *Hil.* 43 *El.* Lord *Cromwell*'s Caſe, *Co.* 74. *b.* The like Law, if before the compleating of the Exchange by mutual Preſentment, Inſtitution, and Induction, the reaſon of the Exchange fail; for reſpect muſt be had to the Reſignation and Proteſtation of both Incumbents: And therefore, either Incumbent may return to his old Benefice, in *Priſtino Statu*, upon his former Preſentment, 45 *E.* 3. *Fitz. Exchange* 10. *Regiſter* 306. *B. Mich.* 10 *Jac. Colt & Glover* v. Biſhop of *Coventry* and *Litchfield*, *Hobart* 152.

That a Reſignation may take its effect, it muſt not only be abſolute, but alſo made to a proper Perſon; for tho' it may be made before a Publick Notary, yet the Inſtrument muſt be directed to him that hath Power to accept of the Reſignation, and the Notary is to certifie the ſame to him; and when he hath accepted thereof, then, and not till then, is the Church void by Reſignation; and before ſuch Acceptance, all Preſentations made of Benefices, as reſigned, are void, *Paſch.* 3 *Jac. Fairchild* v. *Gayre*, 2 *Cro.* 63. *Smith* v. *Founes*, *Noy* 147. *Mich.* 5 *Jac. Fanes* Caſe, 2 *Cro.* 198.

That Ordinary who hath the Power of Inſtitution, hath Power alſo to accept of a Reſignation made of the ſame Church, to which he may Inſtitute; and therefore the reſpective Biſhop, or other Perſon, who either by Patent under him, or by Priviledge, or Preſcription, hath the Power of Inſtitution, are the proper Perſons to whom a Reſignation ought to be made. And yet a Reſignation of a Deanry, in the King's Gift, may be made to the King; as of the Deanry of *Wells*, *Mich.* 18 & 19 *El. Grendon* v. Biſhop of *Lincoln*, &c. *Plouden* 498. And ſome hold, that a Reſignation may be well made to the King, of a Prebend that is no Donative, 12 & 13 *El. Dyer.* 294. *Pollard* and *Walron*'s Caſe, *Rolls Abr.* 2. *p.* 358. But *Harper* and *Weſton*, in the ſame Caſe held, That a Reſignation of a Prebend ought to be made only to the Ordinary of the Dioceſs, and not to the King as Supreme Ordinary; becauſe the King is not

bound to give Notice to the Patron (as the Ordinary is) of the Reſignation, nor can the King make a Collation by himſelf, without preſenting to the Biſhop, notwithſtanding his Supremacy.

But if a Donative be to be reſigned, the Incumbent thereof is to make his Reſignation to his Patron, and by his Acceptance thereof, the Donative is voided: And if there be two Founders, or Patrons, it is ſufficient that it be made to one of them; if to one of them, and a Stranger alſo, 'tis good; being void as to the Stranger only, eſpecially if both Conſent thereto, and grant it *de Novo*; and ſuch Reſignation of the Church only, doth extend to all the Poſſeſſions of the Donative, *Paſch.* 3 *Jac. Fairchild & Gayr*, *Brownlow & Gouldsborough* 201. and in 2 *Cro.* 63. and in *Yelverton* 60. And generally every Perſon that reſigns, muſt reſign to his Superiour; and therefore it is ſaid by *Coke*, That a Biſhop cannot reſign to the Dean and Chapter, *Hil.* 12 *Jac. B.R. Rolls* 1 *Rep.* 137.

So ſoon as the Acceptance is made, the Patron may Preſent, if he pleaſe, to the Benefice reſigned: But in the Caſe of a Donative, if the Patron doth not preſent within ſix Months, yet the Donative will not be lapſed, but the Ordinary may compel the Patron to fill the Church. In other Caſes, where a Reſignation is made to the Biſhop, or other inferiour Ordinary, that may accept it, the Lapſe doth not run as from the Acceptance, but from the Time of Notice given by the Ordinary to the Patron, *Mich.* 15 *El. c.* 3. *Leonard* 45. *Mich.* 15 *&* 16 *El. Dyer* 327. *Jenkins's* Caſe, 28 *Cent.* 6. 18 *H.* 7. *Keil* 49. *B.* 18 *Eliz. Dyer* 347. 12. 1 *H.* 7. *c.* 9. *b. Doctor and Student*, 116. 5 *E.* 4. *c.*3.*b. Noy* 65. And if the Biſhop doth die, that took the Reſignation, before he gives Notice, yet the Guardians of the Spiritualties, or if he neglect, the Succeſſor Biſhop is bound to give Notice, before the Patron ſuffer by Lapſe, if he neglect to preſent, 18 *H.* 7. *Kellu.* 49. *b.* So if the Temporalties of the Biſhoprick in which a void Church is, or in the Hands of the King, Notice of the Avoidance ought, *de Jure*, to be given to the Patron. The Guardians of the Spiritualties ought to give Notice, and Lapſe cannot run without it, upon what Account ſoever the Avoidance, of which Notice is to be given, did happen, 22 *Eliz. Dyer* 369. 54. will prove this, ſaith *Rolls Abr.* 2. *p.* 365. *Dyer* 369. *b.*

After a Clerk hath taken Inſtitution, the Church is full againſt all Men, in the Caſe of a common Perſon; and ſuch Incumbent may void the Church again by Reſignation, before Induction: But where the Inſtitution was upon the Preſentation of the King, or where the Right of Patronage, after the Inſtitution, doth come to the King, the Church, before Induction had, remaineth open to the King's Preſentment: And therefore, if the King will preſent another, the Reſignation of the Perſon Inſtituted is idle. But if the Caſe be, that a Clerk is Inſtituted to a Church of the King's Gift, and doth not take Induction, if the King will not preſent another, ſuch Clerk may, and muſt reſign, if he reſolve to diſcharge himſelf of the Cure, and the Duties relating thereto: For by his Inſtitution the Church is full, as to the Cure of Souls, againſt himſelf, and all other Perſons, unleſs (and until ſuch time as) the King ſhall uſe his Prerogative of making the Inſtitution void, as he may do before Induction, by preſenting another: But until he doth ſo preſent, the Inſtitution hath the ſame Effects (as I conceive) in his Caſe, which it hath in the Caſe of a common Perſon; and therefore the Clerk that is only Inſtituted, if he be Non-reſident, or neglecteth the Cure, is ſubject to the Puniſhment thereof. If an Inſtrument under the Seal of the Biſhop be found, upon which is Indorſed, that the Reſignation was acknowledged and accepted by the Biſhop, yet that is no abſolute finding that it was a Reſignation in Fact: As the Juries finding of an Acquittance

quittance of the Debtee, is no good finding upon an Iſſue of *Plene Adminiſtravit*, but a Circumſtance and an Inducement to the Jury, *Smith* v. *Founes*, *Noy* 147. *Mich.* 5 *Jac.* the ſame Caſe.

And Note, **That if any Incumbent of any Benefice, with Cure of Souls, do, or ſhall corruptly reſign, or exchange the ſame, or corruptly take for, or in reſpect of the reſigning or exchanging of the ſame, direcly or indirecly, any Penſion, Sum of Money, or other Benefit corruptly, as well the Giver as the Taker, ſhall loſe double the Value of the Sum ſo given, taken, or had; the one Moiety thereof to be to the Queen's Majeſty, her Heirs and Succeſſors; and the other Moiety to him or them that will ſue for the ſame, by Action of Debt, Bill or Information, in any of her Majeſty's Courts of Record, in which no Eſſoin, Protection, or Wager of Law, or Priviledge, ſhall be admitted or allowed,** *Stat.* 31. *El. c.* 6. But of this in its proper place.

CHAP. V.

Church void by Act of Law. Of Simony, &c.

THE laſt Means by which a Church may be void, is, by the Act of the Law; for by that, in ſome Caſes, a void Church, notwithſtanding Preſentation, Admiſſion, Inſtitution, and Induction, remaineth void; in others, a full Church doth become void. A Church, notwithſtanding the aforeſaid After-Acts, may remain void: Firſt, From the Uncapacity of the Perſon preſented, *&c.* And therefore, tho' in former time, if a meer Lay-man was Preſented, Inſtituted, and Inducted, into a Benefice with Cure, this was not a meer Nullity, but he was Parſon in Fact, until Deprivation came, tho' not *de Jure*, *Mich.* 12. *&* 13 *El. Dyer* 293. *Beningfield & Pickering*'s Caſe, 1 *Anderſon* 16. *Windſor*'s Caſe, 5 *Co.* 102. *Coſtard & Wingate*, *Moor* 606. Yet at this Day, **If a Lay-man, or a Deacon of the Age of Twenty three Years, be Preſented and Admitted into a Benefice with Cure of Souls; or if any Perſon be Admitted to any Benefice with Cure, of, or above the Value of Thirty Pounds yearly, in the Queen's Books, unleſs he be then a Batchellor in Divinity, or a Preacher lawfully allowed by ſome Biſhop within this Realm, or by one of the Univerſities of** Cambridge, or Oxford, **their Admiſſion, Inſtitution, and Induction, and all Tolerations, Diſpenſations, Qualifications, and Licenſes, to the contrary, are meerly void in Law, and of none effect,** *Stat.* 13 *El. c.* 12.

Tho' the Patron may preſent again when he pleaſeth, without Notice of an Avoidance in the aforeſaid Caſes, yet becauſe the Statute of 13 *Eliz.* makes only the Admiſſion, *&c.* void, and not the Preſentation, leaving that in force, it was adjudged in the Caſe of the Deacon aforeſaid, that no Lapſe ſhall incur upon any Deprivation, by reaſon of the ſaid Incapacities, without Notice thereof, *Trin.* 18 *Car.* 1. *B.* Biſhop of *Hereford* & *Okely*'s Caſe, *Parſon's Law*, *Car.* 18. *Marſh.* 119. And the like Law, is, I ſuppoſe, in the other Caſes, for the reaſon is the ſame in them all: And before the ſaid Statute, when a Lay-man was admitted and deprived at the Canon Law, Lapſe did not run to the Ordinary, before Notice given thereof to the Patron. *Dyer* 293.

Alſo a Church, notwithſtanding Inſtitution and Induction had, may be ſaid to remain void by the Act of the Law, in reſpect of the Uncapacity of the Preſentee, by reaſon of ſome Simoniacal Contract, preceding the Preſentation to it, and upon which the Preſentment is made: For it hath been enacted, ----**That if any Perſon, or Perſons, Bodies Politick, or Corporate, ſhall, or do, at any time, for any Sum of Money, Reward, Gift, Profit, or Benefit, directly, or indirectly; or for, or by reaſon of any Promiſe, Agreement, Grant, Bond, Covenant, or other Aſſurance, of, or for any Sum of Money, Reward, Gift, Profit, or Benefit whatſoever, directly or indirectly, Preſent, or Collate any Perſon to any Benefice with Cure of Souls, Dignity, Prebend, or Living Eccleſiaſtical; or give or beſtow the ſame for, or in reſpect of any ſuch corrupt Cauſe or Conſideration, that then every ſuch Preſentation, Collation, Gift, and Beſtowing, and every Admiſſion, Inſtitution, Inveſture, and Induction thereupon ſhall be utterly void, fruſtrate, and of none effect in Law: And that it ſhall and may be lawful to, and for the Queen's Majeſty, her Heirs and Succeſſors, to preſent, collate unto, or give or beſtow every ſuch Benefice, Dignity, Prebend, and Living Eccleſiaſtical, for that one time, or turn only; and that all and every Perſon, or Perſons, Bodies Politick, and Corporate, that from thenceforth ſhall give, or take any ſuch Sum of Money, Reward, Gift, or Benefit, directly or indirectly; or that ſhall take, or make any ſuch Promiſe, Grant, Bond, Covenant, or other Aſſurance, ſhall forfeit and loſe the double Value of one Year's Profit of every ſuch Benefice, Dignity, Prebend, and Living Eccleſiaſtical; and the Perſon ſo corruptly taking, procuring, ſeeking, or accepting, any ſuch Benefice, Dignity, Prebend, or Living, ſhall thereupon, and from thenceforth, be adjudged a diſabled Perſon in Law, to have or enjoy the ſame Benefice, Dignity, Prebend, or Living Eccleſiaſtical.** *Stat.* 36 *Eliz. c.* 6.

This Act hath given being to many Book-Caſes: Some of which relate to the Contract it ſelf; ſome to the Puniſhment of the Patron; and others, to the Puniſhment of the Clerk. As for the Contract, it may be made Simoniacally as well before, as after the Church is void: For tho' it be lawful for any Perſon to buy the next Turn of a Church, when it is full of an Incumbent, generally ſpeaking, *Mich.* 33 & 34 *Eliz. Rot.* 2122. yet in ſome Caſes it is not lawful: For if *A.* being ſeiſed of an Advowſon, doth grant the next Preſentation to *B.* and *B.* doth make a Bond to pay him a Sum of Money for it, when the Church ſhall fall void; this is Simony. And ſo Juſtice *Reece* ſaid it had been adjudged in *Poole*'s Caſe: For otherwiſe, by this means, the Statute might be utterly defeated, *Hill.* 17 *Car. March*'s Caſe 228. *Parſons's Law, cap.* 18. *fol.* 136.

So if an Incumbent of a Church, being upon the Deſign of exchanging his Benefice, to get his Patron's Conſent to promote another thereto, doth promiſe, That the Clerk ſhall make a Leaſe of the Glebe, or Tythes, to the Patron, at a certain Rent: And the Clerk is preſented, and doth make the Leaſe accordingly, altho' that he knew not of the Contract, yet this is Simony, *Hil.* 16 *Jac. C. B. Rot.* 667. *Grant & Bowder*'s Caſe. If (a Church being full of a ſickly Incumbent) a Clerk doth contract with a Stranger, to procure the Grantees of the next Avoidance, to ſurrender to the Grantor, and to influence the Grantor to preſent ſuch Clerk, when the Living ſhall become void; and this be done accordingly, this is Simony, *Mich.* 8 *Jac. Penn*'s Caſe, 2. *Brownlow & Gouldſ.* 7. So it is, if (a Church being full of an old and ſickly Incumbent) a Clerk doth contract with the Patron, (for a certain Sum of Money, payable when the Church ſhall become void) to make a Grant of the next Avoidance to a Friend of his; and the Friend having ſuch Grant, doth preſent the ſaid Clerk

Clerk accordingly, *Paſch.* 14 *Jac. Winchomb's* Caſe, in *Hobart* 165. and in *Noy* 25. and in *Brownlow & Gouldsborough* 164. *Trin.* 41 *El. Smith* v. *Shelbourn*, 3 *Cro.* 685. And tho' the Perſon to whom the Grant of the next Turn is made in truſt, ſhould not know of any precedent Agreement between the Patron and the Clerk, yet if the Clerk be preſented, it ſhall be intended, that it was with reſpect to the Agreement, and that he came to his Benefice by Simony, *Cloſs & Rumcoy's* Caſe, in the Caſe of *Calvert* v. *Kitchin & Parkinſon*, 7 *Jac. Lane* 37. And *Hutton* ſaid, That we in Chancery have adjudged, that the Grant of the next Avoidance for Money, when the Parſon was ſick in his Bed ready to die, is Simony: For the Statute is, If the Contract be made directly, or indirectly, by any way or means, *Paſch.* 21 *Jac. Sheldon* v. *Bret. Winch.* 63.

But if a Father (the Incumbent of a Church being ſick) doth purchaſe the next Avoidance thereof, in the preſence of his Son, and with an intent to preſent him, and doth preſent him, after the Death of the Incumbent, it is not Simony; as was adjudged by three Juſtices, upon this Reaſon: That the Father is bound by Nature, to provide for his Son; and therefore, tho' the Son may not contract for a Benefice, to the intent that another ſhould preſent him; yet the Father may contract, with an intent to preſent his Son, and with his privity; for that it being no Offence in the Father, who was the Principal, it cannot be any Offence in the Son, who was the Acceſſary: For there cannot be a *Particeps Criminis*, where there was not any Crime committed. But *Anderſon* againſt the other three, That this Contract with the Father, with an intent to preſent his Son, being in preſence, and with the Son's privity, made it Simony in him: But he granted, That if the Father had bought the Benefice, with an intent to preſent the Son, if it was without the privity and conſent of the Son, it had not been Simony, 41 *El. Smith & Shelbourn's* Caſe, 3 *Cro.* 685. ſee *Bowderock & Mackaller's* Caſe, *Cro. Car.* 331. But this Caſe is otherwiſe reported by *Moor*, *p.* 916. who ſaith, That the Caſe was agreed clearly to be Simony; and that if the Son had not been privy to the Bargain, all the Juſtices, but *Anderſon*, held, that it had not been Simony. But they agreed, That if a Stranger buy the next Avoidance, and preſents one that is not privy until after the Contract, or Purchaſe made; and when he is made privy, is preſented, this is Simony. Not ſo, where the Father doth buy; becauſe he is bound in Nature to provide for his Son. But by *Hobart*, if in the Grant of the next Avoidance it appears, that it was to the intent to preſent his Son, or his Kinſman, and it was done accordingly, it is Simony, in *Winchcomb & Pulleſton's* Caſe, *Mich.* 15 *Jac. Noy* 25. And it was cited to be adjudged, that if a Man purchaſe the next Avoidance of a Church, with an intent to preſent his Son, and afterwards doth preſent him, it is Simony within the Statute, *Paſch.* 3 *Car. Hughes* 390. And Baron *Snigg* ſaid generally, That if *A.* doth buy the next Avoidance, with an intent to preſent *B.* and the Church becoming void, *A.* doth preſent *B.* accordingly, this is Simony. By Averment, and by good Pleading, the Preſentment of *B.* ſhall be void, in *Kitchin & Calvert's* Caſe, *Hil.* 8 *Jac.* in the Exchequer, *Lane* 102. By reaſon of this diverſity of Opinion *Quære*: But my Thoughts are, That ſeeing (whatever the Law is in other Countries, where the Canoniſts have Cogniſance of Advowſons) it was before the Statute againſt Simony, and now is lawful with us, to buy and ſell, *bona fide*, the next Avoidance of a full Church; I ſuppoſe it was, and is lawful, as well for all Subjects as for ſome: And ſuppoſing, that to buy the next Avoidance of a Church, when the Incumbent is ſick in his Bed, ready to die, is Simony in one Man, I cannot but think that it is Simony in another, tho' it be the Father of a Son capable thereof. And ſuppoſing, that for a Stranger to purchaſe the

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next Avoidance in the preſence of his Friend, or only with an intent to preſent his Friend, preſenting him accordingly, is unlawful; I conceive, this is equally unlawful in a Father, with reſpect to his Son: For if it be Simony to buy and ſell in theſe Caſes, it is Simony (at leaſt in the Temporal Court) by reaſon of the Statute, and the word **indirectly** therein; and it is moſt plain, that the Statute doth not give any colour to ſuch Diſtinction: For the Words are: ----**If any Perſon, or Perſons, Bodies Politick, or Corporate**, &c. And ſo are moſt general; and where the Law doth not diſtinguiſh, we ought not to diſtinguiſh. Neither is the Reaſon, That a Father is bound by Nature to provide for his Son, good, to the aforeſaid purpoſe: For a Man is bound by Nature alſo, to provide for himſelf, and ſo might as well purchaſe for himſelf: And if this Reaſon ſhould make that not to be Simony in the Caſe of a Father, which is Simony in another Perſon, before the Church is void, it might as well do the ſame after the Church is void; for the Father's Obligation continueth, he is ſtill bound in Nature to provide for his Son; and it is no more Simony in a Friend to buy, with reſpect to his Friend, when the Church is void, than it is in the aforeſaid Caſes, before it is void (as it hath been held); and then, Why ſhould it be more Simony in the Father, to buy, with a reſpect to his Son, when the Church is void, than before it is void? Unleſs the Reaſon why he of all Men might buy before the Church is actually void, was changed and gone, as it is not; and by the Statute there is nothing more of Simony in buying directly, than indirectly; and therefore, if the ſaid Reaſon excuſe the Father, before the Church is void, it may as well excuſe him after it is void, and by conſequence, it doth excuſe him in neither Caſe; unleſs in the Judgment of thoſe, that can be ſo abſurd as to hold, That no Human Law ought to be made, or if made, ought to be expounded, to reſtrain this Natural Liberty, or (as they may call it) Duty in the Father. However, to avoid Queſtions of Law, 'tis beſt, that a Purchaſer of a next Turn (whether he deſign it for Son, Kinſman, or Stranger) doth make the Contract, when the Incumbent of the Church is not in danger of Death; that he doth not declare to the Perſon to whom he intends a Kindneſs, or whom he intendeth to preſent; that the intended Clerk be not preſent at the Contract; however, that he be not named in the Deed, by which the Power of Preſentation, or Nomination is granted.

So if a Father, in Conſideration of a Clerk marrying his Daughter, doth Covenant with the Clerk's Father, That he will procure the Clerk to be Preſented, Admitted, Inſtituted, and Inducted into ſuch a Church, upon the next Avoidance thereof: This is a Simoniacal Contract. But if the Father of the Clerk doth Covenant, That his Son ſhall marry the other's Daughter; and the other, in Conſideration thereof, Covenants to pay Money; upon which the Father of the Clerk Covenants, to aſſure Land for a Jointure; and afterwards, the Father of the Woman doth Covenant, to procure the Clerk to be Preſented, Inſtituted, and Inducted, into ſuch a Church; if this laſt Covenant be not in Conſideration of the former, nor depending thereupon; without ſpecial Averment, or ſhewing that it was a Simoniacal Contract, it ſhall not be ſo intended, and a Bond for performance thereof, upon a general Demurrer to the Condition, was adjudged good, 11 *Car. Birt* v. *Manning*, *Croke*, *Car.* 425.

Simony may be committed, and yet neither the Patron, or Incumbent, privy to it, or knowing of it. In a Writ of Error to reverſe a Judgment, whereby the King had recovered in a *Quare Impedit*, upon a Title of Simony (which was), That a Friend of the Parſon agreed to give ſo much Money to *J. S.* (who was not the Patron) to procure the ſaid Parſon to be Preſented; who was Preſented according to that Agreement: It was aſſigned for Error, that it did not appear,

appear that either the Patron, or the Parſon were knowing of this Agreement. But *per Cur.* the Parſon is *Simoniace Promotus.* And it was then ſaid, That Dr. *Duxon* had enjoyed the Church of St. *Clement's* above twenty Years, by ſuch a Title of the King's, the Preſentee of the Patron being outed, by reaſon a Friend had given Money unto a Page, belonging to the Earl of *Exeter*, to endeavour to procure the Preſentation; and neither the Earl, nor the Parſon, knew any thing of it. *Paſch.* 19 *Car.* 2. *B. R.* the King *& Truſſel*, 1 *Siderfin* 329. the ſame Caſe, 2 *Keble* 204.

As Simony may be committed when the Church is full, ſo more eſpecially when the Church is become void, whether the Contract was made with the Patron, his Wife, or a meer Stranger, *Rolls* 1 *Rep.* 235. So if a Stranger (the Church being void) doth contract with the Patron, for the void Turn; and the Patron for Money granting the ſame, the Stranger doth Preſent; and after the Induction of the Incumbent, doth acquaint him what he had done, and require Conſideration for it, altho' the Grant of a void Turn, as being a thing in Action is void, and the Preſentee comes in, *Quaſi per Uſurpationem*; yet becauſe it is by means of a Simoniacal Contract, as the Cauſe thereof, (for otherwiſe it is to be intended, that the true Patron would not have permitted that Preſentment) it was held, that it was as well Simony, as if the Grant had not been void, *Mich.* 42 *&* 43 *El. Baker* v. *Rogers*, 3 *Croke* 788. ſame Caſe, *Moor* 914. So if the Father (the Church being void) contract for Money with the Grantee of the void Turn, to permit the Grantor to preſent his Son, and the Grantor, at the Requeſt of the Father, doth preſent accordingly; this is Simony, *Paſch.* 17 *Jac. Booth* v. *Potter*, *Cro. Jac.* 533. So it was found by ſpecial Verdict, that an Uſurpation had been made to a Church, and a *Quare Impedit* brought to remove the Incumbent, and pending the *Quare Impedit*, the perpetual Advowſon was ſold by the Plaintiff, (*Ea intentione*,) that *J. S.* Clerk, ſhould be preſented after the Uſurper's Clerk removed; and accordingly, after ſuch Removal, *J. S.* was Preſented, Admitted, Inſtituted, and Inducted. This was held by the Court to be Simony, *Paſch.* 35. *Car.* 2. *C. B. Anonimus*, 2 *Ventris* 39.

But if a Patron (the Church being void) doth take a Bond of a Clerk, before he preſents him, to pay him Ten Pound yearly, to the Son of the laſt Incumbent, ſo long as he ſhall be a Student in *Cambridge* unpreferred, no Simony is committed. So in the Earl of *Suſſex's* Caſe, vouched by *Foſter*, Juſtice: A Patron took Bond of his Preſentee, to pay Five Pounds yearly to the Wife and Children of the laſt Incumbent; and yet, notwithſtanding great oppoſition, the Clerk kept his Living, *Paſch.* 2 *Jac. Abigal Baker*, v. *Mounford*, *Noy* 142. Charitable Reſolutions, if any ſuch were given; but I much doubt, whether they are to be taken for Law. Or if the Condition of an Obligation be, That a Clerk, after his Admiſſion, Inſtitution, and Induction, to ſuch a Church, ſhall at all times after, be ordinarily reſident, and ſerving the Cure of the ſaid Benefice, without abſence by Eighty Days in any one Year, during the time that he ſhall be Parſon of the ſaid Church; this is a good and lawful Condition, without any Averment taken, that it was for ſome Simoniacal purpoſe, *Mich.* 14 *Jac. B. R. Carey* v. *Yeo. Rolls* 1. 417. See *Brockham's* Caſe, 4 *Car. Richardſon's* Opinion, *Litt. Rep. f.* 138.

So if a Patron takes Bond of his Preſentee, to reſign within three Months after Requeſt abſolutely (he being firſt Inſtituted and Inducted); or if the Condition be, That whereas *A.* is within a ſhort time to be Preſented, Inſtituted, and Inducted to the Church of *D.* if *A.* after his Admiſſion, Inſtitution, and Induction thereto, at all times, upon the Requeſt of *B.* his Heirs, Executors, or Adminiſtrators, ſhall reſign the ſaid Rectory, and Church, to the Ordinary, or

or Guardian of the Spiritualties for the time being, by which *B.* his Heirs, or Aſſigns, Patrons of the ſaid Church, may preſent of new to the ſaid Church, diſcharged of all Charges, and Incumbrances, done, or ſuffered by the ſaid *A.* Theſe Conditions are not void as Simoniacal, without Averment, that they were for Simoniacal Purpoſe, becauſe they may be upon good and valuable Reaſons, without any colour of Simony, as if he take a ſecond Benefice, or be many Months Non-reſident, or that the Patron may preſent his Son, when capable of a Benefice, *Trin.* 8 *Jac. Jones*'s v. *Lawrence*, *& Paſch.* 9 *Jac. Lawrence* v. *Jones*'s, 2 *Cro.* 274, 248. *Hil.* 5 *Car. Babbington* v. *Wood*, in 1 *Cro.* 180. and in *Hutton* 110. and in *Jones* 220. *Mich.* 14 *Car. B. R. Carey* v. *Yeo*, *Roll* 1. 417. *Mich.* 43 *&* 44 *El. Webb & Hargrave*, *Moor* 644. And if the Clerk having given Bond to reſign, doth after take away his Bond, it ſeems, that he refuſing to reſign according to the Condition, may notwithſtanding be compelled in Chancery to reſign: For in the Caſe of a Fellow of a College, the Court did diſplace him, and decreed him to leave it, *Paſch.* 15 *Car. Holme* v. *Wild*, *Tothill*, *p.* 129. But the Chancery will reſtrain the Patron, that he ſhall not make any ill uſe of theſe Bonds of Reſignation, *Chancery Rep.* 2 *Part* 399. But when a Condition was to reſign upon Requeſt, and the Plaintiff did aſſign for Breach, that the Defendant could not be found to make a Requeſt to him, and therefore that he made a Proclamation at the Church where he was born; and another Proclamation at ſeveral Markets within the ſame County, by them giving him Notice of his Requeſt; yet that this was not ſufficient, as adjudged upon a Demurrer, for that the Requeſt ought to have been made to the Perſon himſelf, *Mich.* 8 *Car. B. R. Gruit* v. *Pinnel*, *Roll's Abr.* 1. *p.* 443. The Judgments that to take and give a Bond to reſign, is not Simony, have occaſioned many corrupt Patrons to exact ſuch Bonds of their Clerks, only that they might thereby make ſure (as they think) to themſelves, a Recompence for their Preſentments. And ſome inconſiderate Clerks (that have given ſuch Bonds) have been emboldned thereby to take the Oath againſt Simony, tho' they well underſtood the baſe Deſign of their Patrons and themſelves, in taking and giving ſuch Bonds, and intended to accompliſh them afterwards, by ſubmitting to their Demands, to the utter fruſtrating that moſt Religious Law againſt ſuch Corruptions; tho' the Judgments in this Caſe were given for the Validity of ſuch Bonds, only becauſe the Defendants demurred generally to them, and did not averr, that the Bonds were made to reſign, only to over-awe the Clerks, by fear of After-payments, or to let a Leaſe of the Glebe, Tythes, *&c.* For then (as was declared in the Caſes aforeſaid) it had been Simony; but otherwiſe it could not appear to the Court to be ſo. It was ſaid by the Court upon Evidence, in Sir *John Paſcall & Clark*'s Caſe, 15 *Jac. Com. B. Rot.* 2051, *Noy* 22. That if a Patron doth preſent one to a Church, having taken an Obligation of the Preſentee, that he ſhall reſign at three Months Warning, that it is Simony within the 31 *El.* And ſuch Conſtruction, upon a Preſumption, that theſe Bonds are taken and given upon a Simoniacal Deſign, when they are general, and do not contain ſome good Reaſon, or ſuch Reaſon of them is not otherwiſe manifeſt; or tho' they do, if it appear that they were taken upon a corrupt Deſign, by any After-practice, is but ſuitable to the Judges wonted Care, of preſerving ſuch-like Religious Laws, in their full and effectual force: But this Caſe of *Paſchall* being againſt the Reſolution of *Jones & Lawrence*'s Caſe, ſolemnly ſetled not many Years before, doth not, as I have been told, paſs for any great Authority; and there have been very many Reſolutions agreeing with *Jones & Lawrence*'s Caſe, ſince that time. However, our Ordinaries may diſcourage, if not quite ſpoil, (and no doubt, but their Juſtice and Prudence will oblige them to it) this way of trading, by not accepting of any Reſignation made by the Conſtraint of ſuch Bonds: In regard, (as hath been ſhewed,

ſhewed, *Chap.* 4. a Reſignation (eſpecially of a Benefice with Cure) cannot be made to void the ſame by the ſole Act of the Incumbent, but the Ordinary muſt for that end alſo accept it, and declare the Church void; and 'till then, the Patron's new Preſentation will be null: And the reaſon of the Law in this Caſe, is partly, becauſe the Ordinary is to give Notice of a Reſignation to the Patron, that he may preſent again; and if he do not within ſix Months after Notice, that the Ordinary may provide for the Church; but more eſpecially, I ſuppoſe, becauſe the Biſhop having Cure of all Souls within his Dioceſs, is to ſee, that the Paſtors to whom he hath committed, and who have undertaken the Cure, and in whom thereby the People have an Intereſt, do not without a reaſonable Cauſe leave their Charge; that it be not for Money, *&c.* or to live a Lay-Converſation, which he is not to ſuffer.

If the Patron (or other Perſon) take Bond of his Preſentee, or his Friend, to pay Money upon the Account of a Preſentation made, it hath been held, that the Bond is not void, as being but collateral to the Simony, which *Eo Nomine* is puniſhable only in the Eccleſiaſtical Court, in Sir *William Bowyer*'s Caſe, *Hil.* 11 *Jac.* 2 *Bulſtrode* 182. and in *Winchcomb*'s Caſe v. *Pulleſton* 15 *Jac. Noy* 25. *Hil.* 17 *Eliz. March, p.* 156. 3 *Inſt.* 153. For a Bond being ſued, the Defendant pleaded, That the Sum was agreed to be paid for the Reſignation of a Church, to the intent that another might be preſented; and ſhews, that Clerks, Patron, Obligor, and Obligee, were Parties to the Agreement, and the Bond was allowed good; becauſe Simony is not an Offence againſt the Common Law, nor any Contract, or Bond, made void by the Statute; and that it is not averrable, that the Money was for other Cauſe than the Obligation expreſſeth, *Paſch.* 40 *Eliz. Oldbury* v. *Gregory*, *Moor* 564. *Gregory* v. *Older*, *Noy* 72. But *Hobart* holds, in *Winchcomb*'s Caſe, *Hobart* 167. That ſuch Contracts are void between the Parties, and againſt Law, as being *Contractus ex turpi cauſa*, and *Contra bonos mores*; like as if a Man be bound in an Obligation uſurious, the Bond is void between the Parties; and if paid by an Executor, it is a *Devaſtavit*. And according to this, an Action being brought upon an *Aſſumpſit* to pay twenty Pounds, upon Conſideration of procuring a Clerk to be Preſented, and Inſtituted, to one of the King's Donatives, (for to Donatives, and to all other Benefices of the King's Preſentment) the Statute againſt Simony doth extend, *Mich.* 9 *Car. Bowderock* v. *Mackaller*, 1 *Cro.* 337, 353, 361. And Judgment being given againſt the Defendant, a Writ of Error was brought in *B. R.* where it was urged, that the Contract was good, and that it had been adjudged, *Mich.* 40 *&* 41 *Eliz. C. B.* where it was pleaded, That an Obligation was made upon a Simoniacal Contract; and ſhewed how that the Bond was not void, becauſe Simony is but a Spiritual Offence, and that in 8 *Jac.* between *Taverner & Smith*, it was adjudged to the ſame effect. But notwithſtanding theſe Precedents, the Court, after two Adjournments, was of Opinion, That the Conſideration was illegal, being to perform a Simoniacal Contract. And it being objected, That Simony was an Offence, whereof the Common Law takes not any Notice, or at leaſt did not before the Statute; that was denied, *Mich.* 9 *Car. Hil.* 9 *Car. & Paſch.* 10 *Car. Mackaller* v. *Todderick*, *Roll*'s *Abr.* 1. 18. See the Opinion of *Noy*, in *Sanderſon & Warren*'s Caſe, 20 *Jac. B. R. Palmer* 293. *Byrte & Manning*, *Mich.* 11 *Car. B. R.* 1 *Cro.* 425. And this I take to be the better, as well as the latter Opinion.

As to the Puniſhment of the Patron, be he an Uſurper, or other corrupt Contracter, he doth forfeit the double Value of the Benefice about which the Contract is made; and if he that preſents be the true Patron, and not an Uſurper; wherein all Caſes, the Clerk loſeth the Benefice, the King gaineth the Preſentment

ſentment, *viz.* for the next Turn; that is, the Clerk being actually preſented in purſuance of the corrupt Contract.

The Clerk, as well as the Patron, ſuffers by Simony: For if any Simoniacal Contract be made, by reaſon of which a Clerk is preſented to a Church, tho' it be but by a Friend, and the Preſentee was no way Party, or privy to it, yet the Preſentation, Inſtitution, and Induction of ſuch Preſentee, are abſolutely void by the Statute of 31 *Eliz.* to all Perſons that are concerned, without Sentence Declaratory in the Spiritual Court, *Paſch.* 17 *Jac. March, p.* 84. becauſe tho' he be not for want of *Privity Simoniacus*, yet he is *Simoniace Promotus*, *Trin.* 8 *Jac. Co.* 12. *f.* 101. in Dr. *Hutchiſon*'s Caſe, and by *Co. Mich.* 13 *Jac. King* v. *Zaker.* 3 *Bulſtrode* 88. *Mich.* 42 & 43 *Eliz. Baker* v. *Rogers*, 3 *Cro.* 788. 3 *Inſt.* 71. *Paſch.* 19 *Car.* 2. the King v. *Truſſell*, 1 *Siderfin* 329, 2 *Keble* 204. before mentioned. And this holds, not only where the Perſon Preſenting, or Collating, hath Right to Preſent or Collate, but alſo to any Perſon, or Perſons, Bodies Politick, or Corporate, that do uſurp, as having no Title, 3 *Inſt. chap.* 71. *fol.* 153. Firſt, They are void as to the King; ſo that he may preſent another, without any Deprivation, or Removing of the Incumbent by *Quare Impedit*, *Paſch.* 17 *Jac. Booth* v. *Potter*, 2 *Cro.* 533. And they are void unto the Ordinary; ſo that he may admit the King's Preſentee: But not ſo as that he can without Notice firſt given of the Voidance, take Advantage of Lapſe, if the Patron preſent not within ſix Months, from the time ſuch Simoniacal Perſon was Inſtituted and Inducted; for this is expreſly provided for by the ſaid Statute. **That no Title to Confer, or Preſent, by Lapſe, ſhall accrew upon any Avoidance mentioned in this Act, until ſix Months next after Notice given of ſuch Avoidance, by the Ordinary to the Patron.** Which is to be intended of ſuch Voidances only by reaſon of Simony, where the Preſentation is not given from the Patron to the King; (that is) where the Perſon obtain his Orders, Admiſſion, Inſtitution, Induction, *&c.* ſimoniacally; for no Lapſe can incur at all, where the Right of Preſentation is in the King: So to ſuch Preſentee, and to all that claim under him for his Inſtitution, will not be a Super-Inſtitution, and they are void unto the Pariſhioner; ſo that if ſuch a Perſon ſue them for Tythes in the Eccleſiaſtical Court, or for treble Damages at Common Law, they may plead him no Incumbent, becauſe of the Simony, in *Winchcomb & Pulleſton*'s Caſe, *Hobart* 168. *Penn*'s Caſe. 2 *Brownlow*, & *Gouldsborough* 7. *Mich.* 40 *Eliz. Com. Banc. Risby* v. *Wentworth*, 3 *Cro.* 642. *Trin.* 14 *Car.* 2. *Knight* v. *Dauncer*, 1 *Keble* 312. And if that Plea, being duly made and proved, be not allow'd as a ſufficient Barr, to the Proceedings in the Eccleſiaſtical Court, 'tis ſaid a Prohibition lieth, *Mich.* 15 *Jac. Winchcomb* v. *Pulteſton*, *Noy* 25. & in *Hobart* 168, *Mich.* 8 *Jac. Penn*'s Caſe, 2. *Brownlow & Gouldsborough*, 7. *Trin.* 8 *Jac.* Dr. *Hutchiſon*'s Caſe, 12 *Co.* 103. Becauſe if the King Preſent, and his Preſentee be received, the Pariſhioners muſt not pay Tithes to both, and to whom he ſhall pay is at his peril: But tho' the Preſentation, Inſtitution, and Induction, be void, as to all theſe, and to others that have Intereſt, yet they are not void to an Uſurper: For a Man without Right, cannot Preſent unto any ſuch Benefice, as to a Church void; neither can the Ordinary excuſe himſelf, if he receive the Clerk of an Uſurper, by pleading the Simony; for he is none of them that have Intereſt, ſaith *Hobart*, in his Argument, in *Winchcomb & Pulleſton*'s Caſe, *Hob.* 168.

If a Simoniacal Contract be made by a Clerk, or other Perſon, altho' the Patron doth after Preſent the Clerk *gratis*, yet the Perſon contracting doth forfeit the double Value of the Church, as I conceive: For the Words of the Statute, 31 *Eliz.* are, **That all and every Perſon, and Perſons, Bodies Politick, and Corporate, that from thenceforth ſhall give, or take any ſuch Sum**

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of Money, Reward, Gift, or Benefit, directly or indirectly; or that ſhall take or make any ſuch Promiſe, Grant, Bond, Covenant, or other Aſſurance, &c. **ſhall forfeit the double Value of one Year's Profit,** *Parſon's Counſellor, fol.* 50. And by the Opinion of *Tanfield*, Chief Baron, in his Argument of *Calvert & Kitchyn*'s Caſe, if a Clerk ſeeketh for Money to obtain a Preſentation unto a void Church, altho' afterwards the Patron preſent him *gratis*; yet this Simoniacal Attempt hath diſabled him to take that Benefice, *Hughes* 1816. & *Parſon*'s Law, *cap.* 18. 135.

If Judgment be given againſt the Simoniſt, and he, by the Aſſent of the Parties, being to continue a certain time in the Benefice, will not (the time agreed upon being expired) remove, but commits Waſte upon the Houſe, or Glebe, (*Coke*) ſaid, If this Stay had been by Rule of Court, an Attachment ſhould have been granted againſt the Simoniſt for his Contempt. But when it is only by Aſſent of Parties, there is no ground for an Attachment; neither can a *Vi laica removenda* be had in this Caſe, becauſe he is a Clergy-man; but the Remedy is by way of Indictment of forcible Entry, or by an *Ejectione firmæ*; for that one may be Indicted for a forcible Entry into a Church, is agreed, *Hil.* 14 & 15 *Car.* 2. the King v. *Larking, &c.* 1 *Keble* 438. 1 *Siderfin* 101. And to ſtop him in doing Waſte, a Prohibition may be had by the Patron, Incumbent, or any other Perſon, becauſe that is the King's Writ; and any one may pray a Prohibition for the King, and it is grantable, *Ex debito Juſticiæ*, and not Honorary, and in the Diſcretion of the Court, Serjant *Moreton*'s Caſe, 1 *Siderfin* 65. *Hob.* 247. But if ſuch Perſon be in Fact removed by a *Vi laica removenda*, (which is to remove *Omnem vim laicam*) and the Sheriff hath not only thereby diſpoſſeſſed him, but (which is more than he is enabled to do by the Writ) put another into poſſeſſion, yet he ought not to be reſtored, neither hath he any Remedy, he being for ever diſabled by reaſon of the Simony, *King* v. *Zaker*, 3 *Bulſtrode, fol.* 91, 92.

Tho' the Preſentation, Inſtitution, and Induction, of a Perſon, that by any ways or means comes into a Church, upon a Simoniacal Contract, are meerly void; yet if the Clerk is not privy, or conſenting to the Corruption, he ſhall not be diſabled from taking the ſame Benefice, at the Preſentment of the King, or of the Patron that firſt preſented him, after the King's Turn is ſerved, in Dr. *Hutchiſon*'s Caſe, *Mich.* 8 *Jac.* 12 *Co.* 101. *Hil.* 8 *Jac. Kitchen* v. *Calvert, Lane* 73, 103. *Inſt.* 3. *cap.* 71. And yet where the Father (the Church being void) dealt with the Patron, to permit another to Preſent his Son, and (as was alledged) without the Privity of the Son, it was adjudged, that the Son's Preſentation, Inſtitution, and Induction, were void, and that he was a Perſon for ever after diſabled to accept of that Benefice, *Paſch.* 17 *Jac. Booth* v. *Potter*, 2 *Cro.* 533. 1 *Inſt.* 120. *a.* But in this Caſe the Father did procure the King's Preſentee to be deprived for ſome Crimes, and ten Days before the Deprivation, procured a Grant of the next Avoidance to a Stranger, and ten Days after the Avoidance by Deprivation, procured the Stranger to preſent his Son the ſecond time; upon which laſt Preſentment, *&c.* this Action was brought, and the Judgment by all the Court was, That his ſecond Preſentation was void, and that he was uncapable of the Benefice for ever. Sir *Simon Degge*, in his *Parſon's Counſellor*, takes the firſt Opinion to be more rational than the latter, by reaſon of the Penning of the Statute, the Words of which are, **That the Perſon ſo corruptly taking, procuring, ſeeking, or accepting, ſhall,** &c. **from thenceforth be adjudged a diſabled Perſon in Law, to have or enjoy,** &c. And tho' the Incumbent in this Caſe take and accept the Benefice upon the corrupt Contract, yet as to him it is not corruptly taken, *Parſon's Counſellor* 52. But I take the latter to be the better Opinion, elſe the Clerk by

gaining the King's Title, when the Simony was detected, might eaſily eſcape all the Penalties in the Statute, and the Statute ſeems to diſenable him that comes to a Benefice by any corrupt means. Therefore *Quære*. However, it is clear, that if the Preſentee be either Party, or privy to the Simoniacal Contract, by reaſon of which he is preſented, he is for ever diſabled to hold that Benefice, for which the Contract was made, and doth forfeit the double Value of one Year's Profit of every ſuch Benefice by the Statute; and the Forfeiture of the double Value of one Year's Profits of the Church, is not to be accounted according to the Valuation in the King's Books, in the Firſt-Fruits Office, but according to the full and true yearly Value of the Benefice, as the ſame may be Rented, which ſhall be tried by Jury, *Co. Inſt.* 3. *chap.* 71, 154.

And tho' the King, (to whom the Turn goeth) would preſent him before, or after he is Convicted of the Simony, with a *Non Obſtante* the Simony, yet he cannot enjoy that Church, as being by the Statute utterly diſabled during his Life, *Trin.* 4. *Car. Halt* v. *Blundell*, *Hetley* 104. Yea, tho' the true Patron never Preſented him, but only an Uſurper, *Paſch.* 13 *Jac. King* v. *Cole & Saker*, 2 *Cro.* 385. And the ſame Caſe, *Roll's Rep.* 235. And tho' the King ſhould ſay, that the Simoniſt ſhould ſtill continue in his Benefice he had gotten, and thereupon he ſhould not be removed till Death; yet (by *Coke*, Chief Juſtice) the King ſhall have the next Preſentation, *Mich.* 13 *Jac. King* v. *Saker*, 3 *Bulſtrode* 88. And tho' the King grants a ſpecial Pardon to the Simoniſt of his Crime; yet, as *Hobart* held, in *Winchcomb & Pulleſton*'s Caſe, *Paſch.* 14 *Jac. Hobart* 167. the Church remaineth ſtill void to his Preſentation. The reaſon of the Opinion is, that the King cannot enable him, whom an Act of Parliament (as in this Caſe) hath diſabled, *Saker*'s Caſe, 2 *Cro.* 386. *Trin.* 10 *Jac.* Dr. *Hutchiſon*'s Caſe, 12 *Co.* 101. 1 *Inſt.* 120. *a.* For the Law being abſolute and direct, cannot be diſpenſed withal, by any Grant, or *Non Obſtante*, as it may be when a thing is prohibited *ſub modo*, as upon a Penalty given to the King, or King and Informer, 1 *Inſt.* 120. *a.* 3 *Inſt. cap.* 71. And there is ever obſerved a Difference betwixt him that is *Simoniacus*, and him that is *Simoniace Promotus*; for *Simoniacus* is he who makes the Contract or Promiſe for a Benefice, or is conſenting and privy to it, and is diſabled to take the ſame; and is therefore by the Canon Law, to be deprived of any Benefice that he had before: But *Simoniace Promotus*, is he, on whoſe behalf a Simoniacal Contract, or Promiſe, is made by another, without his Privity or Conſent, and he ſhall only be deprived of that Benefice to which he is corruptly preferred, *Paſch.* 17 *Jac. B. R. Lapthorn*'s Caſe, *Booth* v. *Potter*, 2 *Roll's Abr. Kitchin* v. *Calvert*, *Lane* 103. *Snow* v. *Philips*, 1 *Keble* 781.

So if a Man be preferred to a Benefice by Simony, and afterwards comes a general Pardon, which finds him in poſſeſſion; tho' ſuch Pardon, (Simony not being excepted) doth diſcharge the Puniſhment of Simony, both as to the Patron and Incumbent, ſo that the Forfeiture of the double Value of the Benefice is not recoverable upon either; yet that will not inure to the ſetling of him in that Benefice, which was never full by reaſon of the Simony, *Trin.* 41 *Eliz. Smith* v. *Shelbourn*, 3 *Cro.* 685. and in *Owen.* Neither will Simony be pardoned by the general Words of a Pardon (as all things that the King can or may pardon); but there ought to be ſpecial and particular Words to that purpoſe, 15 *Car.* 2. *Com. Banc. Phillips*'s Caſe, 1 *Siderfin* 170. *Mich.* 16 *Car.* 2. *B. R. Snow*, Leſſee of *Crawley*, v. *Phillips*, 1 *Siderfin* 221, 222. The ſame Caſe, 1 *Keble* 780. it was reſolved in theſe Caſes, That altho' Simony ſhould be included within the Words of a General Pardon, yet that ſhould be only as to the Forfeitures, but not ſo as to enable the Perſon to hold his Benefice;

and

and *Burton*'s Caſe, in 6 *Co.* 13. that ſeems to be to the contrary, was denied for Law, *Trin.* 27. *Car.* 2. *C. B.* the King, *v. Turvil*, 2 *Modern Rep.* 52. And as to theſe pecuniary Forfeitures by the aforeſaid Statute, 31 *Eliz.* **One Moiety of them ſhall be to our Sovereign Lord the King,** &c. **and the other Moiety to him, or them, that will ſue for the ſame, by Action of Debt, Bill, Plaint, or Information, in any of her Majeſty's Courts of Record; in which no Eſſoin, Protection, Priviledge, or Wager of Law, ſhall be admitted or allowed.**

The Courts of Record to be here underſtood, are the Chancery, King's Bench, Common Pleas, and the Exchequer; but not any inferiour Court of Record, *Gregory*'s Caſe, 6 *Co.* 20. And the Priviledge and Protection herein mentioned, are to be taken for the common Protection and Priviledges of Officers and Courts; but are not to be extended by thoſe general Words, to the Priviledge or Protection of Parliament; as is obſerved by *Parſon's Counſellor*, 67. And this Act doth not only extend to Benefices with Cure, but to Dignities, Prebends, and all other Eccleſiaſtical Livings, 1 *Inſtit.* 120. *a.* And there is a ſaving of the Eccleſiaſtical Juriſdiction, as to theſe Caſes, *viz.* **That this Act, or any thing herein contained, ſhall not in any wiſe extend to take away, or reſtrain any Puniſhment, Pain, or Penalty, limited, preſcribed, or inflicted, by the Laws Eccleſiaſtical, for any the Offences before in this Act mentioned, but that the ſame ſhall remain in force, and may be put in due Execution, as it might before the making of this Act; this Act, or any thing therein contained to the contrary thereof in any wiſe notwithſtanding.** And therefore the Eccleſiaſtical Court may proceed againſt a Simoniſt, *Pro ſalute animæ*, and upon Examination and Evidence deprive him for that Cauſe, *Trin* 41 *Eliz. Smith* v. *Shelbourn*, 3 *Cro.* 685. tho' he was not privy to the Contract, becauſe there be not any Acceſſaries in Simony; and tho' he was preſented by an Uſurper, and the true Patron did recover the Advowſon and Preſentation, *Mich.* 42 *&* 43 *Eliz. Baker* v. *Rogers*, *Moor* 914. Yea, and tho' a General Pardon did follow the Simony, in which Simony is not excepted; yet the Eccleſiaſtical Court may proceed to Sentence Declaratory, that the Simoniſt was an Intruder, and that his Admiſſion, Inſtitution, *&c.* are utterly void, as if they had never been: For tho' the Puniſhments of Simony are taken away by Pardon, yet the Church remaineth void, 41 *Eliz. Smith*'s Caſe, *Owen*, 3 *Cro. ubi ſupra.* And when the Spiritual Court hath ſo Sentenced the Simony, the Temporal Court ought to give Credence thereto, and ought not to diſpute whether it be Error or not: For the Temporal Court cannot take Cogniſance of their Proceedings, whether they be lawful or not; which is the Reaſon, that in the Temporal Court, it ſufficeth, to plead a Sentence out of the Spiritual Court briefly, without ſhewing the manner thereof, and of their Proceedings. And tho' it was ſaid, that in the Spiritual Court they ought not to have intermedled to deveſt the Freehold, which is in the Incumbent after Induction. True indeed, they ſhould not alter the Freehold; but they by proceeding, meddle only with the manner of obtaining the Preſentment, which by conſequence only deveſteth the Freehold from the Simoniſt, by the diſſolution of his Eſtate, when his Admiſſion and Inſtitution are voided, and therefore may proceed, *Mich.* 42 *&* 43 *Eliz. Baker* v. *Rogers*, 3 *Cro.* 789. *Trin.* 41 *Eliz. Smith* v. *Shelbourn*, 3 *Cro.* 686. Or rather, the Church being made void by Act of Parliament, he who pretends to be Incumbent thereof, hath no Freehold therein, ſo depriving of him cannot be ſaid to deveſt any Freehold from him. However, it is beſt, that not any of the Articles to be examined upon, in this Caſe, be ſuch, as may expreſly draw the Right and Title of the Benefice into queſtion, leſt occaſion be taken from thence to bring a Prohibition, *Hil.* 11 *Jac.*

Sir

Sir *William Bowyer* v. High-Commiſſion Court, 2 *Bulſtrode* 182. And *Warburton* then ſaid, That if one be preſented by Simony, and he who is preſented is Party, or Privy to the Simony, he ſhall be deprived, and alſo diſabled to take any other Benefice; but if he be preſented by Simony between two Strangers, whereto he is not privy, he is deprivable by reaſon of the Corruption, but not diſabled to take any other; for ſo (ſaid he) is the Rule of the Civil Law, *Mich.* 42 & 43 *Eliz. Baker* v. *Rogers*, 3 *Cro.* 789.

As by Corruption preceding a Preſentment, a Church may remain void in Law, ſo by reaſon of the Preſentment it ſelf; for in all Caſes where a void Preſentment is made to a void Church, by one that hath no Right, tho' Inſtitution, and Induction follow thereupon; or where Collation (which is in effect Preſentation and Inſtitution) is made by the Biſhop to the Church of another, before he hath Title by Lapſe to Collate, the Church doth remain void at all times after the ſix Months, to the Preſentation of the very Patron. For Inſtance: If a Clerk (a Church of the Patronage of a common Perſon being void, and not lapſed to the King) doth obtain a Preſentation from the King, which declareth, that the Title doth belong to him, *Ratione lapſus*, ſuch Preſentation is void, becauſe it ſuppoſeth a Right in the King, when there was none, and was obtained by Miſinformation, whereby the King was deceived, who intended no Uſurpation or Wrong; and therefore the King, in ſuch Caſe, can be no Uſurper, but the Inſtitution made by reaſon of ſuch void Preſentment, ſhall be but as a Collation of the Biſhop's, which makes no binding Plenarty againſt the true Patron; ſo that he may not only bring his *Quare Impedit*, when he will, but alſo preſent his Clerk ſeven Years after; and if the Biſhop doth receive his Clerk, the other is out *ipſo facto*; yet till then, he is to all others a full Incumbent, and not in the nature of a Curate only, and may ſue for Tithes, and is capable of a Confirmation from the King, (but *Quære* as to that) as the Book is, 11 *H.* 4. *c.* 7. And therefore the Chief Juſtice was of Opinion, That if the Patron brought a *Quare Impedit* in this Caſe, the Incumbent muſt be named, or elſe he could not be removed; and alſo, that ſuch a Plenarty did barr the Lapſe of the Metropolitan, and the King, *Hil.* 17 *Jac. Gawdy* v. Biſhop of *Canterbury*, &c. *Hobart* 302.

Tho' Inſtitution and Induction do follow upon a good Preſentment, yet the Church may remain void in Law, by reaſon that ſomething required to be done by the Preſentee, before Admiſſion, was not performed. And therefore if a Preſentee be admitted to a Benefice with Cure, unleſs he hath firſt ſubſcribed the Articles of Religion, agreed upon in the Year 1562, in the preſence of the Ordinary, his Admiſſion, Inſtitution, and Induction, are meerly void in Law, as if they never were, *Stat.* 13 *Eliz.* 12. But becauſe the Preſentation is not alſo made void, it ſeems by the Reaſon and Authority of ſome Books, that Lapſe doth not run till after Notice given by the Ordinary of ſuch Non-ſubſcription, as *Trin.* 17 *Car. C. B.* the Biſhop of *Hereford* & *Okely*'s Caſe, *March* 119. *Parſon's Law*, *cap.* 18. *Parſon's Counſellor* 76. 1 *And.* 62.

CHAP.

CHAP. VI.

Church void by taking Orders, Admiſſion, Inſtitution, &c. Simoniacally; or for not Subſcribing the Articles, &c. And of Deprivation.

IT hath been ſhewed in ſeveral Inſtances in the former Chapter, that notwithſtanding Preſentation, Admiſſion, Inſtitution, and Induction had, a Church, by the Act of the Law, may remain void; and there are yet ſeveral other Caſes, whereby a Church, by the Act of the Law, may become void: **For it is enacted, That if any Perſon, for any Sum of Money, Reward, Gift, Profit, or Commodity whatſoever, directly, or indirectly (other than for uſual and lawful Fees); or for, or by reaſon of any Promiſe, Agreement, Grant, Covenant, Bond, or other Aſſurance, of, or for any Sum of Money, Reward, Gift, Profit, or Benefit whatſoever, directly, or indirectly, Admit, Inſtitute, Inſtall, Induct, Inveſt, or Place any Perſon in, or to any Benefice, with Cure of Souls, Dignity, Prebend, or other Living Eccleſiaſtical, that then every Perſon ſo offending, ſhall forfeit and loſe the double Valus of one Year's Profit of every ſuch Benefice, Dignity, Prebend, and Living Eccleſiaſtical. And that thereupon, immediately from, and after the Inveſting, Inſtallation, or Induction thereof had, the ſame Benefice, Dignity, Prebend, and Living Eccleſiaſtical, ſhall be eſtſoons meerly void; and that the Patron, or Perſon, to whom the Advowſon, Gift, Preſentation, or Collation, ſhall by Law appertain, ſhall, and may, by Virtue of this Act, Preſent, or Collate unto, Give and Diſpoſe of the ſame Benefice, Dignity, Prebend, or Living Eccleſiaſtical, in ſuch ſort, to all Intents and Purpoſes, as if the Party ſo Admitted, Inſtituted, Inſtalled, Inveſted, Inducted, or Placed, had been, or were, naturally dead,** *Stat.* 31 *Eliz. c.* 6. **And if a Clerk, directly, or indirectly, entring into the Miniſtry, or receive Orders ſimoniacally, doth at any time within ſeven Years after, Accept, and Take, any Benefice, Living, or Promotion Eccleſiaſtical, immediately from and after the Induction, Inveſting, or Inſtallation thereof, or thereunto had, the ſame Benefice, Living, and Promotion Eccleſiaſtical, ſhall be eſtſoons meerly void, and the Perſon to whom the Right of Preſenting doth appertain, may Preſent, or Collate to, or Beſtow the ſame, as if the Perſon Inducted, or Inſtalled, were naturally dead,** *Stat.* 31 *Eliz. c.* 6. But Note, That the Living is not void in either Caſe, but from, and after the Inveſting, Inſtallation, or Induction, and therefore, until after Induction, the Patron hath no advantage: And tho' after the Clerk is Inducted, or Inſtalled, in the aforeſaid Caſes, the Patron may Preſent; yet if he doth not, no Title to Confer, or Preſent, by Lapſe, doth accrue, but after ſix Months next after Notice given of ſuch Avoidance by the Ordinary, to the Patron, *Stat.* 31 *Eliz. c.* 6. and in *Winchcomb* and *Pulleſton*'s Caſe, 14 *Jac. Hobart* 167. **So if any Perſon, or Perſons, be to be admitted to any Deanry, Canonry, or Prebend of any Cathedral, or Collegiate Church, or to any Maſterſhip, Headſhip, Fellowſhip, of, or in any College, Hall, Houſe of Learning, or Hoſpital; or to any Profeſſor's Place, Reader's Place, in either of the Univerſities, and in any College elſewhere, or to any Parſonage, Vicarage, Eccleſiaſtical Dignity, or Promotion, Curates Place, Lecture, and School, publick, or private, and do not at, or before his, or their reſpective Admiſſion to be Incumbent, or have Poſſeſſion thereof, ſubſcribe**

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the Declaration, or Acknowledgment following, such his respective Deanry, &c. shall be void, as if such Person, so failing, were naturally dead. See the Declaration to be subscribed at *Chap.* 15.

If the Admission be to a Mastership, Headship, Fellowship in any College, Hall, or House of Learning, or to a Professor's, or Reader's Place, in any of the Universities, the Subscription is to be made before the Vice-Chancellor of the respective Universities for the time being, or his Deputy. And if the Admission be to any of the aforesaid Preferments, the Subscription is to be made before the respective Arch-Bishops, Bishops, or Ordinary of the Dioceſs. And every such Person, Vicar, Curate, and Lecturer, (after such Subscription made) is to procure a Certificate under the Hand and Seal of the respective Arch-Bishop, Bishop, or Ordinary of the Dioceſs (who are bound upon Demand to make and deliver the same) and publickly and openly to read the same, together with the Declaration, or Acknowledgment before-mentioned, upon some Lord's Day, within three Months then next following, in his Parish-Church, where he is to Officiate, in the Presence of the Congregation there assembled, in the time of Divine Service: And every Person failing therein, doth lose such Parsonage, Vicarage, or Benefice, Curate's Place, or Lecturer's Place, respectively, and is utterly disabled, and *ipso facto* deprived of the same, and such Parsonage, Vicarage, or Benefice, Curate's Place, or Lecturer's Place, doth become void, as if he was naturally dead.

Also every Person that shall hereafter be Presented, or Collated, or put into any Ecclesiastical Benefice, or Promotion, within this Realm of England, **Dominion of** Wales, **and Town of** Berwick **upon** Tweed, **shall in the Church, Chapel, or Place of Publick Worship, belonging to his said Benefice; or Promotion, within two Months next after he shall be in the actual Possession of the said Ecclesiastical Benefice, or Promotion, upon some Lord's Day, openly, publickly, and solemnly, read the Morning and Evening Prayers, appointed to be read by, and according to the Book of Common-Prayer, at the Times thereby appointed; and after such Reading thereof, shall openly, and publickly, before the Congregation there assembled, declare his unfeigned Assent, and Consent, to the Use of all Things therein contained, and prescribed, according to the Form appointed: And that all, and every such Person, who shall (without some lawful Impediment, to be allowed and approved by the Ordinary of the Place) neglect, or refuse to do the same, within the time aforesaid; or (in case of such Impediment) within one Month after such Impediment removed, shall** ipso facto, **be deprived of his said Ecclesiastical Benefices, and Promotions; and that from thenceforth, it shall, and may be lawful, to, and for all Patrons and Donors, of all and singular the said Ecclesiastical Benefices and Promotions, or any of them, (according to their respective Rights and Titles) to Present or Collate to the same, as tho' the Person, or Persons, so offending, or neglecting, were dead. But no Title to Confer, or Present by Lapse, shall accrue by any Avoidance, or Deprivation,** ipso facto, **by Virtue of this Statute, but after six Months after Notice of such Avoidance, or Deprivation, given by the Ordinary to the Patron, or such Sentence of Deprivation openly and publickly read, in the Parish-Church of the Benefice, Parsonage, Vicarage, becoming void, or whereof the Incumbent shall be deprived by Virtue of this Act. This Act, or any thing therein contained, shall not be prejudicial, or hurtful, unto the King's Professor of the Law within the University of** Oxford, **for, or concerning the Prebend of** Shipton, **within the Cathedral Church of** Sarum, **united and annexed unto the Place of the same King's Professor for the time being, by the late King** James **of Blessed Memory,** *Stat.* 14 *Car.* 2. *c.* 4.

Like-

Likewiſe every Perſon that is admitted to any Benefice with Cure, except that within two Months after his Induction, he doth publickly read the Thirty Nine Articles, agreed upon in the Year 1562, in the ſame Church, whereof he ſhall have Cure, in the time of Common-Prayer, with Declaration of his unfeigned Aſſent thereto, he ſhall be upon every ſuch Default, *ipſo facto*, immediately deprived, *Stat.* 13 *Eliz. c.*12. The Declaration of unfeigned Aſſent aforeſaid, muſt be abſolute, without Condition; and therefore a Clerk having read the Articles, and ſaid, *I give my Conſent unto them, ſo far forth as they agree with the Word of God*; the Eccleſiaſtical Court was ſuffered to proceed to a Deprivation of him, tho' he ſued to ſtop Proceedings there, by a Prohibition from the Temporal Court, *Mich.* 33 & 34 *Eliz. Smith* v. *Clarke*, 3 *Cro.* 252.

If the Articles be not read as aforeſaid, (tho' the Ordinary may deprive for that Cauſe, by Judicial Proceedings, yet) the Church, upon ſuch neglect, is abſolutely void, at the end of two Months, as to the Perſon Inducted into it; nor will a General Pardon extend to a Reſtauration of him; for that ſuch Pardons are generally to be extended only to Offences and Contempts, for which a Perſon may be puniſhed by Indictment, but in this Caſe the Puniſhment is to loſe his Living, *Trin.* 41 *Eliz. Baker* v. *Bret & Robinſon*, 3 *Cro.* 690. *Trin.* 44 *Eliz. Green*'s Caſe, 6 *Co.* 29. However, tho' it be void as to the Incumbent by his neglect, ſo that the Patron may preſent again; yet not ſo, as that he muſt of neceſſity to avoid a Lapſe: For it is enacted, **That no Title to Confer, or Preſent, by Lapſe, ſhall accrue upon any Deprivation**, ipſo facto; **but after ſix Months after Notice of ſuch Deprivation given by the Ordinary to the Patron**, *Stat.* 13 *Eliz.c.*12. *Trin.* 17 *Car.* the Biſhop of *Hereford & Okely*, *March*, Caſe 196. *Hil.* 22 & 23 *Car.* 2. *Shute* v. *Higden*, *Vaughan* 129. 2 *Jones* 18. And tho' the Patron hath a perſonal and manifeſt knowledge, that his Clerk hath not read the Articles, according to the Statute, as if he by Suit hath obtained a Declaratory Sentence of the Avoidance for that Cauſe, yet he ſhall not be bound thereby to Preſent to avoid a Lapſe, but may ſafely expect the Ordinary's Intimation, nor doth the Intimation of another ſatisfie the Law, *Paſch.* 22 *Eliz. Dyer f.* 369. *Trin.* 44 *Eliz. Green*'s Caſe, 6 *Co.* 29 *b*. **In like manner, if any Sum of Money, being once due by any Incumbent, of any Dignity, Benefice, or Spiritual Promotion, charged with the Payment of Tenths to the King, and reaſonably demanded and required, (any time after the Feaſt of the Nativity of our Lord, at their Dignities, Hoſpitals, Colleges, Churches, Chanteries, or Houſes, by the Arch-Biſhop, or Biſhop, or ſuch as ſhall be charged with the Collection of any part of the ſaid Penſion, or by any other their Miniſters, Servants, or Officers, to pay ſuch Portion of the ſaid Penſion, and yearly Rent, as they ſhall be taxed and aſſeſſed) be not truly contented and paid, unto ſuch Arch-Biſhop, or Biſhop, or their Miniſters and Officers, and to ſuch other Perſon, or Perſons, or their Miniſters, or Servants, as ſhall have the Charge of Collection thereof, every Year yearly, at the time of ſuch Requeſt and Demand thereof; or elſe within Forty Days next, after every ſuch Requeſt, at the furtheſt: Then every Incumbent making ſuch Default of Payments, after ſuch Default certified thereof, into the King's Exchequer, in Writing, under the Seals of any Arch-Biſhop, Biſhop, or of ſuch as be limited and charged to the Collection of the Penſion, by the Act of** 26 *H.* 8. *c.*3. **ſhall be adjudged**, ipſo facto, **deprived of that only Dignity, Benefice, or other Eccleſiaſtical Promotion, by what Name ſoever it be called, whereof ſuch Certificate ſhall be made, ſo that ſuch Dignity, Benefice, or other Eccleſiaſtical Promotion, whereof any Incumbent making ſuch Default of Payment, ſhall be adjudged Deprived, as is afore ſaid, ſhall**

be clearly void, and deſtitute of an Incumbent in Law, to all Intents and Purpoſes, as if ſuch Incumbent, making ſuch Default of Payment, were dead indeed. *Stat.* 26 *H.* 8. *c.* 3. with *Stat.* 2 *&* 3 *E.* 6. *c.* 20.

When a Biſhop doth certifie as aforeſaid, any Perſon's Refuſal, or Neglect, to pay his Tenths, his Certificate is not peremptory; becauſe the Biſhop doth it only as an Officer, and not as a Judge, as in the Caſe of Baſtardy: And therefore the Party concerned in ſuch Certificate, may be admitted to his Traverſe of it, and the Default in not paying, ſhall be tried by Jury; and tho' the Biſhop hath certified the Refuſal to be after Demand duly made, yet if the contrary be found by Verdict, the Judges are to rely upon the Verdict, and not the Certificate. That the Certificate may be good, there ought to be an expreſs Demand to pay the Tenths; and the Officer of every Biſhop that doth demand them, ought to be Authorized to receive them; wherefore a Demand made by an Apparitor is not good, and the Officer cannot appoint them to be paid to another Perſon as his Deputy, or at any other Place than where the Incumbent is to pay them, *viz.* his own Houſe, or Church; or if a Member of a Cathedral, at his Stall in the Quire, (for upon Non-payment, the Place of Demand muſt be certified) and that they were demanded in the Name, and by the Authority of the Biſhop, *Mich.* 29 *&* 30 *El.* the Queen *v. Blancher*, 3 *Cro.* 80. the ſame Caſe, *Moor* 915. *Mich.* 39 *&* 40 *Eliz. Reyner* v. *Parker*, *Moor* 541. *Paſch.* 22. *Eliz. Savile*, Caſe 2. And if the Tenths, after that they are demanded, and before the Time limited by the Statute be expired, be paid by any Incumbent into the Receipt of the Exchequer, and the Biſhop of the Dioceſs doth after certifie, that the Incumbent hath not paid his Tenths, this Certificate is not of any force, *Paſch.* 22 *Eliz.* the Biſhop of *Coventry* and *Litchfield* v. *Beacon*, *Savile*, Caſe 63. When any Avoidance is upon Certificate of Refuſal, or Non-payment of Tenths, the Ordinary is not bound to give Notice to the Patron of ſuch Avoidance, but the Patron muſt take Notice, and preſent at his peril, within ſix Months after ſuch Certificate duly made, *Paſch.* 7 *Eliz. Dyer*, *fol.* 237. And ſo it is in all Caſes, where an Avoidance is made (as here) by Act of Parliament, unleſs it be ſpecially provided thereby, that Lapſe ſhall not run but from the Time of Notice.

The laſt Means by which a Church doth become void, by the Act of the Law, is, by the Deprivation of the Incumbent thereof, by Sentence in the Eccleſiaſtical Court, grounded upon ſome Act, or Defect, there duly proved againſt ſuch Party deprived. In all Caſes before-mentioned, where a Church doth either remain, or become abſolutely void, by the Act of the Law, as to the Pariſhioners, *&c.* as well as the Patron, yet if the Perſon Inſtituted and Inducted thereinto, doth continue therein afterwards as Incumbent, the Ordinary may examine the Matter, and declare the Church void, by Sentence in the Eccleſiaſtical Court. And in Caſes where the Church is void by the Act of the Law, notwithſtanding Inſtitution and Induction had, and Lapſe doth not run, but from the Time of Notice from the Ordinary, the Ordinary ought to proceed to a Judicial Enquiry, and to declare the Church void by Sentence, before he may give Notice of ſuch Avoidance. But by this Act of his, the Church is not properly void by the Deprivation, but only thereby declared to be voided by the Law, before ſuch Sentence came. And therefore, a Church, properly ſpeaking, is void by Deprivation, when it was only voidable before the Sentence, by reaſon of ſome Defect or Crime, and by the Sentence is made actually void. For Inſtance: If a meer Lay-man, or a Deacon, not being Three and twenty Years of Age, be admitted to a Benefice with Cure, their Admiſſion, Inſtitution, and Induction, (as before is ſhewed) are meerly void in Law without Deprivation. Or if the Deacon admitted to a Benefice, be

not

not admitted to adminiſter the Sacraments within a Year after his Induction, if he be not Admitted before; that is, Ordained Prieſt, *Stat.* 13 *Eliz. c.*12. But if a Lay-man be only admitted to a *Sine Cure*; or if a Deacon being Three and twenty Years of Age, be Admitted to any Benefice, whether with, or without Cure, their reſpective Benefices ſeem to be only voidable by Sentence of Deprivation, in the Court Chriſtian. And the reaſon of the Difference is, becauſe in the firſt Caſe, the Statute of *El.* 13. *c.*12. doth not only prohibit the Admiſſion of ſuch to Benefices with Cure, but alſo, declares the Admiſſions, Inſtitutions, and Inductions of them, to be meerly void. But in the latter Caſe, the Statute of 14 *Car.* 2. *c.* 4. doth only make ſuch Perſons uncapable of being Admitted to Benefices, upon pain to forfeit for every Offence, the Sum of One hundred Pounds, but doth not make their Admiſſion void: And (as hath been ſhewed) a Lay-man might have been Admitted to, and enjoy a *Sine Cure*, and a Deacon might have been Admitted to any Benefice; yea, and tho' a Lay-man, who, by Law, was ever uncapable of holding a Benefice with Cure, had been Admitted to ſuch Benefice, yet this, at the Canon and Common Law, had not been a meer Nullity, before the *Stat.* 13 *El. c.*12. But the Church was full of ſuch a Lay-man to all Intents, notwithſtanding his Uncapacity, until ſuch time as it was voided by Sentence of Deprivation, *Mich.* 12 *&* 13 *Eliz. Dyer* 292. and by *Anderſon*, in *Beneſield* & *Pickering*'s Caſe, *Hil.* 36 *Eliz. B. R. Popham* 37. However *Quære*, Whether when an Act of Parliament doth make any Perſons uncapable of being Admitted to Eccleſiaſtical Benefices, under a Penalty, it doth not alter the Caſe, ſo as only by declaring them uncapable, all Admiſſions, *&c.* of them, are void without Deprivation? But ſuppoſing that the Admiſſions, and Inſtitutions, of ſuch Perſons, in the Caſes put, are good, yet the Ordinary may void them by Sentence Declaratory in the Eccleſiaſtical Court, elſe ſuch diſabled Incumbents would hold their Benefices without Remedy, and a Perſon made uncapable of being Admitted to a Benefice by Act of Parliament, ſhould become capable of enjoying it by Inſtitution and Induction, by the ſole Favour of the Biſhop, and his Arch-Deacon. The like Law ſeems to be, in caſe any Perſon hath peremptorily, and obſtinately, refuſed, to take the Oath of the King's Supremacy, (being duly offered before his Admiſſion to any Dignity, Eccleſiaſtical Promotion, Office, or Miniſtry), and ſhould notwithſtanding be Admitted; for ſuch Perſon ſo refuſing, is preſently to be adjudged a diſabled Perſon in Law, to receive, take, or have the ſame Promotion Spiritual or Eccleſiaſtical, *Stat.* 1 *El. c.*1. So if a Perſon utterly illiterate, be duly Preſented, Inſtituted, and Inducted, he is an Incumbent *de Facto*; becauſe he hath all Ceremonies to make him ſuch; yet his Inability is examinable, and his Church, for that cauſe, voidable by Deprivation, as *Hobart* holds, in the Caſe of *Colt & Glover* v. Biſhop of *Litchfield*, *Hobart* 149. Alſo any Incumbent may loſe his Church by Deprivation, by reaſon of ſome Crimes; and for ſome Crimes, he is *ipſo facto*, deprivable; for others, not 'till after Admonition firſt given. If a Clerk be Convicted of Homicide, he is *ipſo facto*, to be deprived of all his Eccleſiaſtical Benefices, by the Eccleſiaſtical Law: But if there be a Fame only, that a Clerk is guilty of the ſaid Crime, or if the Fact be notorious, yet the Eccleſiaſtical Judge may not originally examine this Crime, to make a Man criminous; for neither Felony, nor any other Capital Crime, is Examinable in the Eccleſiaſtical Court, *Huns* Caſe, *Kelloway* 181. no, not for Purpoſes that are determinable there, as is this Cauſe of Deprivation: But the Eccleſiaſtical Judge muſt expect, 'till ſuch time as the Criminal hath been Convicted in the Temporal Court, and hath had his Clergy there: And then may he be Convented and Libelled againſt. But there the Libel ought not to ſay, that he is

an Homicide, or guilty of Man-ſlaughter; for elſe a Prohibition lieth: But only that he was Convicted of Homicide, and ſo the Sentence of Deprivation ought to be grounded only upon the Conviction in the Temporal Court, without any further Examination of the Matter, by which the Verdict there given is not to be Impeached, but Affirmed; and tho' the Perſon Convicted doth deſire, that he may be admitted to his Defence in the Spiritual Court, to prove his Innocency againſt the Verdict, yet that may not be allowed him, becauſe this would be to Impeach in a Court improper, a Sentence given in a proper Court, *Hobart* 288. *Searl*'s Caſe, and *Trin.* 15 *Jac.* the ſame Caſe, 2 *Cro* 430. In the time of Queen *Elizabeth*, an Act was made, **That every Perſon, and Perſons, which ſhall be admitted, or allowed, to have the Benefit, or Privilege, of his, or their Clergy, ſhall not thereupon be delivered to the Ordinary, as hath bẽn accuſtomed; but after ſuch Clergy allowed, and Burning in the Hand, according to the Statute in that behalf provided, ſhall forthwith be enlarged and delivered out of Priſon, by the Juſtices before whom ſuch Clergy ſhall be granted, that Cauſe notwithſtanding,** *Stat.* 18 *Eliz. c.*7. Before this Statute the Law was, That if any Clerk had prayed his Clergy, and was delivered to the Ordinary, he was Re-examined by twelve Spiritual Perſons, yet only *de Credulitate*; and if he was acquitted, he ought not to be deprived; but now being diſabled to make his Purgation, he unavoidably falls under the Cenſure; nor doth his being ſet at large, and exempted from Purgation by the Statute, diſaffirm the Judgment in the King's Court, which is the only ground of the ſaid Deprivation; becauſe the Purgation before being only *de Credulitate*, did not diſaffirm it, tho' thereby he was acquitted, *Trin.* 15 *Jac. Searl*'s Caſe, 2 *Cro.* 430. Many other Cauſes of Deprivation in the Eccleſiaſtical Court there be, which are allowed of by our Common and Statute Law: But what they are, ſhall be declared (as they may more fitly) in another place.

If a Church be only voidable by Deprivation, and the Eccleſiaſtical Judge hath actually pronounced a Sentence of Deprivation againſt the Incumbent, yet if the Perſon deprived doth make his Appeal, the Church is not actually void, ſo long as the Appeal dependeth; and if the Sentence of Deprivation upon the Appeal be declared void, the Clerk is perfect Incumbent, as before, without any new Inſtitution, *Fitzherb. Abr.* 2 *Ri.* 2. *Quare Impedit* 143. 27 *H.*7. *Gard.* 118. *Trin.* 7 *Eliz. Dyer, f.* 240. ſee *Mich.* 33 *&* 34 *Eliz. Gayton*'s Caſe, *Owen Packman*'s Caſe, 6 *Co.* 18. If the Appeal be to the King in Chancery, and the Deprivation be affirmed by the King's Delegates; or if the Deprivation be immediately made by the Lord Chancellor, or Keeper, for that the Incumbent is viſitable immediately by the King, I conceive, that no Appeal lies, and that the only Remedy that the Perſon deprived hath, is to get a Commiſſion of Review, which is only grantable of Grace by the King, and not of Right, nor is there any Remedy at Common Law, if the Cauſe of the Deprivation was Eccleſiaſtical; for there the Sentence is binding, and not thereby examinable: And therefore, if a Perſon be deprived by the Authority aforeſaid, and another be Inſtituted to his Benefice, the new Incumbent's Title ſtands good, 'till it be reverſed upon the Commiſſion of Review: For this was ſaid, in the Caſe of a Clerk deprived by the High-Commiſſioners, *Trin.* 4 *Jac. Bird* v. *Smith Moor* 781.

If a Perſon be deprivable by Canon Law for ſome Offences, yet the King hath Power to pardon the Offence, and his Pardon is ſufficient to prevent a Deprivation, before the Crime doth *Tranſire in rem Judicatam*, 2 *Car. Boſton*'s Caſe, *Latch* 22. and is good againſt all Suits, *Pro Salute Animæ*, or *Reformatione Morum*, and againſt all Suits, *Ex Officio*, whatever in the Eccleſiaſtical Court, *Hall*'s Caſe, 5 *Co.*51. ſaving, that the King cannot pardon, or

or diſpence with a Diſability made by Act of Parliament: And therefore, if a Deacon of the Age of Three and twenty Years, be Inſtituted and Inducted into a Benefice with Cure, tho' he is Incumbent in Fact, 'till Deprivation comes, yet no Diſpenſation, or Pardon, from the King, can make him Incumbent thereof *de jure*, ſo as he ſhall not be ſubject to Deprivation: And that not only becauſe a Perſon is diſabled by Act of Parliament, but alſo when he is unable to ſerve the Cure, or unqualified for it, the King cannot diſpence with him to hold the ſame, and therefore not with a meer Lay-man, or with a Perſon utterly illiterate; becauſe it is *Malum in ſe*, as *Hobart* ſaith, in *Colt* and *Glover*'s Caſe *v.* Biſhop of *Litchfield*, *Mich.* 10 *Jac. Hobart* 149.

As the King's Particular Pardon, ſo a General Pardon, doth ſecure a Clerk deprivable againſt Deprivation; and if a Crime be committed before the Pardon comes, and the Sentence of Deprivation be given after, the Sentence is void, *Hil.* 9 *Jac. Mortimer* v. *Freeman*, *Brownlow & Gouldsb. & Latch* 22. So if a Miniſter be deprived in time of Parliament for an Offence, and the Offence be afterwards pardoned by an Act of the ſame Parliament, the Deprivation is void, and the Party need not ſue to have it reverſed by Sentence, becauſe the Pardon relateth to the firſt Day of the Seſſion of Parliament, in which it was made, *Trin.* 27 *Eliz. Fox*'s Caſe, 3 *Cro.* 41. *Paſch.* 2 *Car. Boſton*'s Caſe, *Latch* 22. And in the Caſe of one *Burton*, the Law is ſaid to be aken to be, That if a Pardon by Parliament doth extend to the Pardoning of the Crime, it doth alſo extend to the annulling of the Sentence given thereupon, tho' as well the Sentence, as the Crime, had a being before the Pardon, which takes its Date from the firſt Day of the Seſſion of that Parliament in which it is made, in the Interpretation of Law: And therefore, if a Crime be committed this Year by a Clerk, and he be for the ſame deprived by Sentence in the next, and in the next Year after the Sentence, a Parliament is called, and then an Act made, which pardons all Crimes committed before the firſt Day of that Parliament, the Crime for which the Clerk was deprived before the Pardon, or the Parliament that made it was in being, being pardoned by ſuch Pardon, the deprived Clerk is Incumbent of his Church again, as before, by Judgment in Law, and is not driven to have the Sentence of Deprivation reverſed in the Eccleſiaſtical Court; no, not tho' another was in the mean time become Incumbent of his Church: as the Caſe is, *Hil.* 29 *Eliz. Burton*'s Caſe, 6 *Co.* 13. ſee *Davis*'s Caſe, *Trin.* 2 *Car. Latch* 141. But it ſeems a ſtrange and hard Conſtruction, that a Pardon extending to diſcharge Crimes committed at any time before the Pardon, ſhould be conſtrued to take in ſuch Crimes, for which Sentences of Deprivation were given, it may be ſome Years before; and to the ſetling of ſuch Criminals in their Benefices again, to the outing of honeſt Men, that came legally to the ſame; and which, it may be, left other Livings, to take thoſe voided juſtly by Deprivation, or at leaſt loſt Opportunities thereby of being otherwiſe provided for. And this Caſe of *Burton*, mentioned by my Lord *Coke*, hath been ſeveral times denied for Law, as it is ſaid by Juſtice *Windham*, *Mich.* 15 *Car.* 2. in the Caſe of the King *v. Wainwright & Jeofferies*, 1 *Siderfin* 164. beſides *Coke* refers us to find this *Burton*'s Caſe in *Dyer*, but no ſuch Caſe is to be found in the Printed *Dyer*; but as I have heard, the Caſe is in ſome Manuſcript Reports of *Dyer*, but not as *Coke* gives it, but is the very ſame Caſe, in effect, with *Fox*'s Caſe, in 3 *Cro.* 41. mentioned before (that is) *Burton* was Sentenced for Adultery, during a Seſſions of Parliament; and afterwards, in the ſame Seſſions, there paſſed a General Pardon, which related to the firſt Day of that Seſſions, ſo over-reached the Sentence of Deprivation, and by conſequence made it void.

In *Windſor*'s Caſe, *Paſch.* 41 *Eliz.* 5. *Co.* 102. and in 3 *Cro.* 686. and in *Moor* 558. *Paſch.* 40 *Eliz. Loveden* v. *Windſor*, 'tis ſaid, that one *Parry* was deprived in the time of Queen *Mary*, becauſe married, and a Favourer of the Religion in the time of *E.* 6. and that another thereupon was Inſtituted and Inducted into his Benefice, who therein continued until the firſt of *Elizabeth*, when by the High-Commiſſioners, the ſecond Incumbent was deprived, and the firſt Sentence againſt *Parry* was repealed, and he reſtored to enjoy by force of his firſt Preſentation, Inſtitution, and Induction, the Benefice he loſt; and the Reaſon upon which the Caſe is reſolved, ſeems to be, that the Sentence of Deprivation being declared void, and *Parry* thereby reſtored to his firſt Living, by relation he was in upon his firſt Inſtitution and Induction, ſo the Church, cannot be ſaid ever to have been void; or as I conceive, upon this ground, that when a real Cauſe of Deprivation by Law, ceaſeth to be a Cauſe thereof, a Sentence of Deprivation that was well given, when the Cauſe of Deprivation was warrantable in Law, and the Effects thereof, (as the Inſtitution and Induction of another, into the Benefice of the Deprived) at ſuch time when the Law ſhall make the Offence, upon which the Deprivation was grounded, to ceaſe to be an Offence, ſhall be ſaid void, or at leaſt voidable: For the firſt Sentence was well given; becauſe, for a Prieſt to be married, or to be a Favourer of the Religion received in the time of *E.* 6. as the Law ſtood in the time of Queen *Mary*, were ſufficient Cauſes of Deprivation, until the Law was again altered, 1 *Eliz.* and ſo the other lawful Incumbent, until the ſecond Deprivation came, or at leaſt until ſuch alteration was made.

In the Caſes aforeſaid, and ſo in all others, where the Church is only voidable before Deprivation, and by that made void, the Ordinary is to give Notice of the Avoidance to the Patron, and the Patron hath ſix Months after the Notice, in which he may Preſent before Lapſe can run to the Ordinary, *Mich.* 15 *El.* 3 *Leonard* 45. *Hil.* 43 *Eliz. Leake* v. Biſhop of *Coventry*, and Dr. *Babington*, 3 *Cro.* 811. *Mich.* 15 & 16 *Eliz. Dyer, fol.* 327. 1 *H.* 7. 9. *b.* Doctor and Student, *lib.* 2. *c.* 13. 5 *E.* 4. 3. *b. Hil.* 9 *Car. King* v. *Prieſt Jones* 337. *Hil.* 36 *Eliz. B. R. Popham* 37.

And ſeeing that in all Caſes when the Church is ſo void, that the Patron is not bound to take Notice of the Avoidance thereof, for the preventing of a Lapſe, and the Biſhop cannot have advantage of the Lapſe, until ſix Months after he hath given Notice of the Avoidance to the Perſon of the Patron (if he be within the County when he gives Notice) *viz.* to him that is to Preſent to the preſent Avoidance, altho' the perpetual Inheritance of the Advowſon be in another, (yet if he doth only give Notice to ſome ſuppoſed Patron, his Notice is vain) it may be a Queſtion, What Courſe in ſuch Caſe the Biſhop is to take? As to which, if the Biſhop doth not certainly know who is Patron, and ought to Preſent to the void Turn, his way (by the Opinion of *Hobart*) is to award a *Jure Patronatus*, with ſolemn Premonitions *Quorum* Intereſt, and then Enquiry being made who is Patron, the Ordinary is to give him Perſonal Notice, who is found to be ſo by the Verdict; that is, if he be then within the County, otherwiſe by publick Edict at the void Church, *Dy.* 328. 3 *Cro.* 119. and if he doth not Preſent within ſix Months after, the Ordinary may Collate: And tho' by the *Jure Patronatus*, not he that is the true Patron, but a Stranger, is found to be Patron; yet this Proceeding ſhall excuſe from Diſturbance upon the ſpecial Matter ſhewed: But if he that is found to be Patron, upon the *Jure Patronatus*, doth Preſent, and the ſix Months do incur, *Quære*, If the true Patron be bound, ſince there was no Notice given him? And I am of Opinion, (ſaith he) that tho' without Notice the Patron is not bound by the Lapſe, yet that is nothing to ſave the Uſurpation of another pretended Patron, who is not ſubject

to

to give Notice, in Sir *William Elvis*'s Caſe *v.* the Arch-Biſhop of *York*, *Taylor & Biſhop*, *Hob.* 318.

And accordingly when a Clerk was deprived for the cauſe of not ſubſcribing the Articles upon the Statute of 13 *El. c.* 12. and the Biſhop gave Notice thereof in theſe words: *R. Epiſcopus C. univerſis Rectoribus, Vicariis, Curatis non Curatis, Clericis & literatis quibuſcunque infra Diocæſin noſtram Ciceſtrenſem ſalutem. Cum Ri. Clericus Vicarius perpetuus Vicariæ perpetuæ Eccleſiæ Parochialis de C. noſtris Diocæſis non ſubſcripſit Articulis &c. juxta Statutum, &c. Mandamus eis omnibus, & præcipue Curato de C. ad Declarandum in Dicta Eccleſia de C. dictam non ſubſcriptionem, &c.* which were read in *Engliſh* by the Curate, in the Pulpit, in the ſaid Church of *C.* in the time of Morning Prayer, and after were fixed to the Door of the Church, by a publick Apparitor, theſe Exceptions were taken thereto: Firſt, That there was no mention of the Patron, or his Name, in the Intimation. Secondly, That no expreſs mention is made of the Deprivation, according to the Proviſo in the Statute aforeſaid, nor of any Qualification of the Perſon deprived, by which he ought, or it was needful for him to ſubſcribe the ſaid Articles. Thirdly, That he is called, *Vicarius Perpetuus*, and not *Nuper Vicarius*, which implies, that he was not deprived at the time of the Intimation, by which no Deprivation was, or could be notified. Fourthly, That it was not made to the Perſon of the Patron: And the Opinion of the Civilians was, That the aforeſaid Intimation is not ſufficient to prejudice the Patron; for that it is upon a Statute Penal, both to the Incumbent and Patron, and ſo ought to be, *Vere, proprie, & perſonaliter, non ficte*; but ought to notifie, that the Ordinary had deprived him by Declaratory Sentence, *Pro non aſſenſu & Subſcriptione Articulis ſecundum Statutum.* And ſo reſolved for the Cauſes aforeſaid, by all the Juſtices, and Chief Baron, except *Harper* and *Mounſon*, *Abſente Gaudy*, *Hil.* 18 *Eliz. Dyer* 346.

CHAP. VII.

Of Advowſons, and Right of Patronage, Appendant and in Groſs.

AFter a Clerk hath knowledge, that a Church is void, he is in the next place to inform himſelf who is the rightful Patron thereof; and in order thereunto, he ought to underſtand how, and by what means, the Right of Patronage, (which is a Right of preferring a fit Clerk to a Spiritual Promotion) may come to any Perſon. That the way to the knowledge of this may be the more clear, it is to be noted, that of Advowſons, ſome Advowſons are appendant, and ſome in groſs; ſome partly appendant, and partly groſs. To explain which we muſt know, that there are two ſorts of Inheritances, the one Corporate, ſuch are Meſſuages, Lands, *&c.* which have Subſtance in themſelves, and may continue for ever. The other Incorporate, as Advowſons, Ways, Commons, Courts, *&c.* And theſe latter may be, and often are appendant to the former, ſo that an Advowſon appendant is an Inheritance incorporate, that doth appertain to ſome Corporate Inheritance, whereby he in whom ſuch Corporate Inheritance is, hath Title to the Advowſon, as annexed thereunto: But when an Advowſon, either originally (which can be only by building the Church, or the like occaſion) or after by Grant, Deed, Partition, or ſome other Legal Act) is ſevered wholly from that Corporate Inheritance

ritance to which it was appendant, it is ſaid to be an Advowſon in groſs; and when it is in part, and at ſome turn only ſevered from what it was appendant, it is ſaid to be in part appendant, and in part in groſs.

The Original of appendant Advowſons, is thought to be by the ſame means by which the Titles to the Advowſons themſelves were gained, *viz.* by giving either the Lands upon which the Church is built, or the Glebe with which it is endowed; and ſo the Land on which the Church is built, or the Glebe with which it is endowed, or both, are ſuppoſed to be Parcel of the Mannor, or Honour, to which we find the Church appendant, *Hughes*'s Abridgment, Tit. *Advowſons*. But to ſhew that an Advowſon is appendant, 'tis not neceſſary to ſet forth the Original thereof; for that were impoſſible, being the Appendancy is ſuppoſed time out of Mind, the beginning and commencement whereof is not to be known: And it doth in it ſelf imply a Title by Preſcription, to the Owners of that Mannor, *&c.* 11 *H.* 6. 11. & 12. 13 *Eliz. Dyer* 299. 1 *Inſt.* 121. But where the Advowſon hath at all times, whereof the Memory of Man is not to the contrary, paſſed with the Mannor by theſe words, *Cum pertinentiis*, 33 *H.*6. 4. *b.* it is to be taken as an Advowſon appendant: But a Preſcription for the appendancy of an Advowſon is not good, where the thing to which it is affirmed to be appendant is of that quality, that thereto an Advowſon may not be ſaid to be perpetually appendant, 5 *E.* 6. *Dyer* 70. *b.* 8 *H.* 7. 4. *&* 5. *Plowden* 68. 1 *Inſtit.* 122. Such are things that are not of a perpetual Subſiſtence, as Rents, and Services, that may be extinguiſhed; it ſhall therefore be ſhewed particularly, to what things an Advowſon may be appendant.

Properly, and originally, an Advowſon may be appendant only to Inheritances Corporeal, as to Mannors, Caſtles, *&c. Plowd.* 170. *b.* 10 *H.* 7. 13. but moſt commonly it is appendant to ſome Mannor; and an Advowſon in one County, may be appendant to a Mannor in another County; that is, (I ſuppoſe) where the Mannor did originally extend it ſelf into divers Counties, 33 *H.* 6. 4. So two, or more Advowſons, may be appendant to one Mannor, as where a Mannor is extended into divers Pariſhes: And one Advowſon, may be appendant to two Mannors, as when two diſtinct Churches, appendant to two Mannors, by Union, become one Church; in which Caſe the Advowſon is entire, and no Moieties, as is between Coparceners, Joint-Tenants, and Tenants, in Common; yet ſome Authorities are, that each of the ſame Patrons, after the Union, is ſeized *De Medietate Advocationis Eccleſiæ*, 14 *H.* 6. 15. *b. Dyer* 259. *b.* But if an Advowſon be originally appendant to one Mannor, of which Mannor another Mannor is held, tho' the Mannor that holds of the other, doth by way of Eſcheat become parcel thereof, yet the Advowſon is appendant only to that Mannor to which it was originally appendant, *Coke Litt.* 122. Laſtly, the Moiety of an Advowſon may be appendant to a Mannor, or to part of a Mannor, 33 *H.* 6. 11. & 12. *a. Dyer* 44. *b.* But when 'tis ſaid, that an Advowſon may be appendant to a Mannor, 'tis to be underſtood in reſpect of the Demeſnes only, which are of perpetual Subſiſtance and Continuance, and not in reſpect of the Rents, or Services, *Paſch.* 39 *Eliz. Rot.* 2024. *Long*'s Caſe in *C. B.* 5 *E.* 6. *Dyer* 70. And generally, one thing incorporate, cannot be appendant to another thing incorporate, *Plowden* 170. *Bracton, Lib.* 2. *fol.* 53. *Co.* 4. *Tirringham*'s Caſe, 36. *b.* 1 *Inſt.* 121. *B.*

An Advowſon may be appendant to ſome things ſecondarily, to which it may not be appendant originally; for originally an Advowſon cannot be appendant to one or two Acres of Land, 33 *H.* 6. 12. *a.* yet by ſecondary means it may, 18 *E.* 3. 52. *b.* 39 *E.* 3. 36. *b.* 19 *E.* 3. *Quare Impedit* 155. 28 *H.* 8. *Dyer* 24.

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As if he that is ſeiſed of a Mannor, to which an Advowſon is appendant, grants one or two Acres of the Mannor, *Una cum Advocatione*, the Advowſon is appendant to ſuch Acre, 5 *H.* 6. 10. *a. Fitz.* Feoffments 115. 17 *Ed.* 3. 3. eſpecially after the Grantee hath Preſented, 44 *Ed.* 3. 16. 17 *Ed.* 3. 3. *b.* 5. *a. Adjud. ib.* 21. *B.* But this Feoffment of the Acre, with the Advowſon, ought to be by Deed, to make the Advowſon appendant, 17 *E.* 3. 4. *B.* 18. *B.* And the Acre of Land, and the Advowſon, ought to be granted by the ſame Clauſe in the Deed: For if one having a Mannor, with an Advowſon appendant, grant an Acre parcel of the ſaid Mannor, and by another Clauſe in the ſame Deed, grants the Advowſon, yet the Advowſon ſhall paſs in groſs, and not appendant to the Acre; but if the Grant had been of the entire Mannor, the Advowſon would paſs as appendant, *Paſch.* 33 *H.* 8. *Dyer* 48. 2. 44 *E.* 3. 4. *b.* 48 *E.* 3. 4. *b.* So if an Husband ſeiſed in Right of his Wife, of a Mannor, to which, *&c.* alien the Mannor, by Acres, to divers Perſons, ſaving one Acre, the Advowſon ſhall be appendant to that Acre, 17 *E.* 3. 22. *b.* Or if Leſſee for Life of a Mannor, to which an Advowſon belongs, alien one Acre with the Advowſon appendant, the Advowſon is thereby appendant to that Acre, 18 *E.* 3. 44. 17 *E.* 3. 5. *a.* So if in ſuch Caſe he alien one Acre, with the Advowſon appendant, and after alien the reſt of the Mannor, the Advowſon is appendant to the Acre aliened with it, 17 *E.* 3. 22. *B.* 19 *B.*

As an Advowſon may by ſecondary Means be appendant to one, or more Acres, ſo tho' an Advowſon cannot originally be appendant to a Meſſuage, *M.* 33 *Eliz.* in *C.B. Long & Hemming's* Caſe, 3 *Cro.*209. yet ſecondarily it may, 7 *E.*4.20. As when a Meſſuage is built upon a parcel of Land, to which an Advowſon was appendant, the Advowſon becomes appendant to the ſame Meſſuage; and if the Meſſuage doth fall, or be pulled down, the Advowſon ſhall be as before, appendant to the Land, *Plowden* 170. *B.* 10 *H.* 7. 13. *B.* by *Keble.* In like manner an Advowſon of a Vicarage may be appendant to a Parſonage, as being derived and endowed out of the ſame, 18 *Eliz. Dyer* 350. *b.* 17 *E.* 3. 76. *a. Mich.* 16 *Jac.* Sir *George Shirley* v. *Underhil & Burſey, Moor* 894. Upon which account it is, that if a Parſon be Patron of a Vicarage, and doth Leaſe the Parſonage to another, the Patronage of the Vicarage ſhall paſs as incident thereunto, *Rolls Abr.* 2. 59. And upon the ſame account, the Rector of Common Right is ever Patron of the Vicarage, tho' by ſome Ordinance or Compoſition it may be appointed and ſetled otherwiſe; and ſo may even a Rectory be appendant unto other things, as to a Mannor, by Reſervation upon the Appropriation, becauſe the Advowſon of the Rectory was appendant thereto, *Mich.* 16 *Jac. Sherley* v. *Underhil's* Caſe, *Moor* 894. *Mich.* 13 *Jac. B. R.* the King *v* Biſhop of *Norwich, Cole & Saker,* 1 *Rolls Rep.* 235. As alſo by the Grant of the Parſon, before the time of Memory, *Mich.* 13 *Jac. B. R. King* v. *Saker,* 2 *Cro.* 386. the ſame Caſe, 1 *Rolls Rep.* 235. *Mich.* 14 *Jac.* the Dean and Chapter of *Exeter,* and *Corniſh's* Caſe, *Rolls Abr.* 2. 336. And in this Caſe, altho' the Right of Appropriation be not extant, yet the uſe of Preſenting Time out of Mind, is a ſufficient Evidence of the Appendancy to the Mannor, *&c.* contrary to Common Right, Sir *George Shirley* v. *Underhill & Burſey, Mich.* 16 *Jac. Moor* 894.

Alſo an Advowſon of one Church, may be appendant to another ſecondarily, tho' things of the ſame Nature cannot originally be appendant to each other, *Fitz. Quare Impedit.* 13. 24 *E.* 3. yet 'tis ſaid, one Advowſon cannot be appendant to another, *Rolls Abr.* 1. 231.

An Advowſon (to what thing ſoever it is appendant) may be ſevered from the ſame, and become an Advowſon in groſs, by divers means, by ſome of which it is made to be abſolutely diſappendent, by others only for a certain time. An Advowſon is made diſappendent abſolutely; firſt, by an Exception of the Advowſon upon a Grant of the Mannor, or other thing, unto which it is appendant; or, by a Grant of the Advowſon alone, the thing to which it belonged not being alſo conveyed. And tho' he that is ſeiſed of a Mannor, to which an Advowſon is appendant, doth grant one Acre of Land, parcel of ſuch Mannor, *Una cum Advocatione Eccleſiæ*, which Grant alone makes the Advowſon appendant only to the Acre; yet, as hath been ſaid, if he firſt granteth the Acre, and then by a diſtinct Clauſe in the ſame Deed, he further giveth, and granteth the Advowſon, ſuch Advowſon ceaſeth to be appendant to the Mannor: For tho' theſe two Grants be but in one and the ſame Deed, yet becauſe they are by ſeveral Clauſes, are as ſeveral Grants, and by the latter it is granted as an Advowſon in groſs, for it ſhall be conſtrued as all Grants are, *viz.* ſo as ſhall be moſt for the Benefit of the Grantee, and therefore to paſs in groſs, 33 *H.* 8. 48. *Dyer.* And yet if the entire Mannor be granted, and by the ſame Deed, the Advowſon that is appendant to it, tho' the Advowſon be named in a diſtinct Clauſe, and in groſs, yet it ſhall paſs as appendant, 48 *E.* 3. 4. *B.*

If upon the levying of a Fine, he that hath an Advowſon as appendant, doth acknowledge the Right to be in another, by ſuch Conuſance the Advowſon is ſevered from the Mannor to which it was appendant, and can never become appendant again by any After-Grant; but if in ſuch Caſe, one Perſon, doth by Fine, acknowledge the Right of an Advowſon to be in another; and upon this Conuſance, he to whom the Acknowledgment is made, doth grant, that the other, his Heirs and Aſſigns for ever, ſhall Preſent by Turns, by reaſon of the Acknowledgment that the Advowſon was in him, it ſhall be appendant as before, for ſo much of it as doth remain not granted away, *viz.* for every other Turn; and in groſs, for that which is paſſed by the Fine, 43 *E.* 3. 35. *a.* And ſo if a Man that is ſeiſed of a Mannor, to which an Advowſon is appendant, doth accept of a Fine from a Stranger, by which the Stranger doth acknowledge all his Right to him in the Advowſon, the Advowſon thereby is not in groſs, 43 *E.* 3. 35. Alſo in the Caſe of a Fine levied of a Mannor, to which an Advowſon is appendant, if a third part be rendred back for Life, the Remainder over, and the other two parts, with the Advowſon; in like manner the Advowſon continueth in the ſame ſtate it was before, *viz.* appendant, 45 *E.* 3. Or if a Man having an Advowſon appendant, doth grant every ſecond Preſentment to another in Fee, yet the Advowſon doth continue appendant for the other Turn not granted, 43 *E.* 3. 35. And if he grant three or more Avoidances, theſe indeed are in groſs; yet the Advowſon, as to the remainder, is ſtill appendant, by *Hob. Paſch.* 17 *Jac.* in Sir *William Elvis*'s Caſe, *Hob.* 323.

Another means by which an Advowſon becomes abſolutely diſappendant, is by Preſentment: For if one doth preſent to an Advowſon that is appendant, as to an Advowſon in groſs, by ſuch Preſentment the Advowſon loſeth its appendancy, 21 *E.* 4. 2. And yet by the Union of Churches, no alteration is made; for if two Churches, the Advowſon of one of which is appendant, the other in groſs, be united, and it be ordained by the Ordinary, with the Aſſent of the Patrons, that They, their Heirs, and Aſſigns, for ever, ſhall Preſent to that Church, the Advowſon of which was before appendant, *Alternis vicibus*, and that the Patron of the Church in groſs, ſhall have the firſt Turn, yet the whole Advowſon ſhall not be in groſs, but for the Turn only of him that was

Patron

Patron of the Advowſon in groſs, and be appendant for the Turn of him that was Patron of the Advowſon appendant, 9 *El. Dyer* 259. *b.*

An Advowſon appendant may be made diſappendant only for a certain time, by divers means; and firſt, by a Leaſe made of a Mannor for Life, to which an Advowſon is appendant, excepting the Advowſon; for by the Exception the Advowſon is in groſs, during the Eſtate for Life; but when the Leſſee dieth, it becomes appendant again to the ſame Mannor, *Paſch.* 3 *Car. Hartop & Cox's* Caſe, *Hutton* 88. *Paſch.* 3 *Jac. Hartop & Tuck* v. *Dalby*, *Hetly* 14. yea, and tho' the Leaſe be made without Deed, the Law is the ſame, 5 *Co.* 11. 11. *B.* So if the King doth Leaſe a Mannor for Life, to which an Advowſon is appendant, without mentioning the Advowſon, the Advowſon doth not paſs, but remains to the King, as an Advowſon in groſs: And in ſuch Caſe, if the King doth make a Grant of the Reverſion, *Habendum* the Reverſion of the Mannor, with the Advowſon, the Advowſon is not thereby paſſed with the Mannor, becauſe it was ſevered, and became in groſs, by the former Grant, *Co.* 11. 47. *Lifford's* Caſe. And in the Caſe of the King, an Advowſon in groſs will not paſs by the *Habendum*, where it is not named in the Premiſſes of the Grant, 38 *H.* 6. 26. So if one hath an Advowſon appendant to a Mannor, and grants the Advowſon for Life, and after enfeoffeth another of the Mannor, *Cum pertinentis*, the Freehold of the Advowſon is not appendant: But if in ſuch Caſe the Grantee re-grant the Advowſon to the Grantor, (before he hath enfeoffed any in the Mannor, I ſuppoſe) the Advowſon is again appendant. But if one Leaſe his Mannor for Life, ſaving to himſelf the Advowſon, and after grants the Reverſion of the Mannor, *Cum advocatione*, the Advowſon ſhall not be appendant again to the Mannor, *Ive's* Caſe, 5 *Co.* 11. *b.*

Alſo an Advowſon appendant, may be made diſappendant for a certain time, only upon the Account of Coparcener-ſhip: For if a Mannor, with an Advowſon appendant thereto, deſcend to two Coparceners, and the Advowſon be allotted to one, the Mannor to another, the Advowſon is in groſs: But if the Siſter, who hath the Advowſon, die without Iſſue, the Advowſon is again appendant to the Mannor, tho' there was a Severance in Perpetuity, as 'tis ſaid in *Hartop & Tuck's* Caſe v. *Dalby*, *Paſch.* 3 *Jac. Hetley* 14. Or if the Mannor had been divided betwixt the Coparceners, without mentioning the Advowſon, the Advowſon remains in Coparcenery, and yet in every of their Turns it is appendant to that part which they have, 1 *Inſt.* 122. But if they had made Partition of the Mannor, with an expreſs Exception of the Advowſon, then the Advowſon remains not in Coparcenery, but in groſs, 1 *Inſt.* 122. *a.* 13 *E.* 2. *Quare Impedit*, 170. 58. 59. 17 *Ed.* 3. 38. *b.* So if Partition had been made, as well of the Advowſon, as of the Mannor, the Coparceners are Tenants in common of the Mannor, and of the Advowſon, as in groſs; and yet, if all but one of the Siſters die, the Appendancy of the Advowſon is revived, 2 *H.* 7. 5. *b.* 19 *E.* 3. *Quare Impedit* 59. So if four Mannors, to one of which an Advowſon is appendant, deſcend to four Siſters, and each Siſter hath a Mannor allotted to her by Compoſition, ſhe to whom the Mannor, to which the Advowſon is appendant, is allotted, will have the Advowſon as appendant thereto. But if upon the Partition, particular Exceptions ſhall be made of the Advowſon, and Compoſition, that the Coparceners ſhall Preſent thereto in their Turns, the Advowſon is ſevered from the Mannor, and doth remain in Coparcenary, and in groſs; and yet if all the Siſters die, ſave her that had the Mannor, to which the Advowſon was appendant, the Advowſon is again appendant to the Mannor, 2 *Hen.* 7. *Br. Incident* 14.

Likewiſe an Advowſon appendant may be made diſappendant, by tortious Acts, as if a Perſon ſeiſed of a Mannor in Tail, to which an Advowſon is appendant, doth alien ſome part of the Mannor, with the Advowſon, and then the Alienee doth grant the Advowſon to a Stranger, the Advowſon is made diſappendant; yet if after, by bringing a *Formedon*, the Land aliened be recontinued to the Iſſue in Tail, the Advowſon alſo is reveſted again in him, as appendant to the Mannor, and not to that part of it only which was aliened, and from which it was ſevered by the Grant, 19*H.*6.30. 1*Inſt.*363.*b.* and the like Law may be in the Caſe of Diſſeiſin: So if a common Perſon hath an Advowſon as appendant, and a Stranger doth Preſent his Clerk, who is in by ſix Months, the Advowſon is made diſappendant, until ſuch time as the rightful Patron hath re-continued it by his Writ of Right. But in the Caſe of the King, a Preſentment of a Clerk to his Church, who is in by ſix Months, makes no diſappendency, becauſe it puts not the King out of poſſeſſion, *Mich.* 13 & 14 *El. Hobart* 140. 18 *El.* 3 *Leon.* 61. *Mich.* 14 *El.* 3. *Leon.* 17.

If the King doth Preſent to a Church of another's Right, that is appendant by theſe words: *Ad noſtram Præſentationem Jure Prærogativæ Coronæ noſtræ Angliæ ſpectant'*, or *Ratione Lapſus*, ſuch Preſentment ſpeaking of, and ſuppoſing a Right, where there is none, is void, makes no Diſappendancy; or if the Preſentation had been made to a Church really lapſed, yet that makes no Diſappendancy neither. So if the King, without Right, Preſent by theſe words, *Ad noſtram Præſentationem ſive ex pleno Jure ſive per Lapſum temporis, ſive alio quocunque modo ſpectant'*, ſuch his Preſentment makes no Diſappendancy, or Uſurpation: For when the King doth Preſent by Wrong (to the making of an Uſurpation, and Diſappendancy), in his Preſentation he muſt not report any Right, but muſt Preſent to the void Church generally, and require Admiſſion, *Hil.* 11 *Jac. Gawdy* v. Biſhop of *Canterbury*, and others, *Hobart* 302. Sir *John Tufton* v. Sir *Rich. Temple*, & *al. Hil.* 17 & 18 *Car.* 2. *Vaugh.* 14.

CHAP. VIII.

Of the Right of Patronage, to whom it ſhall be ſaid to belong. Of Coparceners, and Tenants in Common.

THeſe Things being premiſed, we may more eaſily ſee how, or by what means the Right of Patronage may come to any Perſon: If we conſider it with reſpect to its Original, we may ſay, it is acquired only by theſe two Means, (*viz.*) Either by being the ſole Founder and Endower of a Church; for thereby a Perſon doth make himſelf Abſolute Patron of ſuch Church, and may reſerve to Himſelf, his Heirs, or Succeſſors, the Right of Conferring to the ſame, ſo oft as it ſhall happen to become void, *Paſch.* 9 *E.* 3. *Quare Impedit* 30. Or elſe not by Founding, or Building, a Church, but by giving the Land upon which it is built; or only by Endowing the ſame with Land, or other Profits and Immunities, after it is built; that is, If upon the occaſion any of theſe Acts, the Ordinary, by his Ordinance, and other Perſons (whoſe Conſents are requiſite in this behalf) by their Agreement, do ſettle the Advowſon of the Church, upon ſuch Founder, or Endower, reſpectively, their Heirs, or Succeſſors, *Doderidge Complete Parſon, p.* 56. & 25. *Hughes*'s Abr. Tit. *Advowſon.*

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Tho' the Commencement, and firſt Titles of Advowſons, came by Founding and Endowing of Churches, and thereby the firſt Proprietors gained a Right, not only to Themſelves, but alſo to their Heirs and Succeſſors for ever; and ſuch their Heirs are ſaid to have them by Deſcent: Now as to Deſcents, there cannot be any Deſcent thereof from the Brother to the Siſter, of the entire Blood, by the Maxim of *Poſſeſſio Fratris*, &c. but the ſame ſhall deſcend to the Brother of the half Blood, unleſs the firſt hath Preſented to it in his Life-time, and then it ſhall deſcend to the Siſter, ſhe being the next Heir of the entire Blood, 19 *E.* 2. *Fitz. Quare Impedit* 177, *Co. Lit.* 15. *b.* which is to be underſtood of Advowſons in groſs only.

If an Advowſon doth deſcend to four Coparceners, and the Church after the Death of their Anceſtor doth become void, if they do not all agree in a Preſentment, the Clerk of the eldeſt Siſter ſhall be received; and at the ſecond Avoidance, the ſecond Siſter ſhall prefer her Clerk, and ſo the reſt in their order, 21 *E.* 3. 38. *Mich.* 12 *H.* 7. *Kiel, p.* 1. *Co. Lit.* 18. *b.* 17 *E.* 3. 30. 37. 21 *E.* 3. 39. 35 *H.* 8. *Dyer* 55. 19 *E.* 3. *Quare Impedit* 59. 13 *E.* 1. *Rot.* 3. Or if they do agree for one, or more Turns, to preſent jointly, and after do not ſo agree, the eldeſt Siſter ſhall Preſent to the void Turn, and the reſt to after Avoidances, according to their Seniority, *Paſch.* 34 & 35 *H.* 8. *Dyer* 55. And this Priviledge given to the Eldeſt, of Preſenting firſt, ſhall go to her Iſſue, and Aſſigns, 24 E. 3. 52. *Co. Lit.* 166. *b.* 186. *b.* And alſo, to her Huſband, as Tenant by Courteſie, *Paſch.* 25 *El. Horris & Hays* v. *Nichols*, 3 *Cro.* 18. *Co. Litt.* 186. *b.* 166. *b.* but they are compellable to make Partition; and if they do make Compoſition to Preſent, it may be done without Writing, becauſe they are all privy, and as one Heir by the Common Law, *Hil.* 28 *H.* 8. *Dyer* 29. 1 *Inſt.* 169. *a. Rolls Abr.* 2. *p.* 255. 1 *Inſt.* 196. *a.* But if Compoſition be made againſt Common Right, as that the Eldeſt, after ſhe hath Preſented once, ſhall Preſent in the Second Turn, it doth not bind without Deed, 17 E. 3. 38. But properly ſpeaking, Coparceners cannot make Partition of an Advowſon in groſs, as to the Right, for that it is entire; for tho' they make Partition, yet this is but as to the Preſentment; but ſtill the Advowſon doth continue in Right in Coparcenery, for they ought to join in a Writ of Right afterwards, *Rolls Abr.* 2. *p.* 255. *Corbet*'s Caſe, 1 *Co.* 87. *a.* So Tenants in Common of an Advowſon, (which are ſuch who have equal Right to an Advowſon, but hold by divers Titles) if they make Compoſition to Preſent by Turns, it muſt be in Writing; and 'till each of them have Preſented according to his Turn, by Vertue of the Compoſition, if a *Quare Impedit* be brought betwixt them, it is neceſſary to ſhew the Compoſition, becauſe it was not executed; but otherwiſe, after it ſhall be executed, *Hil.* 28 *H.* 8. *Dyer* 29.

If Partition be made, and an Advowſon aſſigned to one Coparcener in Chancery, the others being within Age, yet at their full Age they may Preſent, either according to the Compoſition, or by Turn, as if no Compoſition had been made, 17 E. 3. 37. *b.* 30. *b.* And if an Advowſon be allotted in Chancery to the youngeſt Coparcener, ſhe may Preſent, and maintain her *Quare Impedit* againſt the others, until it be defeated, 17 E. 3. 38. *Co. Lit.* 171. *b.*

If an Advowſon doth deſcend to two Coparceners, the one being within Age, and in Ward, and the Guardian doth marry with the Elder, and after the Church being void, the Guardian doth Preſent in the Name of both Siſters, this ſhall not ſerve for any Turn to the Eldeſt, but at the next Avoidance, if they cannot agree in Preſenting, the Eldeſt ſhall Preſent alone, as if no Preſentation had been made, after the Deſcent to them, *Dyer*, 35 *Hen.* 8. 555.

If a Coparcener of an Advowſon, or any other, that hath Title to Preſent to an Avoidance, doth in his Courſe preſent his Clerk, who by being Preſented, Inſtituted, and Inducted, and by performing all things required by Law in ſuch Caſe, is become complete Incumbent, tho' he be afterwards deprived for Crime, or other Cauſe, yet that ſhall ſerve for his Patron's Turn; and he that hath the Right of Preſenting next, ſhall Preſent upon ſuch Avoidance. But if after Preſentation, Inſtitution, and Induction, the Church is not only voidable, but actually void, by reaſon that the Law pronounceth the Admiſſion, Inſtitution, and Induction of the Clerk Preſented, meerly void, as for not Subſcribing, or not Reading the Articles of Religion, *&c.* whether the Church be declared void by Sentence, or not, the Preſentation, Inſtitution, and Induction, in ſuch Caſe, ſhall not ſerve for a Turn, but the Preſentee may preſent again, *Paſch.* 41 *El. Windſor*'s Caſe, 5 *Co.* 102. That is, unleſs the Preſentation, *&c.* of his Clerk were void by Simony, in which Caſe the Turn goes to the King; and then, he that hath the next Turn after him, muſt expect 'till the Church doth become void of the King's Incumbent. But if Simony be committed in gaining Inſtitution, or Induction, the Clerk being Inſtituted and Inducted, makes a Plenarty, and he that Preſented him, having but that Turn, ſhall not Preſent again, tho' the Church by ſuch Simony be alſo void, but he that hath Right to the next Avoidance, *Stat.* 13 *El. c.* 6. and in *Winchcomb & Pulleſton*'s Caſe, *Paſch.* 14 *Jac. Hob.* 167.

Or if a Patron doth Preſent one that obtained his Orders by Simony, at any time within ſeven Years after his corrupt entring into the Miniſtry, the Living is not void 'till after Induction, Inveſting, or Inſtallation; and therefore, there being once a Plenarty, if he that Preſented had but one Turn that is ſatisfied, and he that hath the next ſhall Preſent, in *Winchcomb & Pulleſton*'s Caſe, *Paſch.* 14 *Jac. Hob.* 167.

So if one that hath a Turn, doth Preſent one that is *Mere Laicus*, who is Inſtituted, *&c.* and it be declared by Sentence, that he was uncapable of the Church, and therefore that it was void, *ab initio*; yet for that the Church was full, until the Sentence Declaratory came, this ſhall ſerve for a Turn, *Paſch.* 41 *El. Windſor*'s Caſe, 5 *Co.* 102. But if an Incumbent of a Church be legally deprived, and he that hath the next Turn, doth Preſent his Clerk, who thereupon is Admitted, *&c.* if afterwards a Sentence doth come, by which the ſecond Clerk is deprived, and the firſt reſtored by force of the firſt Preſentation, Inſtitution, *&c.* and dies Incumbent, tho' the ſecond Clerk was Incumbent, for the time, to all purpoſes, and the firſt, for that time, no Incumbent; yet the Preſentation, and Incumbency of the ſecond Clerk ſhall not ſerve for a Turn, but he that Preſented the ſecond Preſentee, ſhall Preſent again, after the Death, or Removal, of the firſt. But if the firſt Clerk had died before the ſecond Sentence, or had not reverſed the former Sentence, he that preferred the ſecond Clerk had enjoyed his Turn, *Paſch.* 40 *El. Loveden* v. *Windſor & Hitch. Moor* 558. *Paſc.* 41 *El. Windſor*'s Caſe, 5 *Co.* 102.

CHAP.

CHAP. IX.

Right of Preſentation, by what Means it may paſs from one Perſon to another, and how it may come to the King.

IF we conſider the Right of Patronage as in the Hands of others than the Founders and Endowers of Churches, their Heirs, or Succeſſors, we may ſay, that it may come to a Perſon, either by the Act of the Law, or by the Act and Conſent of the Party entitled to it, or by his Fault or Neglect: In ſome of which reſpects it doth paſs only in part; in others, ſometimes in part, and ſometimes wholly.

By the Act of the Law, the Right of Patronage may wholly paſs to a Stranger: For when there is no Heir, general, or ſpecial, to whom the Land, or Mannor, to which an Advowſon is appendant doth deſcend, the Advowſon, with the Land, or Mannor, doth eſcheat to the Lord of that Mannor, of which ſuch Land, or Mannor, was held, *Co. Lit.* 122. And it is ſaid, That if a Man doth grant an Advowſon in Groſs, to another in Fee, and the Grantee doth die without Heir, it ſeems that this ſhall revert to the Grantor, not being held of any Man, for 'tis a thing which cannot vaniſh, but ought to be in ſome Perſon; but in that caſe, if the Grantor cannot have it, the King ſhall have it as Supreme Patron; and for that Reaſon ought to Preſent, where no other hath Right, *Rolls Abr.* 1. 816.

Alſo by the Act of the Law, the Right of Patronage doth paſs in part; that is, the Right of Preſenting for one, or more Turns; or for ſo many as ſhall happen within a certain time, from the Heir, upon the account of Marriage, and from him and others upon the account of Death, and of Prerogative. Accordingly if a Feme that hath an Advowſon, or part of an Advowſon, to her and her Heirs, doth take an Husband, the Husband may not only Preſent jointly with his Wife, or in his own Name, during the Coverture, but alſo having Iſſue by her after her Death, (tho' the Right of Patronage (ſo far as it was in the Wife) deſcends to her Heir, and tho' the Wife did never Preſent to it, but died before the Church voided) the Right of Preſenting during the Husband's Life, is lodged in him, as Tenant by Courteſie, tho' his Wife had but a Seiſin in Law, becauſe he could by no Induſtry attain to any other Seiſin, 1 *Inſt.* 29. *a.* And if the Church, in this Caſe of the Husband, void, during his Life, and then he die, before the Church is filled; yet the Heir ſhall not have the Turn, but the Husband's Executor: And ſo is the Law in moſt Caſes, where the Intereſt determines after the Church is void, and before Preſentment, by *Finch*, 38 E. 3. 36. *Bro. Preſentation al Eſgliſe* 18. 21 *H.* 6. 56. If the Church being void, the Wife dies, leaving no Iſſue, ſo that the Husband is not Tenant by Courteſie, yet he ſhall Preſent to the void Turn, 21 *H.* 6. 56. *b.*

If a Man that is ſeiſed of an Advowſon, takes a Wife, and dies, the Heir ſhall have two Preſentments, and the Wife the third; yea, and tho' the Huſband, in his Life-time, had granted away the third Turn, *William*'s Caſe, *v.* Biſhop of *Lincoln*, and the Bailiff and Burgeſſes of *Bedford*, 2 *And.* 173. *Trin.* 28 *H.* 8. *Dyer* 35. *b.* Or if a Mannor, to which an Advowſon is appendant, doth deſcend to an Heir, and he aſſigns Dower to his Mother, of the third part of the Mannor, *Cum pertinentiis*, ſhe is thereby endowed of the third part of the Advowſon, and may have the third Preſentment, *Doderidge* in his Deſcription of Advowſons, *p.* 26.

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In the ſecond place, as the Right of Preſenting for one, or more Turns, doth paſs from him that is ſeiſed of the ſame, to others, upon the account of Marriage, ſo upon the account of Death: For if a Teſtator hath only a next Avoidance by Grant, and having made his Will, dieth whilſt the Church being full of an Incumbent, or void, the Avoidance, or Turn, not being deviſed by Will, the Right of Preſenting thereto doth go to the Executor; and in caſe, when the Church is not fallen void, the Executor may make a Grant of that Turn to another, before he proves the Will, *Mich.* 3 & 4 *Phil. & Mary*, *Smithly* v. *Cholmly*, *Dyer* 135. *Plt.* 13.

So if a Church doth become void, the void Turn is a Chattel; and if the Patron dieth before he doth Preſent, the Avoidance doth not go to his Heir, but to his Executor, *Mich.* 31 & 32 *El.* the Queen *v.* Arch-Biſhop, *Fane & Hudſon*, 4 *Leon.* 109. 1 *Inſt.* 388. *a.*

If the Teſtator had Preſented, and his Clerk not been Admitted before his Death, and then his Executors Preſent their Clerk, the Ordinary is at his Election, which Clerk he will receive, *Trin.* 31 *Eliz.* *Smallwood*, &c. *v.* Biſhop of *Litchfield*, and others, 1 *Leon.* 205. If a Diſturbance be before the Patron's Death, his Executors, by ſpecial Writ upon the Caſe, may recover the Preſentment, and prefer their Clerk, by the Equity of the Statute of 4 *E.* 3. *Smallwood*'s Caſe before, *Mich.* 32 & 33 *Eliz.* *Sale v.* Biſhop of *Coventry & Marſh* 1 *Anderſon* 241, *Mich.* 32 *Eliz.* *C. B.* *Leonard* 4. Caſe 53. and *Savile*, Caſe 188. And if the Teſtator be diſturbed in Preſenting, and in a *Quare Impedit* doth recover, and then dies, the Heir ſhall not have Execution, becauſe it is not a real Action, but the Executor, *Brownlow & Gouldsborough* 1. 158. and by *Rhodes* in *Beverly* and *Cornwall*'s Caſe, *Mich.* 29 *Eliz.* *C. B.* 1 *Leonard* 63. But if an Husband be diſturbed in Preſenting to an Advowſon, which he held in the Right of his Wife, and dies, it is ſaid, that the Wife ſhall have a *Quare Impedit* for this diſturbance, 3 *E.* 3. *Fitz.* *Quare Impedit* 57. 3 *H.* 5. *Quare Impedit* 71.

But in the Caſe of a Biſhop, the void Turn of a Church, the Advowſon whereof he is ſeiſed, in the Right of his Biſhoprick, by his Death, doth not go to his Executor. But when the Temporalties of the Biſhoprick are ſeiſed into the King's Hands, the King doth not only Preſent to ſuch Benefices as become void during the Seiſure, 18 *E.* 3. 31. *b.* 21 *E.* 3. 5. *a.* 29. *a.* 30. *a.* 24 *E.* 3. 26. 5 *E.* 2. *Fitz.* *Quare Impedit* 165. 19 *E.* 2. *Quare Impedit* 178. and as were void after the Death of the Biſhop, and before the Seiſure, 12 *E.* 3. *Fitz.* *Quare Impedit* 56. by *Shard*, but alſo of all ſuch as were void when the Biſhop died, 50 *E.* 3. 26. 9 *H.* 6. 16. *b.* *Admit.* 24 *E.* 3. 26. *Lib. Parl.* 21 *E.* 1. Prior *de Bermondſey*'s Caſe, 24 *E.* 3. 30. 1 *Inſt.* 90 *b.* & 388. *a.* Yea, and to ſuch to which the Biſhop had at any time Preſented or Collated, if his Clerks had not taken as well Induction, as Inſtitution, or Collation, before the Biſhop's Death, becauſe nothing but Induction fills the Church againſt the King, *Liber Parliamentorum*, 21 E. 1. the Prior of *Bermondſey*'s Caſe, adjudged in Parl. 24 E. 3. 30. 11 *H.* 4. 9. *a.* *Fitz.* *N. B.* 34. *k.* 36 *k.* 38 E. 3. 3. & 4. *Hobart*'s Rep. 208. much more to ſuch to which the Biſhop had only Preſented, and to which his Clerk was not Inſtituted, 44 E. 3. 3. and if the Biſhop doth die the ſame Day after Induction, the King is not barred, 44 E. 3. 3. Yea, and whether the King doth of Grace grant the Temporalties before Conſecration, or Livery of them be ſued out of the King's Hands afterwards by the Succeſſor, the King, tho' he hath not then Preſented to ſuch Benefice, the Right of Preſenting to which came to him by reaſon thereof, may, at any times after, Preſent to the ſame, 18 E. 3. 1. *a.* 24 E. 3. 26. *b.* And the Priviledge that the King hath of Preſenting, by reaſon of the Temporalties of a Biſhoprick being in his Hands, ſhall be

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extended unto ſuch Preferments, unto which the Biſhop, of Common Right, might Preſent, tho' by his Compoſition he hath transferred his Power unto others. And therefore, when the Temporalties of the Arch-Biſhoprick of *York* are in the King's Hands, the King ſhall Preſent to the Deanry of *York*, altho' by Compoſition betwixt the Arch-Biſhop, and the Chapter there, the Chapter are to Elect him: And this, becauſe the Patronage thereof, *de Jure*, doth belong to the Arch-Biſhop, and his Compoſition cannot bind the King, who comes in paramount, as Supreme Patron: For of the whole Biſhoprick the King is Supreme Patron, altho' it be diſmembred into divers Branches, as Deans, and other Dignities; and of ancient time, all the Biſhopricks were of the King's Gift; but after the King gave leave to the Chapters to Elect, yet the Patronage notwithſtanding remains in the King, 17 E. 3. 40. And if the Caſe be ſuch, that the King doth Preſent to a Church void, *Ratione Temporalium Epiſcopi ſede vacante*; and before Inſtitution doth repeal his Preſentment, and the Repeal, notwithſtanding the Preſentee is afterwards Inſtituted, and Inſtalled, altho' that the King reciting that the Preſentee was Canonically Inſtituted upon his Preſentation, doth ratifie and confirm the Preſentation, ſo that ſuch Clerk is taken to be, and doth die as Incumbent, after a new Biſhop is created; yet the King ſhall Preſent again, as if he had never Preſented; becauſe the Clerk was never in *Ex Præſentatione Regis*, and ſo the Confirmation void, *Trin.* 12 *El. Dyer* 292. It concerns the Biſhop therefore to ſee, that the King Preſent upon ſuch Intruder, or to declare the Church void judicially, and to ſequeſter it, if the King will not Preſent. But if a Biſhop being Patron of a Church, doth Collate thereto, and the Biſhoprick becoming void, the Biſhop's Clerk is Elected Biſhop of the ſame Biſhoprick, and then the King doth grant to him his Temporalties, before Conſecration, the King ſhall not Preſent to his Benefice that was voided by his Conſecration, but the new Biſhop, becauſe it was not void before the Conſecration, at which time the Temporalties were not in the the King's Hands; but otherwiſe it had been, if the Biſhop be Conſecrated before he hath the Temporalties, 41 *E.* 3. 5 *Br. Preſentation*, &c. 3. 46 E. 3. 32. But *Quære* of this Caſe, becauſe the King had alſo a Right to Preſent by his Prerogative, the Incumbent being made a Biſhop; ſo that altho' the granting away the Temporalties before Conſecration, had prevented the King's Right of Preſenting, by reaſon of the Avoidance of the Biſhoprick, yet it did not give away the King's other Right, which he had by the Incumbent's being made a Biſhop.

If the King doth bring a *Quare Impedit* for a Church, upon the account that he hath Title to Preſent, upon the Temporalties being in his Hands, and doth alledge, that they were in his Hands by the Death of *A.* it is no Plea to ſay, that the Church did not void during the time that the Temporalties were in the King's Hands by the Death of *A.* lately Biſhop; for if they were in his Hands by the Death of any other, or by other means, yet the King ſhall Preſent, 24 E. 3. 26.

Laſtly, The Right of Preſenting doth go from him that is ſeiſed of the Patronage to the King in other Caſes, by reaſon of his Prerogative: For tho' it hath been a Queſtion, Whether (when a Church becomes void, by creating the Incumbent thereof a Biſhop) the King, or the very Patron of the Church, ſhall Preſent upon ſuch Avoidance; and anciently the Law was taken to be, that the rightful Patron might Preſent, 11 *H.* 4. 37. or 34 41 E. 3. 5. 5 E. 3. *Fitz. Quare Impedit* 35. 21 E. 3. 40. 7 *H.* 4. 25, 26. 44 E. 3. 25, *& Temp.* E. 1. *Quare Impedit* 181. *Hil.* 6 *El. Dyer* 228. *Mich.* 38 *&* 39 *El. Wentworth* v. *Wright*, 3 *Cro.* 527. and *Hil.* 41 *El.* in *Owen* 144. However, the King's Prerogative, in ſuch Caſe, hath been favoured of late, and the Law taken to be, that the King ſhall Preſent upon ſuch an Avoidance, 41 E. 3. 5. *Br. Preſentation al Egliſe* 7. 5 *Mariæ preſent. al Egliſe* 61. *Mich.* 42 *Eliz.* Sir *Robert Baſſet*

v. *Gee* 3 *Cro.* 790. *Mich.* 22 *Jac. Woodley v.* Biſhop of *Exeter*, *Manwaring & Edwards*, 2 *Cro.* 691. by *Winch. Contra Hutton*, *Rolls*, *Tit. Preſentment*, *p.* 343. *Paſch.* 37 *Eliz. Wright*'s Caſe, *Moor* 399. *Paſch.* 19 *Car.* 2. *Henry Eedes* v. *Waller* Biſhop of *Oxford*, *Vaughan* 19. And this hath been lately ſetled, in the Caſe of the Biſhop of *London* and Dr. *Birch* v. the Attorney-General for the King, *Caſes in Parliament* 164.

Notwithſtanding if the King doth not take the Benefit of the firſt Avoidance, but ſuffers a Stranger to Preſent, and the Stranger's Preſentee to die Incumbent, his Prerogative ſhall not be extended to give him the Right of Preſenting afterwards, *Mich.* 42 *Eliz.* Sir *Robert Baſſet* v. *Gee*, 3 *Cro.* 790. And ſo if a Benefice be held with a Biſhoprick by *Commendam Retinere*, and the Biſhop doth afterwards reſign the Benefice, the Patron, and not the King, ſhall Preſent: See *Mich.* 6 & 7 *Eliz. Dyer* 233. Or if ſuch Biſhop doth not reſign, but is tranſlated to another Biſhoprick (in which Caſe, the Benefice which he held with his firſt Biſhoprick, becomes void) the rightful Patron, and not the King, ſhall Preſent thereto (*Quære*). And ſo the rightful Patron ſhall Preſent, if the Church held by *Commendam Retinere*, doth fall void by the Death of the Commendatory; for otherwiſe the rightful Patron may be ever kept from Preſenting, *Mich.* 22 *Jac. Woodley* v. Biſhop of *Exeter*, *Manwaring* and *Edwards*, 2 *Cro.* 691. *Coke's Entries* 474. *Hele*'s Caſe, ſee *Rolls Abr. Tit. Preſentment*, p. 344. And that the Patron ſhall Preſent upon the Death of the Commendatory, was adjudged *per Curiam*, in the Caſe of *Henry Edes* v. *Walter* Biſhop of *Oxon*, for the Living of *Chinner*, within that Dioceſs, *Paſch.* 19 *Car.* 2. *Vaughan*, *p.* 18. And the reaſon of the Law in theſe Caſes, is not only becauſe that the Church in ſuch Caſes, is void, otherwiſe than by Creation, in which only Prerogative takes place. But becauſe the King, by granting, that the Biſhop ſhall hold the Church by Commendam, that would be otherwiſe void by Creation, doth thereby take the Benefit of his Prerogative, in that way that beſt pleaſeth him: For his Grant to hold the Church in Commendam, in ſuch caſe, is as it were a Preſentation, and as advantagious; and therefore, if a next Turn be granted to another, when the Church is full of him that afterwards is made Biſhop, and the King doth grant, that the Church ſhall be held in Commendam, the Grantee of the next Avoidance hath loſt his Turn, as much as if the King had Preſented; and that the very Patron, and not ſuch Grantee, ſhall Preſent when the Church is void of the Commendatory, *Woodley v.* Biſhop of *Exeter*, and others before: Which plainly proves, that a Grant to hold in Commendam, is as much as to Preſent, and ſhall ſerve for the King's Turn, which he hath by his Prerogative. But if the King hath the next Turn, and he grants a Faculty, or Diſpenſation, to the Incumbent, being Elected Biſhop before Conſecration, to retain his Benefice, this ſhall not amount to a Preſentation to ſatisfie the King's Turn, but that after the Death of that Incumbent, the King ſhall Preſent again, *Davis* 77. 11 *H.* 4. 76. 80.

But Note, That the Lord Chancellor, or Lord Keeper of the Great Seal for the time being, have the Priviledge of Preſenting to the King's Benefices, under the yearly Value of Twenty Marks, *viz.* in the King's Books, 28 *E.* 3. 3. 8. 9. *Br. Quare Impedit* 65. But as I take it at this Day, the Uſe is to Preſent to Livings under the yearly Value of Twenty Pounds; yet the King may Preſent to any of his Under-valued Benefices, if he pleaſe.

Alſo the Right of Preſenting to a Living in the Province of *Canterbury*, may go from an inferiour Biſhop for one Turn, to the Arch-Biſhop of *Canterbury*, *viz.* when he doth Conſecrate a Perſon to be Biſhop of any of the Biſhopricks within his Province, and this Priviledge of the Arch Biſhop, in this Caſe, is ſuch, that he hath the Election of all the Preferments of the Biſhop's Gift, whom

whom he doth Conſecrate, and when he hath made his Option, the new Biſhop is wont to make a Grant of the next Avoidance of the Church choſen to him and his Executors; and if the Church which the Arch-Biſhop chooſeth doth not become void before the Biſhoprick to which the Gift thereof belongeth, ſo that he doth Conſecrate another Biſhop for the ſame See, he may make a new Option, and ſuch ſecond Biſhop is to make him a Grant of the next Turn of the Benefice then choſen as before: But then his former Grant is void, and and theſe Grants (Practice may be Proof), for I find nothing in the Books to warrant it) are good to bind the Succeſſor, notwithſtanding *Stat.* 1 *Eliz.* but *Quære*, Whether the Arch-Biſhop of *Canterbury* hath the like Priviledge upon a Tranſlation? The Arch-Biſhop of *York*, within his Province, hath the ſame Priviledge as the Arch-Biſhop of *Canterbury*.

CHAP. X.

Advowſons, and Right of Preſentation, how granted over from one Perſon to another. What Grants are good, or not.

THE Right of Patronage may paſs from one ſeiſed thereof, to a Stranger, by the Act and Conſent of him that is ſo ſeiſed, and ſometimes the Inheritance of the Advowſon is conveyed, ſometimes only the Right of Preſenting for one or more Turns, as ſhall happen within a certain time, *&c.* And this is either by the Grant of the Party intereſted therein by Deed, or by Deviſe made thereof by Laſt Will and Teſtament.

That the Right of Preſenting may paſs by Grant, it is requiſite that the Grantor have ſuch an abſolute Right in the Advowſon, that he may convey the ſame, according to the Eſtate by him granted; and alſo, that he purſue the Methods the Law preſcribes in ſuch Caſes: For all Eſtates that one hath Power to grant, or lawfully may grant, are not, nor cannot be granted by the ſame Form of Conveyance: For if a Tenant in Tail grant his Advowſon to others, to the uſe of Himſelf and his Wife and the Heir-Males of the Huſband, and the Wife ſurvives the Husband, yet ſhe gains nothing by ſuch Grant, for that the Eſtate is determined by the Death of the Tenant in Tail, *Mich.* 30 *Jac.* Lord *Say* v. Biſhop of *Peterborough*, *Brownlow & Gouldsborough*, 1. 161. So tho' the Son and Heir of that Tenant in Tail, join with his Father in the Grant of a next Avoidance in Tail, yet the Grant upon the Death of the Father is void againſt the Son and Heir that joined in the ſame; becauſe the Son had nothing in the Advowſon, neither in Poſſeſſion, or Right, nor in actual poſſibility at the time of the Grant, Sir *Marmaduke Wivel*'s Caſe, *Hobart* 45. *& Paſch.* 12 *Jac. Wivell* v. *Epiſ. Ceſtriæ*, *Brownlow & Gouldsborough*, 1. 165. And tho' the Grant ſhould be made to the Perſon that hath the Reverſion, when the Eſtate Tail is determined for want of Iſſue, yet without a Fine levied in theſe Caſes by the Tenant in Tail, it is not good; and when it is by ſuch Means determined, and goes to the Reverſioner, he hath it not as an Advowſon in Tail, but in Fee-ſimple, *Mich.* 37 *&* 38 *Eliz.* the Queen *v. Haſſio*, *Moor* 421. *& Cro.* 3. 519. When a Tenant in Tail of a Mannor, to which an Advowſon is appendant, doth grant the next Avoidance, and dies, the Grant is not abſolutely void, but only voidable; for the Iſſue muſt enter into the Mannor to void the ſame, *Noy, p.* 143. *Paſch.* 13 *Jac. B. R. Bowles* v. *Walter*, *Rolls* 1 *Rep.* 190. 1 *Bulſtr.* 31. And yet it is ſaid, that if Tenant in Tail of a Mannor to

which an Advowſon is appendant, doth diſcontinue one Acre with the Advowſon, and dies, the Iſſue in Tail may Preſent at the next Avoidance, before the Acre be re-continued, for that the Diſcontinuee did never Preſent after the Diſcontinuance, this being the firſt Avoidance after, 34 E. 1. *Quare Impedit* 179.

So if Tenant for Life of an Advowſon in groſs, doth levy a Fine thereof, and before any Claim made by him in Reverſion, the Church doth void, he in Reverſion ſhall not afterwards have advantage of the Forfeiture, as to the preſent Preſentation; for that before Election made by him in Reverſion, the Eſtate of the Leſſee was not defeated nor deſtroyed, the which Election ought to have been by Claim, and then it was a Chattel veſted in the Leſſee before Election made by him in Reverſion, which cannot be deveſted after by the Preſentation of him in Reverſion, *Trin.* 13 *Car. B. R. Spring* v. Sir *Julius Cæſar* adjudged upon Error brought, *Rolls Abr.* 1. 857. However the Grants void at the Death of the Tenants in Tail in the Caſes before put, do ſtand good againſt him during his Life.

If Tenant in Tail of an Advowſon, doth grant by Fine the Advowſon in Tail, the Iſſue in Tail is concluded; or if ſuch Tenant doth grant to one by Fine the Nomination of a Clerk to the ſame Advowſon, when it becometh void, this Fine ſhall bind the Iſſue by the Statute, 32 *H.* 8. *c.* 36. *Smith & Stapleton's* Caſe, *Plowd.* 435. *b. Contra.* becauſe the Preſentation and Nomination is in effect the ſame thing, and the Fruit and full Profit of the Patronage: But if Tenant in Tail of an Advowſon, doth grant by Fine the Nomination of a Clerk to one, and his Heirs; ſo that when the Church doth become void, the Grantee, and his Heirs, may nominate a Clerk to the Tenant in Tail, and his Heirs, and that he or they ſhall Preſent the Clerk ſo nominated to the Ordinary, and the Tenant in Tail dieth, ſuch Fine ſhall not bind the Iſſues in Tail, becauſe there the Nomination and Preſentation are diſtinguiſhed, and ſo the Fine is not of the thing entailed, by *Doderidge*, in his *Complete Parſon*, p. 36. So when one was Tenant in Tail, of the Nomination of a Clerk to an Abbot to Preſent over, the Abbot Preſented without any Nomination, and had his Clerk Inſtituted and Inducted, and then the Abbot did get a Releaſe of the Anceſtor Collateral to the Tenant in Tail with Warranty; it was held, that the Iſſue in Tail ſhould be barred, for that the Induction by Uſurpation, put the Tenant in Tail out of Poſſeſſion, ſo that there remained only a Right which was bound by the Warranty Collateral, 1 *H.* 5. *f.* 1. vouched in *Hare* and *Buckley's* Caſe, *Plowden* 529 *a.*

Upon a *Quare Impedit* brought by the Heir of a Tenant in Tail, the Defendant pleaded, that the Father of the Plaintiff gave the Advowſon by Deed, to him and his Heirs; and that the Anceſtor Collateral to the Plaintiff, to whom he is Heir, releaſed with Warranty for him and his Heirs, the ſaid Advowſon to the Defendant, and that this Anceſtor is dead, *&c.* and it was adjudged a good Bar, affirmed in Error, *Jenkins Cent.* 4. *Caſus* 83.

Alſo Eccleſiaſtical Perſons ſeiſed of Advowſons, in the Right of their Churches, have not ſuch an abſolute Right thereto, that they may convey the ſame from their Succeſſors: For if all Avoidances of an Advowſon that ſhall happen within a certain time, or the next Avoidance only be granted by a Biſhop, the Grant binds not ſuch Biſhop's Succeſſor, by reaſon of the Statute, 1 *Eliz.* as was adjudged upon a *Quare Impedit* brought, by reaſon of a Grant made of the Advowſon of an Arch-Deaconry, for Twenty one Years, becauſe it is parcel of the Poſſeſſions and Hereditaments of the Church, and not a thing whereof any annual Rent or Profit can be reſerved. And ſuch Grants made by Biſhops, tho' afterwards confirmed by their Deans and Chapters, are not only void againſt Succeſſors,

Succeſſors, but alſo againſt the King, when the Temporalties of the Biſhoprick come into his hands, Earl of *Bedford*'s Caſe, Rep. 7. f. 7. But tho' theſe Grants are void againſt their Succeſſors and the King, yet the Grant of a Biſhop in ſuch Caſe, is good againſt himſelf, ſo that he cannot void it during the time that he continueth Biſhop: The Statute of the firſt *Eliz.* being made only for the Benefit of the Succeſſors, and the King, that by the preceding Poſſeſſors they might not be prejudiced in their reſpective Rights, but not to reſtrain thoſe in Poſſeſſion, that they ſhall not do any thing to bind themſelves during their own times, for then they could not demiſe Lands not formerly let for Rent, but muſt retain them in their own hands, nor have Benefit of their Waſtes, but by their own Stock, *&c. Mich.* 37 & 38 *Eliz.* Dean and Chapter of *Hereford* v. Biſhop of *Hereford* & *Ballard*, 3 *Cro.* 440. *Paſch.* 32 *Eliz. Sale* v. *Biſhop* of *Coventry* & *Marſh*, 1 *Anderſ.* 241. *Mich.* 32 & 33 *Eliz. Smallwood* and others, *v.* Biſhop of *Coventry* & *Marſh*, 3 *Cro.* 207. *Trin.* 41 *Eliz. Armiger v.* Biſhop of *Norwich* & *Holland*, 3 *Cro.* 690. And the like Law is in the Caſe of Grants, made by Deans and Chapters, for they void when the Dean (being principal Member of the Corporation) dies, and binds both Dean and Chapter during his Life only, *Stat.* 13 *Eliz. c.* 10 *Paſch.* 39 *Eliz. Hunt* v. *Singleton*, 3 *Co.* 60. *Rickman* & *Garth*, 2 *Cro.* 173.

Notwithſtanding ſuch Advowſons as be appendant to Mannors, or other things uſually let, do paſs now, as well as before the ſaid Statute, 1 *Eliz.* with the things to which they are appendant, ſuch things not being granted contrary to the Contents of that Statute. And if he that is poſſeſſed for a Term of Years, of an Eccleſiaſtical Inheritance, to which an Advowſon is appendant, doth grant away the Avoidances if any ſhall happen during his Term then in being, and after doth ſurrender his Term to him in Reverſion, who accepts of the ſame, and makes a new Leaſe thereof to another, *Cum Pertinentiis*; yet he to whom the Avoidances happening during the Term were granted by the firſt Termer, ſhall enjoy the ſame, becauſe the Limitation, **If any ſhall happen**, is no more than the Law in this Caſe would have ſaid. And if by ſuch after Surrender, a precedent Grant ſhould be voided, it would be in the power of the Grantor, at pleaſure, to derogate from his own Grant; whereas by the Rule of Law, every one's Grant is to be taken moſt ſtrongly againſt himſelf, and beneficially to the Grantee, *Trin.* 8 *Jac. Davenport*'s Caſe, *Co.* 8. *f.* 144.

Alſo the Law is the ſame in the Caſe of any Maſter, and Fellows of any College, Maſter, or Guardian of any Hoſpital, Parſon, Vicar, or other, having an Advowſon, in the Right of their Church, College, or other Eccleſiaſtical Preferment, *Stat.* 13 *Eliz. c.* 10. Neither can any Grant, or Leaſe, for any Years, or Lives, made by any of the Perſons aforeſaid, of an Advowſon in groſs, held in Right of their Churches, Colleges, *&c.* hold good, againſt the Succeſſors. However, it ſhall be confirmed, they having by the Statute, 13 *Eliz. c.*10. a Power left them, only of granting things Corporeal, as Lands, *&c.* of which a Rent may be reſerved, and not granting things that lie in Grant, of which ſort are Advowſons, *Rep.* 5. *f.*3. *Jewel*'s Caſe, 5 *Co.*15. 10 *Co.* 60. But ſpeaking properly, theſe Leaſes are rather voidable than void for the Succeſſor may, as he pleaſes, make the ſame either void or valid, as to himſelf; and if he will make ſuch Leaſe void, he muſt do it either by Entry upon the thing in Leaſe, to which the Advowſon is appendant; or by Claim, where the Advowſon is in groſs. And as he may (and if he do) muſt by ſome Act) make them void; ſo he may affirm, and make them good, during his time: For it hath been adjudged, That tho' the King, when the Temporalties of a Biſhoprick do come to his Hands, ſhall avoid a voidable Leaſe, during the vacancy

cancy of the Biſhoprick, in Privity and Right of the Biſhoprick; ſo that if a Turn fall, he ſhall Preſent to the void Church: Yet that ſhall not void the Leaſe ſo abſolutely, but that the ſucceeding Biſhop may make good the ſame: And ſo may a Dean and Chapter, or any other Eccleſiaſtical Perſons in the aforeſaid Caſes. And ſuch Leaſes of Advowſon, whether they were lett in groſs, or paſſed as appendant, are made good by the Succeſſor againſt himſelf, by expreſs Agreement to the Leaſe of his Predeceſſor; or (in caſe the Advowſon was Leaſed with a thing Corporeal, as appendant thereto) alſo by Agreement in Law, 1 *Inſt.* 211. *b. Co.* 7. *f.* 8. Which is made either by Acceptance of Rent, or by Diſtraining for Rent due, for the thing to which the Advowſon is appendant, at a Day after the Death of the Predeceſſor; or (in caſe ſuch Leaſe be for one or more Lives) by bringing an Aſſiſe; but the Aſſiſe cannot be brought, in caſe ſuch Leaſe be for Years; and therefore, being brought by the Succeſſor, doth not affirm ſuch Leaſe; and this extends as well to aggregate, as to ſole Corporations; only in the Caſe of an aggregate Corporation, the Dean, or principal Member thereof, cannot by his ſole Act diveſt any Right that is in him, and the other Members, as was adjudged in the Caſe of *Magdalen*-College, in *Cambridge*, 11 *Co.* 77.

So if an Husband be ſeiſed of a Mannor, to which an Advowſon is appendant, jointly with his Wife, for Life, his Right is not ſo abſolute, that he can convey from his Wife: For if he doth alien one Acre with the Advowſon (by which the Advowſon is appendant to the Acre) and dies, and then the Church doth void, after the Wife hath re-continued the Acre, ſhe may Preſent, but not before, 17 E. 3. 5. 19. adjudged *Contra* 22 E. 3. 7. 23. *Aſſ.* 8. But if the Alienee doth alien the Acre to another, ſaving the Advowſon, and then the Husband dies, the Wife may Preſent to the next Avoidance, becauſe ſhe cannot recover it with the Acre, 17 E 3. 5. 19. *b.* And ſo if the Husband had aliened the Advowſon, as in groſs, and after doth alien the Mannor to another, and dies, the Wife may Preſent upon an Avoidance, before the Mannor is re-continued, becauſe the Advowſon is in groſs, *Rolls Abr.* 2. *p.* 352. *Contra* 17 E. 3. 19. *b.* So if the Wife be endowed of the third part of a Mannor, and of the Advowſon appendant; and after, another Husband and Wife do purchaſe all the Mannor, and then the Husband doth alien one Acre of the Mannor, with the Advowſon; and after the ſecond Preſentment, the Husband dies, and the Tenant in Dower dies, the Wife may Preſent to the third Turn, altho' that ſhe hath not re-continued the Acre; for that the Advowſon, by the Alienation, could not paſs as appendant to the Acre, becauſe that at the time that the Husband aliened, he had but a Reverſion in it, 23 *Aſſ.* 8. 22 E. 3. 7. the ſame Caſe. However, Husbands ſeiſed in the Right of their Wives, and all other Perſons may make their Grants, according to the Intereſts that they have: And therefore, if there be four Joint-Tenants of an Advowſon, and one of them grants over his Intereſt, this is good, for his part, againſt the Survivor; by *Anderſon*, and not contradicted by *Windham*, or *Rodes*: But *Fenner* againſt it, becauſe it is a thing entire, *Hil.* 30 *Eliz. Agnes Kemp v.* Biſhop of *Winheſter*, *Gouldsborough* 81.

That the Right of Preſenting may paſs by Deed, or Grant, 'tis requiſite, that the Deed, or Grant, do contain ſuch apt and proper Words as the Law allows to paſs the ſame: For when the King giveth, or granteth Land, or a Mannor, with the Appurtenances, without he make expreſs mention in his Deed, or Writing, of Advowſons of Churches, when they fall, belonging to ſuch Mannor, or Land: At this Day the King reſerveth to himſelf ſuch Advowſons, albeit that amongſt other Perſons it hath been obſerved otherwiſe, *Stat.* 17 E. 2. *c.* 15. Doctor and Student, *c.* 20. *f.* 1. But if a Mannor, to which an Advowſon

ſon is appendant, doth come to the King's Hands by Eſcheat, or by Purchaſe, if the King giveth the Mannor to a Man as entirely, as ſuch an one held the ſame before it came to the King's Hands by way of Eſcheat, or as ſuch an one held it that enfeoffed us, the Advowſon doth paſs without ſaying, *Cum feodis & advocationibus.* And the Reaſon is, becauſe the Law doth intend in ſuch Caſe, that the King is informed of his Right, and ſo in Judgment of Law, ſuch Words are equivalent to an expreſs mention of the Advowſon, which the Statute requires, *Hil.* 10 *Jac. Whiſtler's* Caſe, 10 *Co.* 62. *Paſch.* 18 *Eliz. Dyer* 350, 351. The King ſeiſed of an Advowſon of a Prebend in Fee, which is Preſentative, grants, *Totam Rectoriam ſive Prebendam noſtram de Itching Abbas in Com. South. cum omnibus Decimis quibuſcunque eidem pertinentibus, &c. Monaſterio de Winton nuper ſpect. in tam amplis modo & forma*, as the late Abbateſs held it, altho' the Abbateſs was ſeiſed in Fee of the Advowſon, yet the Advowſon ſhall not paſs by this Grant, but the King ſhall be underſtood to be deceived; for he intended to paſs the Rectory and Tythes as a Lay-thing, and not the Advowſon, *Hil.* 14 *Jac. Rolls Abr.* 2. *p.* 189. So if the King grants a Mannor *Habendum una cum Advocatione*, the Advowſon being appendant, it will paſs by thoſe words, *Rolls Abr.* 2. *p.* 65. But if it be in groſs, it will not paſs, unleſs it be ſpecially named, not only in the *Habendum*, but in the Granting Part preceding it, 38 *H.* 6. 36. Abbeſs of *Sion's* Caſe, *Paſch.* 3 *Car. Hartop & Tuck v. Dalby, Hetley* 14. So if a common Perſon doth grant a Mannor, *Habendum una cum Advocatione*, of another Mannor; this is not good to paſs the Advowſon, *Rolls Abr.* 2. *p.* 65. And if in the former part of the King's Grant of a Mannor, *Cum pertinentiis*, the Advowſon is excepted; yet, if afterwards there come Words ſufficient to paſs the ſame, all the parts or the Letters-Patent taking effect at the ſame time, the Advowſon ſhall paſs as appendant to the Mannor, *Hil.* 10 *Jac. Whiſtler's* Caſe, 10 *Co.* 65, 66. But if the King grant a Mannor (to which an Advowſon is appendant) with the Appurtenencies, and all Profits, Commodities, and Hereditaments, to the ſame belonging, the Advowſon is not included in ſuch Grant, *Mich.* 14 *Jac.* Chancellor and Scholars of *Cambridge*, v. *Walſgrave*, *Hob.* 126.

If the King being ſeiſed of a Rectory, and of the Advowſon of the Vicarage of the ſame Church, and by Letters-Patents gives, *Rectoriam predictam & etiam vicariam prædictæ Eccleſiæ*, the Advowſon of the Vicarage doth not paſs, no not in the Caſe of a common Perſon, much leſs in the Caſe of the King, for that the Vicarage is another thing than the Advowſon, *Mich.* 31 & 32 *Eliz.* 3 *Cro.* 163. But by *Walmſley* Juſtice, if the King had granted *Eccleſiam ſuam de D.* it had paſſed, *Mich.* 31 & 32 *Eliz. Aſhegells & Bennis* Caſe, 1 *Leonard* 191. But if an Advowſon of a Vicarage that is appendant to a Rectory, come to the King, by the Patron's being attainted of Felony, and the King doth afterwards grant the Rectory, *Et omnia tenementa parcel. ſpectant' dictæ rector' adeo plene & in tam amplis modo & forma*, as the Perſon attainted had it, the Advowſon of the Vicarage doth paſs, 18 *Eliz. Dyer* 350.

If the King be ſeiſed of the Rectory of *D.* and grants *Advocationem Eccleſiæ de D.* thereby, the Advowſon doth not paſs, for that by the Appropriation the Advowſon is gone, and is not in *Eſſe*, and by conſequence cannot be granted: And it was held not to be a Caſe within the Statute of 4 & 5 of *Phil. & Mary*, of Confirmation of Grants of the King; for the ſaid Statute doth but help miſrecital, miſ-naming, miſtaking, *&c.* but doth not make Grants good of ſuch things that are not. And if it were in the Caſe of a Subject, nothing would paſs, by *Manwood* Chief Baron, *Trin.* 26 *Eliz.* the Queen & Lord *Lumley's* Caſe, 2 *Leon.* 80. *Hob.* 304.

If the King, for Recuſancy, doth ſeiſe two parts of a Mannor, to which an Advowſon is appendant, thereby he ſhall have two parts of the Advowſon; and if he doth grant the Mannor with the Appurtenencies, and all Profits, Commodities, and Hereditaments, to the ſame belonging, for Twenty one Years if the Recuſant continues ſuch for ſo long time, the two parts of the Advowſon are not thereby paſſed from the King, *Mich.* 14 *Jac.* Chancellor, *&c.* of *Cambridge* v. *Walſgrave*, *Hobart* 126. and by *Moor* 872. For want of a more ſpecial mention of the Advowſon, according to the Statute, 17 E. 2. *c.* 15. or of the words, *Adeo plene & integre & in tam amplis modo & forma prout*, &c. the Recuſant had the Mannor. But in Caſes of Reſtitution, as in Reſtitution of the Temporalties of a Biſhoprick, to a ſucceeding Biſhop, Advowſons do paſs from the King, without expreſs mention of them, or words equivalent for the words of the ſaid Statute are: **When the King giveth or granteth**, *Hil.* 10 *Jac.* in *Whiſtler's* Caſe, 10 *Co.* 64. *b.* 41 E. 3. 5. 27 *Aſſ.* 48 *Trin.* 4 *Eliz.* *Wyllion v.* Lord *Barkley*, *Plowd.* 251 & 252.

In the Caſe of a common Perſon, by the Grant of a Mannor, to which an Advowſon is appendant, without any mention of the Advowſon, or ſaying, *Cum pertinentiis*, the Advowſon doth paſs: And ſo it did in the Caſe of the King, before the Statute of *Prærogativa Regis*, 17 E. 2. 15. 18 E. 3. 15. 8 *H.* 7. 4. 19 E. 2. *Br.* 844. *Hil.* 10 *Jac.* 10 *Co.* 64. *b.* *Whiſtler's* Caſe, *Rot.* 2 *Abr.* 60. *n. a.* And 'tis ſaid, that without mentioning the Advowſon, or ſaying, *Cum pertinentiis*, the Advowſon paſſes, tho' the Feoffment of the Mannor be without Deed, 39 E. 3. 21. *Mich.* 29 *Eliz.* *Gouldsborough p.* 42. *Co.* 10. 64. *Rolls Abr.* 2. 62. becauſe it is parcel of the Mannor, and lieth in Tenure, 15 *H.* 7. but if the Grant be of the third part of the Mannor, tho' the word *Cum pertinentiis* be added, if no expreſs mention of the Advowſon be made, nothing of the Advowſon doth paſs, *Trin.* 30 *El.* *Long* v. the Biſhop of *Glouceſter &c.* *Savile* 103. And yet if a Wife be endowed of a third part of a Mannor, the third part of the Advowſon ſhall paſs therewith, as appendant to it, 6 E. 3. 44. *Quare Impedit* 40. And if another Husband, and the Wife, after ſuch Endowment, do purchaſe all the Mannor, and Preſent twice, and then alien one Acre of the Mannor with the Advowſon appendant, the third part of the Advowſon doth not paſs as appendant to the Acre; for that the Husband hath but a Reveſion in the third part, at the time of the Grant, 23 *Aſſ.* 8. adjudged; beſides, at this Day, no Alienation of the Husband's ſhall be prejudicial to the Wife, *Stat.* 32 *H.* 8. *c.* 28. And yet note that it is ſaid, That if one doth Demiſe a Mannor, to which an Advowſon is appendant, and ſaith not, *Cum pertinentiis*, the Advowſon doth not paſs, which was ſaid in the Caſe of a Parſon's Leaſe, *Paſch.* 25 *El.* *C. B.* in *Higgins & Grant's* Caſe, 3 *Cro.* 18. *Doctor and Student*, *c.* 20. *l.* 1. but this ſeems to be contrary to *Whiſtler's* Caſe, 10 *Co.* 64. before-mentioned, unleſs there may be a difference between a Grant and a Leaſe.

Tho' it be before ſaid, that without mentioning the Advowſon, or ſaying, *Cum pertinentiis*, the Advowſon paſſes with the Mannor, tho' the Feoffment of the Mannor be without Deed, yet if a Man be ſeiſed of a Mannor, whereunto an Advowſon is appendant, and maketh a Feoffment of three Acres parcel of the Mannor, together with the Advowſon to two, to have and to hold the one Moiety of the Acres of the Advowſon to one, and his Heirs; and the other Moiety of them, together with the other Moiety of the Advowſon to the other, and his Heirs, this cannot be good without Deed; for the Feoffor cannot annex the Advowſon to theſe three Acres, and diſannex it from the reſt of the Mannor without Deed, 1 *Inſt. f.* 190. *b.* *Savil* 104. So an Advowſon in groſs will not paſs without Deed by Livery and Seiſin, only at the Door of the Church, *Rolls Abr.* 2. *p.* 62. 6 *H.* 7. 3. 16 *H.* 7. 3. Yet it is ſaid, that if the Advowſon

vowſon be pleaded to be granted by Deed, and Iſſue is taken by a Stranger to the Deed, that he did not grant it by the Deed, if it be found, that he did grant it without Deed, or by another Deed, it is good; for that the Deed is Surpluſage, and the Effect of the Iſſue is upon the Grant, and not the Deed, 43 E. 3. 1. *b.* 2 *Rolls Abr* 2. 681.

If a Prebendary having an Advowſon belonging in Fee to his Prebend, doth Leaſe his Prebend, *Cum omnibus commoditatibus emolumentis proficuis & advantagiis*, the Advowſon doth not paſs by ſuch Words, becauſe they imply only things gainful, which are contrary to the nature of an Advowſon, *Mich.* 16 *Jac. John London* v. *the Chapter of the Collegiate-Church of the Virgin Mary of Southwell*, *Hobart* 304. And yet an Advowſon may be yielded in Value upon a Voucher, and be Aſſets in the Hands of an Executor; but Words in Grants ſhall be conſtrued according to a reaſonable and eaſie Senſe, not ſtrained to things unlikely and unuſual; and upon that Reaſon, a Grant of all Woods, and Trees, doth not paſs Apple-Trees, 14 *H.* 8. 1. So an Appropriation will not paſs by the Name of an Advowſon, 44 E. 3. 33. yet an Advowſon will be contained under the Name of a Tenement, and therefore Licence to purchaſe Lands and Tenements in Mortmain, extends to Advowſons, 23 *E.* 3. 18 *Eliz. Dyer* 350. And ſo Advowſons paſs by the Name of all Hereditaments lying where the Church lieth, 15 *Eliz. Dyer* 322. See *John London*'s Caſe before, *Hob.* 304.

Sometimes an Advowſon is called a Nomination, or Preſentation; therefore, if the Nomination of an Advowſon be granted, *Habendum* the Advowſon, the *Habendum* is ſufficiently purſuant; for tho' it vary in Name, yet it is all one in Nature, ſo that the Grant of the Nomination of an Advowſon, is in ſubſtance, the Grant of the Advowſon; for the Profit and Commodity of an Advowſon reſteth in the Nomination, or Diſpoſition, of the ſame: Hereof it enſueth, that if one grants the Advowſon, excepting the Preſentation, during his Life, ſuch Exception is void and repugnant to the Grant, 38 *H.* 6. 38. *b. Doderidge*'s *Compleat Parſon*, p. 63. And tho' Nomination, and Preſentation, are oftentimes, in Law, uſed for one and the ſame thing, 14 *H.* 2. 22. by *Kingſmill*; yet Preſentation, and Nomination, may be ſo diſtinguiſhed, that one may have the Preſentation, and another the Nomination, as diſtinct Inheritances. And this may come to paſs, by the Grant of him that is ſeiſed of the Advowſon: For if he that is ſo ſeiſed, doth grant unto another, and his Heirs, That the Grantee, and his Heirs, every time that the Church doth become void, ſhall nominate to the Grantor, and his Heirs, a Clerk to be Preſented to the ſame Church; and that the Grantor, and his Heirs, ſhall Preſent the Clerk, ſo nominated, to the Ordinary of the Place, to be Admitted and Inſtituted accordingly into the Church, this is a good Grant: And he who hath the Right of Nomination, is the only Patron of the Church, and ſhall maintain a *Quare Impedit* in his own Name; and he that is to Preſent ſuch Perſon ſo nominated, in Preſenting, ſhall be but as Servant to him that hath the Nomination, 24 *E.* 3. 69. *b.* 14 *H.* 4. 11. *a.* 1 *H.* 5. 1, 2, & 16. 5 *E.* 4. 123. *a.* 21 H. 6. 17. *a. Paſch.* 2 H. 8. *Kell.* 161. Sir *George Shirley* v. *Underhill* & *Burſey*, *Mich.* 16 *Jac. Moor* 894.

And accordingly, if one hath a Nomination to a Benefice, and another the Preſentation, and he that hath the Preſentation granteth an Annuity to a Clerk, until he be advanced to a Benefice by the Grantor; if afterwards the Church doth become void, and the Grantee be nominated to the Grantor, to be Preſented over; and he being Preſented accordingly, is Admitted, Inſtituted, and Inducted, yet the Annuity ſhall not ceaſe: For the Grantee was not thereunto preferred by the Grantor, altho' he Preſented him, *Doderige*'s *Compleat*

Parſon, p. 65. And yet if a Writ of Annuity be brought againſt the Parſon, the Aid is only grantable of him that hath the Preſentation, and not of him that hath the Nomination, *Paſch. 5 Eliz. Moor* 49. 1 *H.* 5. *f.* 1.

And if one hath the Nomination, and another the Preſentation, and ſuch Right of Preſentation doth accrue to the King, he that hath the Nomination ſhall have all, by reaſon that it is undecent for the King to do any thing as a Servant to another; by *Townſend* Serjeant, *Mich.* 32 H. 8. *Dyer* 48. 3 H. 4. 33. 4 *E.* 6. *Br. Caſe* 410. *Mich.* 1 *Car. Dickenſon* & *Greenhow*'s Caſe, *Popham* 158. But by *Doderidge*, the Nominator ſhall, in ſuch caſe, nominate to the Lord Chancellor, who, in the Name of the King, ſhall Preſent to the Ordinary, *Compleat Parſon*, *p.* 69.

Tho' in the Caſe before, the Nominator is Patron, and he that is to Preſent, is as his Inſtrument, or Servant; yet if he that is ſeiſed of an Advowſon, doth grant to another, that at every Avoidance he ſhall nominate to the Grantor two Clerks, of which he ſhall Preſent one to the Biſhop, the Grantor (his Grant notwithſtanding) remains Patron, becauſe the Election is in him, which of the Parties named ſhall be Preſented, and have the Benefice, 14E.4.2. However, if in theſe Caſes reſpect be had to each other, they are both Patrons after a manner; and for Injury offered by either of them to the other, they may puniſh each other, as if he that hath the Nomination will Preſent immediately to the Ordinary, he that hath the Preſentation may bring a *Quare Impedit*, or a Writ of Right of Advowſon againſt him, as his Caſe ſhall require: So if he that hath the Preſentation, doth refuſe to Preſent the other's Clerk nominated unto him, or doth Preſent one without his Nomination, the other may have his *Quare Impedit*, or Writ of Right, againſt him, and his Writ ſhall be, *Quod permittat ipſum Præſentare*, &c. and not *Nominare*: For if ſo, the Writ ſhall abate; but in his Declaration he ſhall declare upon the eſpecial Matter, 14 H. 4. 11. 1 H. 5. *i. Paſch.* 5 *Eliz. Moor* 49. *Mich.* 16 *Jac.* Sir *George Shirley* & *Underhil*'s Caſe, *Moor* 894. And tho' one hath a Writ to the Biſhop againſt the other, yet that ſhall not out the other of his Poſſeſſion, *Paſch. 5 Eliz. Moor* 49.

As the Right of Patronage, or perpetual Intereſt in an Advowſon may paſs, by the Grant of him that is ſeiſed thereof, ſo the Right of Preſenting to one, or more Avoidances, or to ſo many as ſhall happen within a time limited, may be conveyed by the ſame means; but when a Grant is made of the next Avoidance of a Church, it muſt be done by Deed, for a Grant by Word only will operate nothing, *Mich.* 31 & 32 *Eliz. Criſp*'s Caſe, 3 *Cro.* 163. And if the King doth grant a next Avoidance of an Advowſon belonging to the Duchy of *Lancaſter*, this ought to be under the Duchy Seal, and is not good under the Great Seal, *Rolls Abr.* 2. *p.* 182.

If the Grant of the next Avoidance be to one, his Heirs, and Aſſigns, yet it is but a Chattel, and ſhall go to the Executors, 39 *E.* 3. 37. 34 H. 6. 27. But if one doth make a Grant to *J. S.* for the Life of *J. S.* of the next Avoidance of his Church, ſo that he may Preſent, if the Church void during his Life, this is a limited Grant, ſo that if no Avoidance happens during the Grantee's Life, the Executor ſhall not Preſent, *Trin.* 4 *Car. Hyde* v. *Man*, *Jones* 407. 1 *Cro.* 505. And it is ſaid to be adjudged, 9 *Eliz.* That if a Mannor be bargained and ſold, the Advowſon appendant will not paſs, if the Deed be not enrolled, *Stamp* & *Clinton*'s Caſe, *Rolls Rep. p.* 100. 1 *Inſt.* 222. *b.*

He that hath a Grant of a next Avoidance of a Church, ought to Preſent to the next that happens after ſuch Grant made, at his peril; and if the Church being full, the rightful Patron doth grant *Præſentationem quandocunque & quomodocunque Eccleſia vacare contigerit pro unica vice tantum.* And adds, that this Grant ſhall remain in force, until a fit Clerk by his Preſentment ſhall be Admitted,

ted, Inſtituted, and Inducted, yet theſe general Words do not enable the Grantee to take any other than the next immediate Turn: For if they ſhould, the true Patron would not know certainly when to Preſent, and would be diſabled by reaſon of uncertainty to make any new Grant, nor could the Jury upon a *Jure Patronatus* awarded, know how to return their Verdict, and ſo the Church ſhould remain for ever litigious. But if in this Caſe the Grantee doth Preſent in his Turn, and be diſturbed by any elder Title, or Grant, this Grant ſhall remain in force, to enable him to Preſent to the Church, upon the firſt Avoidance, after the preceding Grant is ſatisfied, *Trin.* 8 *Jac. Starkey* v. *Pool*, 1 *Bulſtrode* 26, And this holds as well in the Caſe of the King, as of a common Perſon, *Trin.* 27 *Eliz. Baskervil's* Caſe, 7 *Co.* 28. And the ſame Law is, where a ſecond Preſentment is granted to the King: For if he doth not take it whilſt he may, *viz.* either before the Church is filled, or after by removing the Incumbent of the Uſurper, he ſhall never have it, *Paſch.* 26 *Eliz. Beverly* v. *Arch-Biſhop of Canterbury*, Owen.

But if the King hath the firſt and next Avoidance of a Church, and after doth grant a Diſpenſation to the Incumbent to retain the Benefice in Commendam after he ſhall be made a Biſhop, if the Incumbent doth hold it with a Biſhoprick accordingly, during his Life, yet this ſhall not amount to a Preſentation, but the King ſhall have his Turn after the Death of the Biſhop, *Mich.* 9 *Jac. King* v. *Horsfall & Wale*, *Davis* 77. becauſe, the Grant of the Commendam was but a continuance of the old Title, and doth only ſatisfie the King's Right by his Prerogative, which is to Preſent to Churches void by Creation, and is not an Execution of the Right which he hath to the next Turn; and the Diſpenſation being granted before Conſecration of the Biſhop, it prevented the Church from being void: See *Chap.* 9. and the King's continuing the Church full of him that is made a Biſhop by Commendam, ſhall not prevent him of the next Preſentment, after the Church is void of the Commendatory; but when the King making the Incumbent of a Church Biſhop, doth Preſent thereto by his Prerogative, he that hath the Grant of the next Avoidance made to him when the Church was full, ſhall not have the next Turn after the Church ſhall be void of the King's Preſentee; reſolved in *Maring* & *Woodly's* Caſe, vouched by *Jones* in *Evans* & *Kiffin's* Caſe v. *Askwith*, *Palmer* 478. nor the King in this Caſe, if he be the Grantee of the next Avoidance, ſhall have the next Turn, becauſe then he doth not continue the old Incumbency, but Preſents a new by a double Title.

If one hath the Grant of a ſecond Avoidance, and he that hath the Grant of the firſt Avoidance, doth Preſent upon a Simoniacal Contract; tho' his Clerk be Inſtituted and Inducted, and the King doth afterwards Preſent upon his Title of Simony, and his Clerk be alſo Inſtituted and Inducted, yet this ſhall not prevent him that hath the ſecond Avoidance, from Preſenting when the Church ſhall be void of the King's Incumbent, becauſe the Inſtitution and Induction of the Clerk of him that had the firſt Avoidance is void, and the King doth Preſent as to his Turn, and ſo only bars the Grantee of the firſt Avoidance from Preſenting again, and not the other, when the King's Right is ſatisfied; but if one hath the Grant of the firſt Avoidance of a Church, and doth Preſent a Clerk to the Biſhop, who doth obtain Admiſſion, Inſtitution, Inſtalment, or Induction thereupon, for any Reward, or Promiſe, *&c.* or doth Preſent ſuch Clerk to his Avoidance, who within ſeven Years before his acceptance, or taking of ſuch Benefice, had obtained Holy Orders, by reaſon of any corrupt Payment, or Agreement; and the Clerk, in either Caſe be Inſtituted and Inducted accordingly, this is a Plenarty, and his Turn ſerved, altho' the Church in both Caſes, immediately upon the Induction be void, but the King in this Caſe hath not

the Turn, but he that hath the Right to the next Avoidance after, *Stat.* 31 *El. c.*6. *Paſch.* 14 *Jac. Winchcomb* v. the Biſhop of *Wincheſter* & *Pulleſton*, *Hobart* 167.

If when a Church is void, a Grant is made of the next Avoidance thereof, it ſhall extend to the next that falls after the Church is filled, and not of the preſent Turn; by *Fitzherbert* & *Shelly*, *Hil.* 28 H. 8. *Dyer* 26. *Mich.* 10 & 11 *Eliz. Agard* v. Biſhop of *Peterborough*, 1 *Anderſon* 15. But when the Church is full, if the Patron grants *Proximam advocationem* to one, and after doth grant *Proximam advocationem* to another, the ſecond Grant ſhall not extend to give the next Turn after that which was firſt granted, for that is not *Proxima advocatio*, but ſhall be void: And ſo if a Man being ſeiſed of an Advowſon in Fee, and having a Wife, doth grant the third Avoidance of the ſame Church, the Grantee ſhall not have the fourth Avoidance, where the Feme hath the third for her Dower, unleſs in theſe Caſes the Deed is more ſpecial, *Mich.* 22 *Jac. Woodley* v. Biſhop of *Exeter*, *Manwaring* & *Edwards*, 2 *Cro.* 691. 20 H. 8. *Bro. Preſent. al Eſgliſe* 52. 35 *H.* 8. *ibid.* 55. 15 *H.* 7. 7. *Trin.* 29 *H.* 8. *Dyer* 35. *Co.* 8. *f.* 144. *Mich* 42 *Eliz. Williams* v. Biſhop of *Lincoln*, *&c.* 3 *Cro.* 791.

If a Patron of an Advowſon doth grant to *B.* and *C.* the next Avoidance, and doth become bound to *C.* in an Obligation, that *C.* ſhall enjoy the ſaid Preſentment without any Diſturbance or Claim of the ſaid *A.* and after *B.* doth releaſe to *A.* who (the Church becoming void) did offer to joyn with *C.* in Preſenting to the Avoidance; yet it was held, that the Obligation was forfeited, altho' that *A.* had a Title of new, after the Obligation was entred into, *Mich.* 26 *Eliz. C. B. Blueſs* Caſe, 4 *Leon. fol.* 18. Or if a Man bind himſelf in an Obligation to procure a Grant of the next Avoidance to be made to another, ſo that the other may at the next Avoidance Preſent, and doth procure a Grant to be made accordingly, and then the Incumbent is made Biſhop, ſo that the King Preſents by his Prerogative; in this Caſe the Condition is not performed, by reaſon of theſe Words, ſo that the Grantee may Preſent, *Hil.* 29 *Eliz. Bingham* v. *Squires*, *Leonard* 4. *fol.* 61.

Whether the Patron of a Church doth grant *Proximam advocationem Eccleſiæ de D. hac vice*; or that another ſhall have the next Nomination of an able Clerk to his Church, when it ſhall void; it is all one in effect, and in the latter Caſe, the Grantor is bound to Preſent to the Biſhop ſuch Clerk ſo by the Grantee named; and if the Grantee be diſturbed, he ſhall have his *Quare Impedit*, as Patron by *Rede*, *Paſch.* 2 *H.* 8. *Kelewey* 160. *b.*

That the Right of Preſenting may paſs by Deed, or Grant, the Grant muſt be made of that Intereſt, which by Law may be granted: For tho' whilſt a Church is void, the next Avoidance, or Avoidances that ſhall happen, or the Inheritance of the Advowſon, may be granted away, *Mich.* 42 & 43 *Eliz. Leeke v.* the Biſhop of *Coventry*, *Owen*: Yet the void Turn it ſelf is not grantable by any common Perſon, for that it is a meer Spiritual Thing, and annexed to the Perſon of him that is Patron; and during the time of the Vacation, 'tis a Thing in Right, Power, and Authority, a Thing in Action, and in Effect, the Fruit and Execution of the Advowſon, and not the Advowſon it ſelf; and yet the Executor ſhall have it, *Paſch.* 11 *Eliz. Dyer* 282. *Paſch.* 2 & 3 *Phil.* & *Mary Agard v.* the Biſhop of *Peterborough*, *Dyer* 129. *b.* and in 1 *Anderſon* 15. *Trin.* 10 *Eliz. Stephens* v. *Clark*, &c. *Moor* 89. *Mich.* 30 & 31 *Eliz. Brokesby* v. *Wickham* & Biſhop of *Lincoln*, 1 *Leon.* 167. *Mich.* 42 & 43 *Eliz. Baker* v. *Rogers*, 3 *Cro.* 173.

And as a void Turn is not grantable, ſo if two have a Grant made to them of a next Avoidance, and after the Church is void, one doth Releaſe to the other all his Right and Title therein, the Releaſe is void; for that the Church being

being void, the Right of Preſenting not being a thing in Poſſeſſion, but only in Action, cannot be releaſed no more than it can be granted, and therefore, they muſt both Preſent, and if diſturbed bring their Action in both their Names, *Hil.* 33 *Eliz. Brokesby* v. Biſhop of *Lincoln*, 1 *Anderſon* 223. *Mich.* 31 & 32 *Eliz. Brokesby*'s Caſe, 3 *Cro.* 173. But a Releaſe in this Caſe is good, if it be made before the Church is void, and the Party to whom the Releaſe is made, may Preſent, and if diſturbed, may bring his Writ in his own Name, *Mich.* 39 & 40 *Eliz. Bennet* v. Biſhop of *Norwich*, 3 *Cro.* 600. *Trin.* 39 *Eliz. Lewis* v. *Bennet*, *Moor* 467.

So if the King ſeiſe an Advowſon without cauſe, *Ignorans tituli ſui*, and after the Church doth void, and then he that Right hath comes, and hath, *Ouſtre le mayn*, *cum exitibus*; yet he ſhall loſe the Preſentment *hac vice*, for nothing doth paſs by the word *Exitibus*, but the Rents and Profits of the thing, and not the Preſentment; for that this is no Profit to the Patron, but a Prehemi-nence only, and the Profit is to the Parſon, 24 E. 3. 29. and *Brook*, *Iſſues* 21, 26.

Tho' a Grant made of a void Turn by a common Perſon be void, yet ſuch Grant is good where the King is Grantor, *Paſch.* 11 *Eliz. Dyer* 282, 300. 9 E. 3. 16 *H.* 7. in the Caſe of *Margaret* Counteſs of *Richmond*, *Trin.* 29 *Eliz.* Sir *Thomas George* v. *Dalton*, 3 *Leonard* 196. But if when a Church is void, the King grants a Mannor with all Advowſons appendant, the void Turn doth not paſs thereby, unleſs he alſo mention it in his Grant, *Mich.* 14 *El. Leon.* 3. 17. 61. *Mich.* 13 & 14 *Eliz. Hobart* 140. *Mich.* 5 *Jac. Fane*'s Caſe, *Cro.* 29 & 30. *Eliz.* Sir *Thomas George* v. Biſhop of *Lincoln* & *Dalton*, *Gouldsborough* 73. & in *Owen* 53. & in 3 *Leon.* 196. & in *Moor*, *p.* 249. 9 *E.* 3. 26 *Quare Impedit* 31. *Hil.* 18 *Eliz. Dyer* 348. *Paſch.* 13 *Eliz. Dyer* 300. Againſt this, *Fitz. N. B.* 33. 11 & 16 *H.* 7. but *Mich.* 18 *Eliz. Leon.* 4. Caſe 339.

But if the King be ſeiſed in Fee of an Advowſon in groſs, and the Church being void, he doth grant the Advowſon, without any mention of the preſent Avoidance, the Grantee ſhall have it, *Rolls Abr.* 2. *p.* 196. (*Quære.*)

A Lapſe cannot be granted by the King, either before it falls, or after, by *Hobart* 154. in *Colt* and *Glover*'s Caſe. And it is ſaid, that when the King hath two Titles to one Church, the one as Patron, the other by Lapſe, if the King grants the Advowſon, without an expreſs Grant of the preſent Avoidance, the Grantee ſhall not have the Preſentment, 16 H. 7. 9 E. 3. *Hil.* 18 *Eliz. Dyer* 348. *Rolls Abr.* 2. *p.* 196.

So neither the King, nor any Biſhop, can bind themſelves not to fill a Church come to them by Lapſe; Becauſe (ſaith *Hobart*) that were *Injuria & malum in ſe*: Nor can the King, having a Lapſe, grant to an Intruder, that he will not Preſent to the Church; nor to an Uſurper upon his Lapſe, that he will not remove his Preſentee: For this were a Breach of that Truſt which the Law repoſeth in him, as well for the behoof of the true Patron, as for the good of the Church: for by this means the Patron ſhould loſe his Patronage: By *Hobart*, in *Colt* & *Glover*'s Caſe before, *Hob.* 154, 155.

The other means by which the Right of Preſenting to a Church, may be transferred over by the Act and Conſent of the Party ſeiſed of the ſame, is by Deviſe made thereof by Laſt Will and Teſtament, for thereby the Right of Preſenting to the next Avoidance, or the Inheritance of an Advowſon may be deviſed to any Perſon, *Paſch.* 13 *Jac.* Sir *Edward Pinchin* v. Dr. *Harris*, 2 *Cro.* 371. And if ſuch Deviſe be made by the Incumbent of the Church, the Inheritance of the Advowſon being in him it is good, tho' he die Incumbent; for tho' the Teſtament hath no effect, but by the Death of the Teſtator, yet it hath an Inception in his Life-time: And ſo it is, tho' he appoint by his Will,

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who ſhall be Preſented by the Executors, or that one Executor ſhall Preſent another, or doth deviſe that his Executors ſhall grant the Advowſon to ſuch a Man, *Trin.* 13 *Jac. Harris* v. *Auſtin* 3 *Bulſtrode* 40 *Paſch.* 13 *Jac.* Sir *Edward Pinchin* v. *Harris*, 2 *Cro.* 371. *Trin.* 13 *Jac. Harris* v. *Auſtin. Rolls* 1 *Rep.* 210.

Laſtly, It may be added, That the Right of Preſenting may paſs from one ſeiſed of the ſame, by the Patron's acknowledging of a Statute, *&c.* for a Perſon having a Mannor, to which an Advowſon is appendant, doth bind himſelf in a Statute Merchant, *&c.* and the Statute be extended; if the Church doth become void during the Conuſee's Eſtate, the Conuſee may Preſent, *Mich.* 32 & 33 *Eliz. C. B. Kent* v. *Wichall*, *Owen* 49. *Mich.* 32 & 33. Sir *John Arundel*'s Caſe, *Noy.* But I conceive that an Advowſon in groſs is not extendable, upon a Statute Merchant, or of the Staple, *Jo. Rep.* 24.

CHAP. XI.

Right of Preſentation, by what Means forfeited.

THE Right of Patronage, or Preſenting, may paſs from the rightful Patron to a Stranger, by Forfeiture, and that in ſeveral reſpects: As firſt, upon the account of a Simoniacal Contract; for in ſuch caſe, the King hath the Right of Preſenting for one Time, or Turn, to the Benefice for which ſuch Contract is made, *Stat.* 31 *Eliz. c.* 6. which ſee *Chap.* 5. That is, if the Clerk be Preſented in purſuance of the Simoniacal Contract, for the Words of the Statute are: **If any Perſon**, &c. **ſhall corruptly Preſent or Collate, or Give, and Beſtow**, &c. And tho' a Clerk without the Privity or Conſent of the Patron, doth make a Simoniacal Contract with the Wife, or Friend of the Patron, and the Clerk is Preſented accordingly, the King ſhall have the Turn, *Mich.* 13 *Jac. King v. Cole* & *Saker*, 2 *Cro.* 385. *Hil.* 11 *Jac.* Sir *William Bowyer v. High-Commiſſion-Court*, 2 *Bulſtrode* 182. The ſame Law, tho' the Contract be only made amongſt Strangers, without the Privity either of Patron, or Incumbent, *Mich.* 9 *Car. Bawderock* v. *Mackaller*, 1 *Cro.* 331. *the King v. Truſſel*, *Paſch.* 19 *Car.* 2. 1 *Siderfin* 329. But if he that hath the Right of Preſentation only upon a Nomination made by another of a Clerk, to him, without the Privity of him that hath the Right of Nomination; or if an Uſurper doth corruptly Preſent to a void Church, the Patron who ought to Nominate or Preſent, ſhall not thereby forfeit his Right, 3 *Inſt. ch.* 71. For it was ſaid, *Mich.* 15 *Jac.* in *Winchcomb* & *Pulleſton*'s Caſe, *Noy* 25. That the rightful Patron may have a *Quare Impedit* after the ſix Months againſt an Incumbent of an Uſurper that is in by Simony; (and *per Cur'*) to ſay in that Caſe, that the Church was full by ſix Months, is no Plea; and the Reaſon is, becauſe the Preſentation of the Uſurper's Clerk being made by Simony, that, and the Inſtitution, and Induction that followed upon it were meerly void, and ſo the Church never full of the Perſon of ſuch Clerk, *Hobart* 167.

If he that hath a Benefice by Simony doth enjoy the ſame, as if he was lawful Incumbent 'till Death, yet this doth not ſatisfie the King's Turn, but he may Preſent afterwards, *Paſch.* 14 *Jac. Winchcomb* v. *Pulleſton*, in *Hobart* 165. & 15 *Jac.* in *Noy* 25. and in *Browntow* & *Gouldsborough*; becauſe the Church notwithſtanding the Inſtitution and Induction of the Simoniſt remained void to the King's Preſentment, before his Death, and his Death cannot make him Incumbent that was none before, or otherwiſe alter the Caſe. And if upon the Death

Death of the Simoniſt, the rightful Patron, or a Stranger, doth Preſent a Clerk, who is alſo Inſtituted, yet the King may Preſent his Clerk; and if he doth, the Ordinary muſt Admit him; and by his being Inſtituted, the Church is actually full againſt the other. But if the firſt had been alſo Inducted, the King could not have outed him, but by *Quare Impedit*, nor by *Quare Impedit* according to *Moor*, in *Winchcomb*'s Caſe, *Paſch.* 18 *Jac. Moor* 877. who holds, that by gaining (after the Death of the Simoniſt, and before the King's Preſentment) a Poſſeſſion of the Church upon the Patron's Preſentment, the King's Turn is abſolutely loſt; of which I doubt. However, if the King doth ſuffer the Patron's Clerk, that ſucceeds the Simoniſt, to die Incumbent, he hath then loſt the Turn, to which by the Simony he was entitled to, as *Hobart* holds in *Winchcomb*'s Caſe, *Hobart* 166. And the Reaſon why the King may Preſent when the Simoniſt is dead, or remove another's Preſentee, after Induction is, becauſe the Title being in the King after the Death of the Simoniſt, (in that the immediate Turn belongs to him) and neither he, nor other Perſon, having Preſented before, whether the very Patron, or a Stranger, then Preſented, he doth it but as an Uſurper: And therefore, he may, before the Church filled againſt him, Preſent, or after the Induction of another's Clerk, as well remove him by Writ, as if he had been Preſented and Setled by Uſurpation upon the King in any other Caſe, and with as much Reaſon after, as before the Death of the Simoniſt; and that he may not Preſent after the Clerk that filled the Church is dead, if he did not take his advantage before, is, becauſe he was to have but one Turn only, and the firſt which was ſerved by Uſurpation through the King's Neglect to remove the Uſurper's Clerk, even as it is in the Caſe of a Lapſe to him.

But the Law in this is now altered, in favour of all Patrons not Guilty of ſuch Simony, and their Clerks; for it is enacted: **Whereas it hath often happened, that Perſons Simoniack, or Simoniacally promoted to Benefices, or Eccleſiaſtical Livings, have enjoyed the benefit of ſuch Livings many Years, and ſometimes all their Life-time, by reaſon of the ſecret Carriage of ſuch Simoniacal Dealing; and after the death of ſuch Simoniack Perſon, another Perſon innocent of ſuch Crime, and worthy of ſuch Preferment, being preſented or promoted by another Patron innocent alſo of that Simoniacal Contract, have been troubled and removed upon pretence of Lapſe (or otherwiſe) to the prejudice of the innocent Patron in Reverſion, and of his Clerk, whereby the Guilty go away with profit of his Crime, and the innocent ſucceeding Patron, and his Clerk, are puniſhed contrary to all Reaſon and good Conſcience:**

For prevention whereof, Be it enacted by the King and Queen's moſt excellent Majeſties, by and with the advice and conſent of the Lords Spiritual and Temporal, and Commons, in this preſent Parliament aſſembled, and by the authority of the ſame, That after the death of the Perſon ſo Simoniacally promoted, the Offence or Contract of Simony ſhall neither by way of Title in Pleading, or in Evidence to a Jury, or otherwiſe hereafter be alledged or pleaded, to the prejudice of any other Patron innocent of Simony, or of his Clerk by him preſented or promoted upon pretence of Lapſe to the Crown, Metropolitan, or otherwiſe, unleſs the Perſon Simoniack, or Simoniacally preſented, or his Patron, was Convicted of ſuch Offence at the Common Law, or ſome Eccleſiaſtical Court, in the Life-time of the Perſon Simoniack or Simoniacally promoted or preſented; any Law or Statute to the contrary notwithſtanding.

And be it alſo provided, enacted, and declared by the authority aforeſaid, That no Leaſe, or Leaſes, really and bona fide made, or hereafter to be made, by any ſuch Perſon, as aforeſaid, Simoniack or Simoniacally promoted to any Deanry, Prebend, or Parſonage, or other Eccleſiaſtical Benefice or Dignity, for good and valuable Conſideration to any Tenant, or Perſon, not being privy unto, or having notice of ſuch Simony, ſhall be impeached or avoided, for, or by reaſon of ſuch Simony, but ſhall be good and effectual in Law, the ſaid Simony notwithſtanding. *Stat.* 1 *& W. & M. c.* 26.

As by Simony, ſo by Recuſancy of the Patron, the Right of Preſenting may go from him unto others; for it is enacted:

That every Perſon or Perſons, that is or ſhall be a Popiſh Recuſant convict, during the time that he ſhall be or remain a Recuſant, ſhall from and after the end of this preſent Seſſion of Parliament, be utterly diſabled to preſent to any Benefice with Cure or without Cure, Prebend, or any other Eccleſiaſtical Living, or to collate or nominate to any Free-School, Hoſpital, or Donative whatſoever, and from the beginning of this preſent Seſſion of Parliament, ſhall likewiſe be diſabled to grant any Avoidance to any Benefice, Prebend, or other Eccleſiaſtical Living.

And that the Chancellor and Scholars of the Univerſity of Oxford, ſo often as any of them ſhall be void, ſhall have the Preſentation, Nomination, Collation, and Donation of, and to every ſuch Benefice, Prebend, or Eccleſiaſtical Living, School, Hoſpital, and Donative, ſet, lying, and being in the Counties of Oxford, Kent, Middleſex, Suſſex, Surrey, Hampſhire, Berkſhire, Buckinghamſhire, Glouceſterſhire, Worceſterſhire, Staffordſhire, Warwickſhire, Wiltſhire, Somerſetſhire, Devonſhire, Cornwall, Dorſetſhire, Herefordſhire, Northamptonſhire, Pembrokeſhire, Caermarthenſhire, Brecnockſhire, Monmouthſhire, Cardiganſhire, Montgomeryſhire, the City of London, and in every City and Town being a County of it ſelf, lying, and being within any of the Limits, or Precincts of any of the Counties aforeſaid, or in, or within any of them, as ſhall happen to be void during ſuch time as the Patron thereof ſhall be and remain a Recuſant convict, as aforeſaid.

And that the Chancellor and Scholars of the Univerſity of Cambridge, ſhall have the Preſentation, Nomination, Collation, and Donation of, and to every ſuch Benefice, Prebend, or Eccleſiaſtical Living, School, Hoſpital, and Donative, ſet, lying, and being in the Counties of Hertfordſhire, Bedfordſhire, Cambridgeſhire, Huntingtonſhire, Suffolk, Norfolk, Lincolnſhire, Rutlandſhire, Leiceſterſhire, Derbyſhire, Nottinghamſhire, Shropſhire, Cheſhire, Lancaſhire, Yorkſhire, the County of Durham, Northumberland, Cumberland, Weſtmerland, Radnorſhire, Denbighſhire, Flintſhire, Carnarvonſhire, Angleſeyſhire, Merionethſhire, Glamorganſhire, and in every City and Town being a County of it ſelf, lying within any of the Limits or Precincts of any of the Counties laſt before mentioned, or in or within any of them, as ſhall happen to be void during ſuch time as the Patron thereof ſhall be and remain a Recuſant convict, as aforeſaid.

Provided, That neither of the ſaid Chancellors, nor Scholars of either of the ſaid Univerſities, ſhall preſent or nominate to any Benefice with Cure, Prebend, or other Eccleſiaſtical Living, any ſuch Perſon as ſhall then have any other Benefice with Cure of Souls: And if any ſuch Preſentation or Nomination ſhall be had or made of any ſuch Perſon ſo beneficed, the ſaid Preſentation or Nomination ſhall be utterly void; any thing in this Act to the contrary notwithſtanding. *Stat.* 3 *Jac. c.* 5.

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By this Statute, a Popiſh Recuſant convict, is diſabled to Preſent, *&c.* and therefore I conceive, if ſuch Perſon doth Preſent, his Preſentation is void, and the Ordinary may refuſe his Clerk, and ſuffer the Turn to come to him by Lapſe, if that none other Preſents who hath a better Right: For that the Preſentation is void, is admitted by *Jones*, in his Argument of *Knight* and *Dancer*'s Caſe, *Paſch.* 14 *Car.* 2. 1 *Keble* 282, 311. And by *Finch*, the Clauſe that diſables Recuſants to Preſent, they being made Excommunicate before, is nugatory; yet if the Clerk be Admitted, Inſtituted, and Inducted upon a Recuſant's Preſentation, it may be good to ſome purpoſes; as againſt all Strangers that claim not under the rightful Patron. But theſe Matters are not there reſolved, therefore *Quære.*

Alſo this Statute doth diſable the Recuſant convicted, from granting away the Avoidance of any Benefice; and it hath been held, That if a Perſon being a Popiſh Recuſant, doth before he is convicted, grant the next Avoidance of his Church, yet being afterwards convicted, ſuch Grant of his is made void by the Statute; for the material Words of the Statute being ſingled by themſelves in this manner will ſhew it: **Every Perſon that ſhall be a Popiſh Recuſant convict, during the time that he ſhall be, or remain a Recuſant, ſhall be diſabled from the beginning of this Parliament to grant any Avoidance.** By which it appears, that he is diſabled before his Conviction, by the retroſpect of the Act, he being afterwards convicted of Recuſancy, *Trin.* 11 *Jac.* the Caſe of the *Chancellor, Maſters, and Scholars of the Univerſity of Oxford*, 10 *Co.* 54.

And the Statute, I ſuppoſe, doth alſo diſable a Recuſant in like manner, from granting his Advowſon for Years, eſpecially to a Friend in truſt: For to this Opinion the Judges did ſeem to incline, tho' they would not anſwer directly to the Queſtion, when moved to them, *Mich.* 11 *Jac. C. B. Hughs p.* 216.

This Statute alſo gives the Avoidances that happen during the time that the Patron thereof ſhall be, and remain a Recuſant convict, to one or the other of the Univerſities; and when by Vertue thereof, the Preſentation *hac vice*, is once veſted in the Univerſity, altho' that afterwards the Recuſant conformeth himſelf, or dieth, yet the Univerſity ſhall Preſent, *Trin.* 11 *Jac.* the Caſe of *Chancellor, Maſters, and Scholars of the Univerſity of Oxon*, 10 *Co.* 54. *a. Cawley*'s *Law againſt Recuſants* 230. And I conceive, that the next Avoidance is veſted in the Univerſity by the Conviction.

Tho' the Statute doth give ſuch Avoidances to the Univerſities, by the Name of the Chancellor and Scholars, and they ſue for the ſame by the Name of the Chancellor, Maſters, and Scholars, of *Oxford*, or *Cambridge*, which is the true Name of the Univerſity; yet they ſhall have the benefit of this Act, notwithſtanding the Miſnoſmer in it: For in an Act of Parliament, miſ-naming of a Corporation, when the expreſs meaning appeareth, will not avoid the Act, no more than in a Will; for both are to be taken according to the meaning of thoſe that are Parties to them: And theſe Clauſes that give the benefit to the Univerſities, are private Clauſes, whereof the Judges without pleading of them, cannot take notice; and therefore, the Judges ought to take them as they are pleaded, *Trin.* 11 *Jac.* the Caſe of the *Chancellor, Maſters, and Scholars of the Univerſity of Oxford*, 10 *Co.* 57. *b.* And it is made a Queſtion, Whether there can be any Lapſe to the Biſhop, *&c.* ſo as to bind the Univerſities, the Preſentations being given to them by Act of Parliament. By *Hutton*, in the Caſe of the *Chancellor, and Scholars, of the Univerſity of Oxford, v.* the Biſhop of *Lincoln*, Sir *Kenelm Digby & Holmes*, *Mich.* 4 *Car. Com. B. Littleton's Rep.* 192.

But notwithſhanding this Statute, if a Popiſh Recuſant be ſeiſed of a Mannor, to which an Advowſon is appendant at the time of his Conviction, and for Non-payment of Twenty Pounds by the Month, the King doth ſeiſe into his hands two Parts of ſuch Mannor, tho' there be no mention made in the Inquiſition and Seiſure, ſpecially of the Advowſon, yet becauſe the Statute of 29 *Eliz.* gives two Parts of the Recuſant's Poſſeſſions to the King, two Parts of the Advowſon will follow the two Parts of the Mannor; and the King, and not the Chancellor and Scholars of either Univerſity, will have Title to Preſent to two Turns, *Mich.* 14 *Jac. Chancellor and Scholars of Cambridge* v. *Walgrave*, *Hobart* 127.

Or if a Recuſant be ſeiſed of an Advowſon in groſs, and the King, by Virtue of the Statute of 3 *Jac. c.* 4. which gives Power to the King to ſeiſe two Parts of a Recuſant's Lands and Hereditaments, doth ſeiſe the Advowſon as a part of his two Parts, the Advowſon is then in the King, and the Univerſity ſhall not Preſent to the Avoidances that ſhall happen, during the Recuſant's Recuſancy; becauſe the Univerſities have no other Intereſt than as a Biſhop to Preſent by Lapſe, and not a real Eſtate: For that the Recuſant, notwithſtanding their Right, and his Diſability by the Statute to Preſent, remains Patron as to other purpoſes; as to confirm a Leaſe of the Incumbent, unleſs the King doth ſeiſe it, and then the King is Patron *pro Tempore*, and not the Recuſant; and ſo the Univerſity cannot have the Right of Preſenting to the Advowſon, as to an Advowſon whereof a Recuſant is ſeiſed.

So if a Recuſant being attainted of Treaſon, or *Præmunire*, or outlawed in a Perſonal Action, he ceaſes to be Patron, and the Univerſity ſhall not Preſent: And ſo, tho' a Recuſant be diſabled to grant away any Avoidance by the aforeſaid Statute, 3 *Jac.* 5. yet he may, during his Recuſancy, grant away his Patronage in Fee to another, or in Tail, for Life, or for Years; and by ſuch Grant he ceaſes to be Patron in poſſeſſion, during the continuance of ſuch Eſtate by him granted; and the Univerſity loſes the advantage of Preſenting, tho' he continue Recuſant: And the Reaſon why the Grant of the Advowſon for Years, is, out of the Statute, and not within the words ***next Avoidance***, is, becauſe the Advowſon is ſo in him that hath the Grant of it for Years, that he may accept of a Releaſe in Fee, from the Patron in Fee; whereas, by the Grant of two or three Avoidances, the Patronage is not ſevered, neither may ſuch Grantee accept of ſuch Releaſe from the Patron; (but *Quære*) Whether theſe Grants ſhall defeat the Univerſity; for that by the words of the Statute, the Recuſant is diſabled to grant any Avoidances, which may admit of a large Interpretation? However, it is admitted, that if ſuch Grants be made by Covin of the Recuſant, the Statute of the 3 *Jac. c.* 5. ſhall extend to give the Univerſity the Avoidance: Yea, and altho' that one doth grant an Avoidance before he is a Recuſant, and then turns Recuſant, unleſs the Recuſancy doth follow by Covin of the Grantor, on purpoſe to defeat his Grantee; as was the ſaid Caſe of the *Chancellor of Oxford*, *Co.* 10. And the Law is owned to be the ſame, in caſe the Fee of the Advowſon, before the Recuſancy, be granted by Covin; but then Covin in theſe Caſes ſhall not be intended, unleſs it be averred. Theſe things were held, and delivered by *Jones* Juſtice, in his Argument, whereby he held, as the chief Point, That the King by his ſeiſing of a Recuſant's Advowſon in groſs, did defeat the Univerſity of the Avoidance: With whom, 'tis ſaid, that *Hobart* and *Winch* did agree, as to that Queſtion; but *Hutton*, *Contra*, *Hil.* 29 *Jac.* *Standen*, &c. *v. Univerſity of Oxon*, and *Whitton*, *Jones* 17. But a diſcontinuance of the Suit was cauſed by one of the Plaintiffs, and ſo no Judgment given.

If a Recuſant have Right of Nomination to a Benefice, and another hath the Right of Preſentation, yet the Recuſant is diſabled by this Act to nominate: For altho' only the word Preſent be uſed in the Statute, yet that ſhall extend as well to Nomination: For the Intent of the Act, is, to prevent Recuſants to appoint who ſhall be Incumbent, and the Caſe of Nomination is in equal miſchief with that of Preſentation, and in the ſubſequent Clauſe, the Right of Nomination is given to the Univerſities, as well as Preſentation. *Cawley's Laws againſt Recuſants* 228, 229. It hath alſo been Enacted:

Whereas in and by a certain Clauſe mentioned in one Act of Parliament made in the third Year of the Reign of King James **the Firſt, entituled,** An Act to prevent and avoid Dangers which may grow by Popiſh Recuſants; **it is enacted, That every Perſon or Perſons, that is or ſhall be a Popiſh Recuſant Convict, during the time that he ſhall be or remain a Recuſant, ſhall from and after the end of that preſent Seſſion of Parliament, be utterly diſabled to preſent to any Benefice with Cure or without Cure, Prebend, or any other Eccleſiaſtical Living, or to collate or nominate to any Free-School, Hoſpital, or Donative whatſoever, and from the beginning of the ſaid Parliament, ſhall likewiſe be diſabled to grant any avoidance to any Benefice, Prebend, or other Eccleſiaſtical Living.**

Be it enacted by the King and Queen's moſt excellent Majeſties, by and with the advice and conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by authority of the ſame, That every Perſon who ſhall refuſe or neglect to make, repeat, and ſubſcribe the Declaration mentioned in one Act of this preſent Parliament, entituled, An Act for the better ſecuring the Government, by Diſarming Papiſts, and reputed Papiſts: **When the ſame ſhall be tendred to ſuch Perſon, by any two or more Juſtices of the Peace, as in the ſaid Act is enacted, or who ſhall upon Notice given, as in the ſaid Act is directed, refuſe or forbear to appear before them, for the making, repeating, and ſubſcribing thereof, and ſhall thereupon have his Name, Sirname, and uſual Place of Abode certified and recorded at the General Quarter-Seſſions, to be holden for the Shire, Riding, Diviſion, or Liberty, for which ſuch two Juſtices ſhall be Juſtices of the Peace by the Clerk of the Peace, or Town-Clerk, as in the ſaid Act is appointed; every ſuch Perſon ſo recorded, ſhall be from and after the time of ſuch Record made, adjudged, taken, and eſteemed, diſabled to make ſuch Preſentation, Collation, Nomination, Donation, or Grant of any Avoidance of any Benefice, Prebend, or Eccleſiaſtical Living, as fully and amply, as if ſuch Perſon were a Popiſh Recuſant convict by the Laws or Statutes of this Realm, any Law Statute, or Uſage to the contrary notwithſtanding. And that the Chancellor, and Scholars of the Univerſity of** Oxford, **and the Chancellor and Scholars of the Univerſity of** Cambridge, **by what Name or Names ſoever they or either of them are incorporated, ſhall reſpectively have the Preſentation, Nomination, Collation, and Donation of, and to every ſuch Benefice, Prebend, or Eccleſiaſtical Living, School, Hoſpital, and Donative ſet, lying and being in the reſpective Counties, Cities, and other the Places and Limits in the ſaid Act of the Third of King** James **mentioned, as in and by the ſaid Act is directed and appointed, ſo often as any of them ſhall become void, according to the Limitations, Directions, and Proviſions in that behalf limited, enacted and provided.**

And be it farther enacted by the Authority aforesaid, That where any Person or Persons are, or shall be seized or possessed of any Advowson, Right of Presentation, Collation, or Nomination, to any such Ecclesiastical Living, Free-School, or Hospital, as aforesaid, in trust for any Papist or Popish Recusant, who shall be convicted or disabled, according to the true intent and meaning of the said Statute, made in the Third Year of the Reign of the said King James the First, or by this present Act; every such Person and Persons so seized and possessed in Trust for any Papist or Popish Recusant convict or disabled, shall be, and are hereby adjudged to be disabled to Present, Nominate, or Collate to any such Ecclesiastical Living, Free-School, or Hospital, or to grant any Avoidance thereof; and their, and every of their Presentations, Nominations, Collations, and Grants, shall be null and void to all intents and purposes whatsoever; and the Chancellors and Scholars of the said respective Universities, as aforesaid, upon every Avoidance, shall have the Presentations, Nominations, and Collations, to such Ecclesiastical Livings, Free-Schools, and Hospitals, in such manner as they should have the same, in case such Recusant convict, or disabled, were seised or possessed thereof.

And in case any Trustee or Trustees, or Mortgagee, or Grantee of any Avoidance, hereafter Present, Nominate, or Collate, or cause to be Presented, Nominated, or Collated, any Person to any such Ecclesiastical Living, Free-School, or Hospital, whereof the Trust shall be for any Recusant convict or disabled, without giving Notice of the Avoidance in writing to the Vice-Chancellor for the time being of the University, to whom the Presentation, Nomination, or Collation shall belong, according to the true intent of this Act, within Three Months after the Avoidance shall happen, such Trustee, or Trustees, Mortgagees, or Grantees, shall forfeit and pay the Sum of Five hundred Pounds, to the said respective Chancellors, and Scholars of either of the said Universities, to whom such Presentation, Nomination, or Collation shall belong, according to the true intent of this present Act, to be recovered in any of their Majesties Courts of Record, by Action of Debt, Bill, Plaint, or Information, wherein no Essoign, Protection, or Wager of Law shall be allowed.

Provided always, That the said Chancellors, and Scholars, of either of the said Universities, shall not Present or Nominate to any Benefice with Cure, Prebend, or other Ecclesiastical Living, any Person as shall then have any other Benefice with Cure of Souls; and if any such Presentation shall be had or made of any such Person so beneficed, the said Presentation shall be utterly void; any thing in this Act to the contrary notwithstanding.

Provided, That if any Person so presented, or nominated to any Benefice with Cure, shall be absent from the same above the space of Sixty Days in any one Year, that in such Case the said Benefice shall become void.

Provided nevertheless, That if any such Person shall present himself before the Justices of the Peace at the General Quarter-Sessions to be holden for the County, Riding, Division, or Liberty, where his Name was recorded, and shall there in open Court, make, repeat, and subscribe the said Declaration, and take the several Oaths contained in one Act of this present Parliament, entituled, An Act for the Abrogating of the Oaths of Supremacy and Allegiance, and appointing other Oaths, he shall from thenceforth be discharged of and from the said disability, and be enabled to make such Presentation, Collation, Nomination, and Donation, and Grant of any Avoidance to any Benefice, Prebend, or Ecclesiastical Living, School, or Hospital, as if this Act had not been made. *Stat.* 1 *W.* & *Mar. Sess.* 1. *cap.* 26.

In

In a *Quare Impedit* brought by either of the Univerſities, it muſt be alledged, that the Party was a Recuſant convict, at the ſame time when the Church became void; for without ſhewing that, they do not enable themſelves to Preſent, *Cawley's Law againſt Recuſants* 230. Then ſuppoſe the Caſe to be, That *A.* is a Recuſant convict, and by Pardon that Conviction is pardoned (as it hath been held it may), and then the Church becomes void, I conceive, the Univerſity ſhall not have the Preſentation: For that the Patron was no Recuſant convict, at the time the Church became void, his former Conviction being taken away by the Pardon; and indeed, no Perſon ſtrictly ſpeaking, can properly be ſaid to be a Recuſant, before he be convicted of it; for 'tis the Conviction which in Law is the Proof and Evidence of his Recuſancy.

Alſo the rightful Patron may loſe his Right to Preſent, by ſuffering himſelf to be Outlawed: For if any Outlawed Perſon hath an Advowſon, that doth fall void during the Outlawry in force, ſuch Avoidance is forfeited to the King: And ſo it is, if he be Outlawed only in an Action of Treſpaſs, or other Perſonal Action, 8 *R.* 2. *Quare Impedit* 200. and altho' the Perſon Outlawed be but Tenant at Will of a Mannor, to which an Advowſon is appendant, 5 *H.* 5. 3. Or if a Perſon hath a Grant only of a next Avoidance, and be Outlawed at ſuch time when the Church voids, the Right of Preſenting doth belong to the King, *Book of Entries* 485. And the King, in ſuch Caſe, will Preſent, tho' the Outlawry be pardoned, 9 *H.* 6. 57. by *Paſton.* But then the King muſt Preſent in his Turn, or loſe the Preſentment, *Mich.* 2 *Jac.* *King* v. *Biſhop of Winchester & Champion*, 2 *Cro.* 54.

But if an Uſurpation be made by the King upon a rightful Patron, who brings a *Quare Impedit*, and hath Judgment to recover, and then is Outlawed, and the King's Clerk doth reſign, and takes a new Preſentation of the King, by reaſon of the Outlawry, and is again Inſtituted and Inducted, the Patron reverſeth the Outlawry, and brings a *Scire Facias*, to have Execution of the Judgment; it was adjudged; That he ſhall have Execution thereof, and remove the Incumbent; becauſe any Incumbent that comes in *Pendente placito*, ſhall be removed, eſpecially being made Party to the Writ; elſe the Incumbent in this Caſe would have advantage of his own Practice, and any Incumbent being ſued, might reſign and diſappoint the Plaintiff of his Suit, *Mich.* 27 & 28 *Eliz.* *Beverly* v. *Cornwall*, 3 *Cro.* 44. *Mich.* 30 & 31 *Eliz.* *Gouldsborough* 103. *Trin.* 30 *El.* 1 *Anderſon* 148. *Mich.* 30 & 31 *El.* *Moor* 269. *Savil.* 89. And in this Caſe it was ſaid by the Judges, That if a Perſon Outlawed hath a Mannor to which an Advowſon is appendant, and the King takes the Profits, and the Church voiding during the Outlawry, the King doth Preſent his Clerk, tho' the Party doth reverſe the Outlawry for Error, yet he ſhall not in ſuch caſe be reſtored to the Preſentment, becauſe, it is but a thing acceſſary to the Principal, *viz.* the Mannor, and the Profit only of the Advowſon. But otherwiſe it is, if the Church be void at the time of the Outlawry, and the Preſentment thereby forfeited as a Chattel, principal and diſtinct; upon the reverſal of the Outlawry for Error, the Party ſhall have Reſtitution of the Preſentment, *Mich.* 30 & 31 *Eliz.* *Beverly* v. *Cornwall*, *Moor* 270. becauſe, there it is the thing principally forfeited by the Outlawry.

Tho' the Law doth give Avoidances of Churches forfeited by Outlawry to the King, yet the King may grant away ſuch Forfeitures to a Subject: But if the King doth grant *Omnia bona & Catalla tenentium reſidentium*, &c. within ſuch a Liberty to a Subject, it is a Queſtion, Whether Avoidances of Churches that come to the King by Outlawries, ſhall paſs from him by ſuch words, unleſs they had been more

more ſpecial: Foraſmuch as ſuch Avoidances are ſpecial Chattels, and not uſually intended or thought of, when Men ſpeak generally of Goods and Chattels. And *Anderſon* held that they ſhould not paſs, but it was adjourned, *Mich.* 31 & 32 *Eliz. Queen* v. *Arch Biſhop of Canterbury, Fane* & *Hudſon*, 4 *Leonard* 107.

The Right of Preſenting may be alſo loſt from the Patron to the King, by his being attainted; but if the Leſſee of an Advowſon for another's Life be attaint, the King muſt take his Intereſt and Advantage during the time, *viz.* during the Life of the *Ceſtui que vie*, or at leaſt of an Avoidance which hapned during the Life of *Ceſtui que vie*; or if filled by Uſurpation before it void again, or otherwiſe, he ſhall never have it, as is ſaid, *Paſch.* 26 *Eliz. Beverly* v. *Arch-Biſhop of Canterbury, Owen*: The ſame Caſe, 3 *Cro.* 44.

Alſo the King may gain a Right of Preſenting to a Church upon the account of an Appropriation made without his Licence: For if an Advowſon (whether held of the King or not) be appropriated without his Licence, altho' another be Founder, the King may by his Prerogative ſeiſe the Advowſon; and being ſeiſed by him (tho' the Inheritance be not forfeited) he ſhall have the Preſentments to the Avoidances, in the Name of Diſtreſs, until ſuch time as Fine is made to him, for making the Appropriation without his Licence, 21 *E.* 3. 5. by *Shard. Mich.* 18 & 19 *Eliz.* in *Grendon*'s Caſe *v. Biſhop of Lincoln, Plowden, f.* 499.

So if an Alien born doth purchaſe an Advowſon, and the Church doth become void, after Office found that he is an Alien, the King ſhall Preſent, *Parſons Law, chap.* 10. *f.* 74. Or if a Villain doth purchaſe an Advowſon, his Lord ſhall Preſent, becauſe the Lord upon ſuch Purchaſe by the Villain, may claim the Inheritance of the Advowſon, and upon ſuch Claim the Intereſt thereof ſhall be veſted in him, and then the Lord in his own Right ſhall Preſent to an Avoidance, *Parſons Law, chap.* 10. *fol.* 75. And Note, That if the Lord doth Preſent his Villain to a Church, this is no Enfranchiſement of him, *Mich.* 8 *Jac. C. B. Waller*'s Caſe, *Parſons Law, Chap.* 9. *fol.* 72.

Alſo the Right of Preſenting may be forfeited by Alienation; for if Leſſee for Life of a Mannor, to which an Advowſon is appendant, alien the Mannor, by which he commits a Forfeiture, and after the Church voids, the Leſſor may Preſent, and that before his Entry into the Mannor for the Forfeiture, becauſe his Entry is lawful in any part, 19 H. 6. 33. 16 E. 3. *Quare Impedit* 146. *Contra* 39 *E.* 3. 21. So if he aliens one Acre of the Mannor only with the Advowſon, by which the Advowſon is appendant to the Acre, the Leſſor may Preſent, and that before Entry into the Acre, *Rolls Abr.* 2. *p.* 352. *Contra* 18 E. 3. 44.

If Tenant for Life of an Advowſon in groſs, doth grant it in Fee, it is no Forfeiture; yet if he doth levy a Fine thereof, *&c.* this is a Forfeiture to him in Reverſion: But if after ſuch Fine levied, and before any Claim made by him in Reverſion, the Church doth void, altho' the Reverſioner doth then Preſent; yet it is ſaid, that he ſhall not have the Preſentment: For notwithſtanding the Forfeiture, until he in Reverſion hath made his Election, to take advantage thereof, the Eſtate of the Tenant for Life is not determined; and if he ſhould make his Claim after the Death of the Incumbent, yet the preſent Avoidance ſhall be a Chattel veſted in the Tenant for Life, which cannot be deveſted by the Preſentment of him in Reverſion, *Trin.* 13 *Car. B. R. Springe* & Sir *Julius Cæſar*'s Caſe, adjudged upon a Writ of Error, *Rolls Abr.* 2. *p.* 352. *Co. Lit.* 251. *Paſch.* 12 *Car. Springe* v. Dame *Cæſar*, *Jones* 391. Yet *Quære* for *Paſch.* 7 *Car. C. B.* in the Caſe of *Merton*-College *v. Wood & Ramſey*, *Lit. Rep.* 366. the Court ſeemed to be of another Opinion. But if a Diſſeiſor of a Mannor,

to

to which an Advowſon is appendant doth alien, the Diſſeiſee may Preſent before his Entry into the Mannor, 19 H. 6. 33. *b.* But *Quære :* For *Brook* thinks he cannot make Title without the Mannor, *Br. Quare Impedit* 11. But if the Diſſeiſor of a Mannor to which, *&c.* doth Preſent, when the Church is void, if the Diſſeiſee doth re-enter into the Mannor, he may Preſent at the next Avoidance, 14 H. 6. 15, 16. So if the Diſſeiſee doth re-enter when the Church is void, he may Preſent, and have a *Quare Impedit*, by *Townſend*, 2 H. 7. 2.

And here Note : If one that is ſeiſed of an Advowſon doth Leaſe the ſame for Years, and the Leſſee doth accept of a Preſentation from the Leſſor, this is an Extinguiſhment of the Leaſe. So if a Man doth Preſent to his own Church, as Proctor to another, by this he loſeth his Advowſon, 42 *Eliz. C. B. Rudd* v. *Topſey*, *Owen* 142. *Litt. Rep.* 282. And if a Biſhop doth Preſent by Uſurpation unto an Advowſon, as in the Right of his Church, and his Clerk doth die Complete Incumbent, *Quære*, Whether the Advowſon be not in Mortmain, and forfeited to the King : See 47 E. 3. 11.

CHAP. XII.

Of LAPSE.

IN the laſt place, the Right of Preſenting may go from the true Patron to others, by his neglect. And firſt, By not Preſenting in ſuch time, or taking ſuch Courſe in Law, as to prevent the Right of Preſenting from going to another, by reaſon of Lapſe : For ſo it may do, if the Church, or Benefice, be of the Patronage of a common Perſon in moſt Caſes ; that is, unleſs it be a Donative : For they remaining void, never go in Lapſe ; but the Ordinary may compel the Patron to fill the ſame by Church Cenſures, *Paſch.* 3 *Jac. Fairchild* v. *Gair*, *Yelverton* 61. Tho' uſually a free Chappel is Donative, and ſo goes not in Lapſe, yet, by the Foundation, or after Compoſition, it may be Preſentative, and ſo be ſubject to Lapſe, and yet remain free from the Juriſdiction of the Ordinary in whoſe Dioceſs it is ſituate, in *Rawſon* & *Burgues* Caſe, *Trin.* 23 *Car. B. R. Stiles* 82, 83. But if a Church, or Benefice, be of the Patronage of the King, or he hath a Right of Preſenting thereto, he can never loſe his Turn to the Ordinary, by his neglect of preferring his Clerk thereto : For altho' it hath been enacted :

That of Churches being vacant, the Advowſons whereof belong to the King, and other Preſent to the ſame ; whereupon Debate ariſeth between the King, and other, if the King, by the Award of the Court, doth recover his Preſentation, tho' it be after the Lapſe of Six Months from the time of the Avoidance, no time ſhall prejudice him, ſo that he Preſent within the ſpace of Six Months, *Stat.* 17 E. 2. *c.* 8.

From which it ſeems to be, that if the King had not Preſented, his Church, as well as a common Perſon's, ſhould go in Lapſe, yet the Law is not taken ſo to be, *Mich.* 28 *&* 29 *Eliz. Beverly* v. *Biſhop of Canterbury & Cornwell*, 1 *Anderſon* 148. *Trin.* 4 *Jac. King* v. *Matthew*, *Brownlow & Gouldsborough* 1. and by *Yelverton* 90. *Dr. & Student*, *l.* 2. *c.* 36. 2 *Inſt.* 273. And the Reaſon may be, becauſe

becauſe the Words are not particular enough: For tho' the Statute of *Weſtminſter* 2. ordains, That Plenarty by Six Months, ſhall barr the Party that hath Right, yet it ſhall not barr the King, becauſe he is not expreſly named in the Statute. So no Statute of Limitation ſhall barr him: For his Prerogative, *Nullum tempus occurrit Regi*, ſaith *Jones*, ſhall not be taken away by a general Statute, *Hil.* 20 *Eliz. C. B. Standen*, &c. v. *the Univerſity of Oxon & Whitton*, *Jones* 21. And therefore not by theſe general Words, as I ſuppoſe: And ſo 'tis ſaid in *Magdalen-College Caſe*, 11 *Coke* 74. *b.* and the ſame Caſe, *Rolls* 1 *Rep.* 151. And in caſe the King doth not Preſent, all that the Ordinary can do, is to ſequeſter the Profits of the Church, and appoint a Clerk to ſerve the Cure, 18 E 3. 21. 14 H. 7. 21. *Dr. & Student l.* 2. *c.* 36.

But that we may the better know when the Title of Lapſe doth take place as to ſuch Benefices the Preſentment to which may be loſt by Lapſe, we muſt firſt conſider, How, and by what Means, the Church in queſtion doth become void. For in ſome Caſes the Ordinary muſt give Notice of the Avoidance, before the Patron is bound to Preſent, or the Title of Lapſe can accrue to him upon the neglect of Preſenting. In other Caſes the Patron muſt take Notice of the Avoidance, and make Preſentment at his peril, within ſuch time as the Law alloweth him to provide for the Church. But in what Caſes Notice of an Avoidance is to be given by the Ordinary, before Lapſe can run; and when it runs from the very time that the Church is void, hath been already declared in the foregoing Chapters, *viz.*

From the time that a Church is void, where Notice is not neceſſary, and from the Time of Notice duly given of an Avoidance in ſuch Caſes when it is neceſſary, and not from the Time of Notice given of the Refuſal of a Clerk Preſented, 14 H. 7. 21. 15 & 16 *Eliz. Dyer* 327. *Mich.* 15 *Eliz.* 3. *Leonard* 46. *Paſch.* 3 *Eliz. B. R.* Every Patron, as well Lay-man as Clerk, hath by the Common Law Six Months allowed him to provide for his vacant Church, within which no Ordinary can Collate by reaſon of Lapſe, *Dr. & Student* 116. *b. Cuſtoms of Normandy*, *c.* 1. *Patronage* 870. which Six Months allowed are to be accounted ſuch Months as make an entire Half-Year, conſiſting of 182 Days, *Paſch.* 5 *Jac. Catesby* v. *Baker & the Biſhop of Peterborough*, *Yelverton* 100. *Trin.* 5 *Jac. Biſhop of Peterborough* v. *Catesby*, 2 *Cro.* 166. 6 *Co.* 61. and not according to Twenty eight Days in the Month, as ſome have thought, 22 H. 7. *Kelewey* 88. *Trin.* 27 *Eliz. Albany & Biſhop of St. Aſaph's* Caſe, 1 *Leonard* 31. (but the Law doth not regard the odd Days in the Year); within which Six Months allowed, every Patron muſt Preſent his Clerk; yea, tho' an Infant, or Feme Covert; for Nonage, or Coverture, will not excuſe this Neglect, or prevent a Lapſe, 33 E. 3. *Quare Impedit* 46. *Mich.* 15 *Eliz. C. B.* 1 *Leon.* 32.

Tho' the Patron hath Six Months as aforeſaid, before Lapſe incurs, yet it concerns him not to delay Preſenting till the Six Months be almoſt expired: For if he doth Preſent but one Week before the Six Months be ended, the Ordinary may pretend that he hath not time to examine the Clerk. Or if the Ordinary refuſe the Clerk for Inability, becauſe Unlearned, &c. the Patron will not have time to Preſent a new within the Six Months, but Lapſe may incur. And tho' the Patron neglecting to Preſent, doth bring his *Quare Impedit* againſt the Biſhop within the Six Months, if the Church remained open for the time to his Preſentment, had it been made; Lapſe ſhall not be prevented by ſuch Device, or the Ordinary barred from Collating: For 'tis moſt unreaſonable, that the Church by ſuch Tricks ſhould be kept void, or that the Patron ſhould make advantage of an unjuſt Suit, and the Ordinary be puniſhed for doing nothing amiſs, *Mich.* 15 *Jac. Brickhead* v. *Arch-Biſhop of York*, *Hobart* 200.

In the Caſes in which Notice is to be given, the Patron neglecting from Year to Year to Preſent, Lapſe doth not run to the Ordinary; yet if in ſuch caſe a Stranger doth Preſent, and his Clerk is Inſtituted and Inducted, and not interrupted by the Patron until Six Months, (accounting from the Induction) be expired, the Patron is without Remedy for that Turn: For that (tho' he had not Notice from the Ordinary of the Avoidance) yet the Induction of the Stranger's Clerk is a notorious Act, of which the Patron as well as the Country might have taken Notice, *Paſch.* 39 *Eliz. Servein* v. *Biſhop of Lincoln*, *Noy* 65. *Paſch.* 17 *Jac.* Sir *William Elvis* v. *Arch-Biſhop of York*, and others, *Hobart* 318.

But if a Biſhop doth Collate his Clerk, either before he gives Notice of an Avoidance, where Notice is to be given, or at any time within the Six Months limited to the Patron to fill his Church, the Patron may at any time after Preſent his Clerk: For tho' wrongful Collation makes ſuch a Plenarty as ſhall barr the Lapſe to the Metropolitan and King, yet is no barr to the true Patron; and if the Biſhop doth admit the Patron's Clerk, the other is out *ipſo facto*; or if the Biſhop will not admit him, the Patron may, as well then as at any time before, have his Remedy at Law againſt the Biſhop, *Hil.* 17 *Jac. Gawdy* v. *Biſhop of Canterbury*, and others, *Hob.* 302. And therefore, if the Ordinary doth Collate within the Patron's Six Months, and then the Six Months paſs, no Preſentation being made by the Patron, the Ordinary, if he will have the benefit of a Lapſe, muſt Collate of new; for the firſt Collation being by wrong, cannot by time become rightful, and therefore doth not put the Patron to his *Quare Impedit*, for that it was but as a Proviſion for the time, and there ought to be a new Act, before it ſhall be a good Collation, by *Rolls* 2. *p.* 368. And yet it is ſaid, that if the King Preſent *Ratione Lapſus*, when he hath no Title of Lapſe, that ſuch Preſentation is void, and that the Inſtitution thereupon is but as a Collation of the Biſhops, and void to the Patron, but full as to all others; ſo that ſuch a Plenarty doth barr the Lapſe of the Metropolitan and King, *Paſch.* 17 *Jac. Gawdy* v. *Biſhop of Canterbury*, and others, *Hobart* 302.

But if Inſtitution in ſuch caſe be but as a Collation, I ſuppoſe, it is a Collation by wrong only, and therefore hath no greater Effect than ſuch a Collation hath that is made deſignedly by the Biſhop, which is only, as hath been ſaid, looked upon to be proviſional for a time: And therefore, if after ſuch Inſtitution, or Collation, neither the Patron, nor other Perſon, by Uſurpation, doth Preſent to the Biſhop within the Six Months, it might ſeem (according to the Caſe in *Rolls Abridg.*) that the Biſhop may Collate upon ſuch Collatee, as unto a Church lapſed to him, and that the other might be thereby outed of his Incumbency. (*Quære.*)

However, if the Patron, or other Perſon, doth Preſent to the Ordinary before the Six Months be expired, and the Preſentation is void in Law, the Ordinary is not bound to admit the Clerk therein nominated, as I conceive, but may ſuffer Lapſe to run to himſelf (and the Preſentee is without Remedy), if within time no other Preſentation is made Or if the Patron, or Uſurper, do make a Preſentation that is good in Law, and in due time, it may fall out, that the Right of Preſenting may go to the Biſhop by Lapſe, ſuch Preſentation notwithſtanding: For in ſeveral Caſes the Ordinary may refuſe to Admit and Inſtitute the Clerk Preſented, by occaſion of which Lapſe may come to him; and all things that are juſt Cauſes to deprive a Clerk, are juſt Cauſes to refuſe a Clerk when Preſented, 5 *Co.* 58. *a. Parſ. Counſ.* 4, 5.

But if a Lay-man be Preſented, and the Ordinary doth Inſtitute him; and after the Patron's Six Months be ended, the Ordinary doth deprive him, and his Admiſſion, Inſtitution, and Induction, are declared to be null, yet this ſhall not relate to give Title of Lapſe to the Ordinary, *Dyer*, 3 *Eliz.* 294. *Rolls Abr.* 2. *p.* 220.

If the Clerk refuſed be the Preſentee of a Biſhop, or other Eccleſiaſtical Patron, the Ordinary is not bound to give Notice of the Refuſal, 18 H.7. *Keilwey* 49 *b.* 14 *H.* 7. 21. *a. Mich.* 15 *Eliz.* 3 *Leonard* 47. Or if he ſhould do it, ſuch Patron can neither revoke nor vary his Preſentation, by Preſenting one afterwards that is better qualified, without the Ordinary's Conſent; the Law ſuppoſing him that is a Spiritual Perſon, to be capable of chooſing an able Clerk, 31 E. 1. *Quare Impedit* 185. *Rolls* 2. *p.* 354. *Mich.* 1 *H.* 8. *Keil.* 154. *Mich.* 3. *Car. Stoke* v. *Stiles Latch* 191, 253. And ſo Lapſe may come to him unavoidably, if the Clerk firſt Preſented be juſtly refuſed. But if the Clerk Preſented be the Preſentee of a Lay-Patron, and be refuſed by the Ordinary, the Ordinary in moſt Caſes is bound to give due Notice to the Patron of ſuch Refuſal: For if in ſuch Caſe no Notice is given, no Lapſe can run, tho' no other Clerk be Preſented, 38 E 3. 2. Nor if Notice be given, unleſs upon Tryal the Clerk was juſtly refuſed. But if a Clerk Preſented be for good Cauſe refuſed, and Notice thereof be in due time and manner given to the Patron, and no other Clerk be Preſented in time, Lapſe doth run to the Ordinary, *Mich.* 15 *Eliz. C. B.* 3 *Leonard* 46.

If the Clerk, whether of an Eccleſiaſtical, or Lay-Patron, be not refuſed, but only the Biſhop doth delay the Examination of him, whereby Six Months paſs, tho' no Writ be brought by way of prevention, yet Lapſe ſhall not incur, becauſe the Church remains void by the Biſhop's own fault, and he is thereby a Diſturber: And generally, if the Biſhop be a Diſturber, the Church doth not go in Lapſe, altho' it remains void by the ſpace of Six Months, *Trin.* 3 *Jac. B. R. Palmer & Smith*'s Caſe, *per Cur. Rolls Abr.* 2. *p.* 366. But in what Caſes the Biſhop may juſtly refuſe a Clerk, and in what he muſt give Notice, and how, is hereafter declared.

If the Church doth become litigious, which is, when two ſeveral Patrons Preſent their ſeveral Clerks to a void Church, within the Six Months, *Rolls* 2. *p.* 384. *Paſch.* 26 *Eliz. C. B. Gerard*'s Caſe, 2 *Leonard* 168. the Biſhop therefore may ſuſpend Admitting the one Clerk and the other; by *Hobart, Mich.* 15 *Jac. Birckhead*'s Caſe *v. Biſhop of York*, *Hobart* 201. and ſuffer Lapſe to incur without any Enquiry, 34 H. 6. 41. 35 H. 6. 18. For tho' to award the Writ of *Jure Patronatus*, be the Remedy in this Caſe, to ſatisfie the Biſhop who hath the beſt Right, and to ſecure him, if he Admit the Clerk according to the Verdict found in the *Jure Patronatus*, from being a Diſturber; yet the Biſhop is not bound to award the ſame *ex Officio*, but only at the Prayer of the Party, *viz.* either Patron or Clerk, 8 *E.* 4. 24. 5 *H.* 7. 20. *b. per Keble*, 22 *H.* 6. 30 *per Markh.* 34 H 6. 38. *Broke, Title, Coſts* 2. *Paſch.* 26 *Eliz. Gerrard*'s Caſe, 2 *Leonard* 168. For if he were compelled to award his Writ, *Ex Officio*, 'tis ſaid, that Lapſe in ſuch Caſe could never come to him, 35 *H.* 6. 19. And yet by ſome it is ſaid, that the Biſhop ought to make this Inquiſition at his peril, 34 *H.* 6. 11. by *Priſot*. But the former Opinion takes place.

If when the Church is litigious, the Ordinary is required to award a *Jure Patronatus*, and doth not award it accordingly, he is a Diſturber, and the Right of Preſenting doth not Lapſe from the true Patron, if his Clerk be not Admitted within the Six Months, 34 *H.* 6. 40. *Br. Quare Impedit* 12.

Or

Or if a Clerk be Preſented to the Ordinary, and he doth refuſe to Admit him without cauſe, and after ſuch Refual, the Church doth become litigious, the Ordinary(foraſmuch as theChurch had not remained void, but by his own Act) ſhall not have the Benefit of Lapſe, altho' the Church be not filled within the Six Months, 22 *E.* 3. *Quare Impedit* 194.

After the Commiſſioners upon a *Jure Patronatus* awarded, have certified the Biſhop of the Right, as it is found before them, the Biſhop ſhall not take advantage of the Lapſe ; that is, if the Clerk of the Patron for whom it is certified, doth afterwards make a new Requeſt to the Ordinary to be Admitted, which may be done upon the firſt Preſentment, without any new Preſentation or Requeſt of the Patrons ; but without ſuch After-Requeſt,the Ordinary may have the void Turn,as by Lapſe,ſuch Enquiry and Certificate notwithſtanding, 34*H.*6.12.

And ſo he may, if the Six Months end before Certificate be made in whom the Right is upon ſuch Enquiry, altho' the Enquiry was depending upon a *Jure Patronatus* awarded before they ended, *Mich.* 15 *Jac. Birckhead* v. *Arch-Biſhop of York*, *Hobart* 201. That is, (I ſuppoſe) if the Biſhop after a *Jure Patronatus* required, did not unduly delay to award and execute the ſame : But if the Biſhop doth enquire by a *Jure Patronatus*, and thereby a Stranger is found to be the true Patron, if the Stranger Preſent within the Six Months, the Biſhop is bound to receive his Clerk ; but if not, and the Diſturber doth Preſent, the Biſhop is bound to receive the Diſturber's Clerk, *Br. Quare Impedit* 12. (*Quære.*)

Alſo if when a Church is litigious, no *Jure Patronatus* is awarded, but only an Aſſiſe of Darrein Preſentment, or *Quare Impedit* is brought by one Party, who doth recover againſt the other, if the Biſhop was not named in the Writ, and the Six Months paſs pendant the ſame, Lapſe ſhall incur, for that there was no default in the Biſhop, 1 *E.* 1. *Rot. patentium Memb.* 15. 6 *E.* 1. *Rot. Pat. Memb.* 25. 33 *E.* 3. *Quare Impedit* 194. *Mich.* 3 *Jac. Lancaſter* v. *Low*, 2 *Cro.* 92. And tho' the Patron in ſuch caſe, doth recover within the Six Months, yet if the Six Months paſs, before the Writ to the Biſhop be taken forth, Lapſe ſhall incur, 17 *E.* 3. 75. *F. N. B.*. 48. b. And if the Ordinary doth Collate before the Receipt of the Writ, his Clerk ſhall not be removed, 11 *H.* 4. 80. And ſo it is, if after the Recovery, within the Six Months, the Defendant doth bring a Writ of Error, and the Six Months do paſs pendant the ſame, 17 *E.* 3. 75. unleſs the Plaintiff before the Six Months by ſuch means paſs,doth bring *Quare Incumbravit* againſt the Biſhop, for thereby it is ſaid, that Lapſe ſhall be prevented, 17 *E.* 3. 75. but *Quære.* However, it is generally ſaid, that if a *Quare Impedit* in any caſe be brought, and the Biſhop be named therein, Lapſe ſhall not paſs to the Ordinary *pendente breve*, *Mich.* 3 *Jac. Birckhead* v. *Arch-Biſhop of York*, *Hobart* 200. 1 *Inſt. f.* 344. *b.* Accordingly, if a Man brings a *Quare Impedit* againſt Patron, Ordinary, and Incumbent ; and the Ordinary pleads, that he claims nothing but as Ordinary, and after the Plaintiff recovers, and the Patron, and Incumbent do bring a Writ of Error, depending which, the Biſhop dies, and another is made Biſhop ; and afterwards, the Incumbent voiding the Church in controverſie by taking a ſecond Benefice, the ſaid Church remains void Six Months ; and after this, the firſt Judgment is affirmed, no Lapſe incurs to the Ordinary, as was adjudged, this matter being returned by the new Biſhop, upon the Writ to him directed,*Paſch.* 3 *Jac. B. R. James* v. *Bolton*, *Rolls Abr.* 2. *p.* 366.

It is a Rule, that the Metropolitan ſhall never Preſent, or Collate by Lapſe after Six Months, but when the immediate Ordinary might have Collated by Lapſe within the before going Six Months, and had ſurceaſed his time ; and ſo it is, if the time be devolved to the King ; therefore, if the Biſhop be named

med in the Writ, the Lapſe is ſtopped, not only againſt him, but the Metropolitan and the King, 1 *Inſt.* 344. *b.* The Right of Preſenting by Lapſe, doth go, generally ſpeaking, firſt, to the next immediate Ordinary, and therefore firſt to the Biſhop of that Dioceſs in which the Church is ſituate, *Stat.* 25 *E.* 3. *c.* 7. *Doctor and Student*, *c.* 12. & *c.* 32. That is, if the Church be not of the Patronage of ſuch Ordinary, for then it goes immediately to the Metropolitan.

If an Arch-Biſhop doth viſit an inferiour Dioceſs, and doth inhibit the Biſhop during the Viſitation (as the uſe is), and afterwards during the Viſitation and Inhibition, and before any Releaſe made by the Arch-Biſhop, ſome Church within the ſaid Dioceſs doth Lapſe, altho' that the Juriſdiction of the Ordinary be ſuſpended during the Viſitation, ſo that he cannot in any caſe Collate his Clerks himſelf, yet he ſhall have the benefit of the Lapſe, and not the Arch-Biſhop to whom, in this Caſe, the Biſhop muſt as a Common Perſon Preſent his Clerk, and the Arch-Biſhop as his Ordinary, ought to Inſtitute upon ſuch Preſentment, as was agreed by the Civilians, *Trin.* 13 *Car. B. R. Dodſon* v. *Lynn*, *Rolls* 2. *p.* 367.

In caſe the Ordinary dieth, or be deprived or tranſlated before he takes the benefit of a Lapſe incurred, it is ſaid, that the King ſhall have the Turn, *F. N. B.* 34. *g. Bracton*, *l.* 5. *f.* 404, 510. See *Mich.* 10 *Jac.* in *Colt* & *Glover*'s Caſe *v. Biſhop of Coventry*, *Hobart* 154. But ſome doubt, whether the King or Metropolitan ſhall have it, *Paſch.* 7 *E.* 6. *Dyer* 87. *b.* And I do rather think, that the Right doth go with the Spiritualties, to the Metropolitan, or other Warden of the Spiritualties, becauſe it is but a meer Truſt in Law, and hath no relation to the Temporalties which go to the King: And of this Opinion was *Noy* Attorney Gen', *Noy* 69. ſo *Rolls* 2. *p.* 367. & 345. From the immediate Ordinary, the Title of Lapſe, after half a Year, (that is, at the end of a whole Year, accounting from the time that the Patron is bound at his peril to take Notice of the Avoidance) goes to the Ordinary's immediate Superior; and therefore, if it went firſt to the Biſhop of the Dioceſs, it goes from him to the Metropolitan of the Province, *Mich.* 28 & 29 *Eliz. Beverly* v. *the Biſhop of Canterbury* & *Cornwall*, 1 *Anderſon* 148. And if it Lapſe firſt to the Metropolitan, as he is the Biſhop of a Dioceſs, (as the Arch-Biſhop of the Province of *Canterbury*, is Biſhop of the Dioceſs of *Canterbury*; and the Arch-Biſhop of the Province of *York*, is Biſhop of the Dioceſs of *York*) then in the next place it doth Lapſe immediately to the King; and ſo a Benefice doth Lapſe immediately from the Metropolitan to the King, when the Metropolitan is the very Patron, and doth neglect for his Six Months to Collate.

If the Metropolitan doth not within half a Year fill the Church, the Right of Preſenting to which, comes to him by Lapſe, or other Church, to which he may Collate, ſuch Right paſſeth from him to the King as Supreme Patron, *Mich.* 18 & 19 *Eliz.* in *Greendon*'s Caſe *v. Biſhop of Lincoln*, *Plowden* 498. *b.* And being once come to the King, the King may take his own time to Collate: And *Fitzherbert* ſaith, That the King in that Caſe doth Preſent by Lapſe as Ordinary: But the Title of Lapſe doth never go to the ſuperior Ordinary, but where it comes firſt to the inferior, (ſaving in the Caſe of the King's free Chappels, to which he Preſents by Lapſe in default of the Dean, in reſpect of his Supreme Eccleſiaſtical Juriſdiction, 27 *E.* 3. 8. *b. Co.* 5. *de Jure Eccleſiaſtico.* And therefore, if courſe be taken to ſtop Lapſe from going to the Biſhop in ſuch Caſes in which it would otherwiſe go, it ſhall never go to the Metropolitan, or King, 11 *H.* 4. 80. *F. N. B.* 48. *Roſwel's Caſe*, 6 *Co.* 52. *Fenk.* 281. *Mich.* 3 *Jac. Lancaſter* v. *Low*, 2 *Cro.* 93. And therefore, if Notice (where requiſite) is not given to the Patron, ſo that for want thereof Lapſe doth not come to the Biſhop, the Church remaining void Eighteen Months, it ſhall not go to the

the King, becauſe it never came to the immediate Ordinary, tho' it was only through his fault, or neglect, that it did not, 18 *Eliz. Dyer* 348. *Jenkins Cent.* 7. *Caſe* 7. And for the ſame Reaſon it is, that (tho' in other Caſes the Church is not full againſt the King but by Induction) yet if the Patron doth Preſent, and his Clerk is Admitted and Inſtituted, and doth forbear to be Inducted Eighteen Months, the King ſhall not Preſent upon him for Lapſe, the Inſtitution ſtopping the Lapſe from going to the inferior Ordinary, *Hob.* 154. *Colt* & *Glover's Caſe*, and by *Rolls Abr.* 2. *p.* 367. and by *Popham* in *Robins* & *Prince's Caſe*, *Hil.* 43 *Eliz. Gouldsborough* 164.

Where the Title of Lapſe is come to the King, if the King doth Preſent, and his Preſentee is Inſtituted, yet the King may revoke his Preſentation, and ſo null the Inſtitution at any time before his Clerk is Inducted; or if his Clerk be Inſtituted upon ſuch Title, and die before his Induction, the King may Preſent another, his Turn not being ſerved by the Inſtitution only of his Clerk, *Trin.* 32 *Eliz. Wright* v. *the Biſhop of Norwich*, 1 *Leonard* 156.

The King hath not only the Right of Preſenting to Churches which Lapſe to him during his own Reign, but alſo to ſuch which have Lapſed to any of his Predeceſſors, and no advantage taken by them thereof, contrary to the appearing Senſe of the Statute, 25 *E.* 3. *c.* 1. For by the true meaning of that Statute, King *Edward* the Third, and his Heirs, were only excluded from Titles of Preſentation in others Right, fallen before the time of that King, whereof any Church was then full, *Hil.* 9 *Car. King* v. *George Arch-Biſhop of Canterbury* & *Priſt*, 1 *Cro.* 355. and ſame Caſe, *Jones* 334. 11 *H.* 4. 8. *Vide* 11 *H.* 4. 4. 7*c*. *Contra.*

After a Church is Lapſed to the Biſhop, or Arch-Biſhop, it concerns them to take advantage thereof with all ſpeed, leaſt the Benefit be loſt; for after a Church is lapſed to the immediate Ordinary, if the Patron doth Preſent before he hath filled the Church, the Ordinary ought to receive his Clerk: For Lapſe to the Ordinary, is only an Opportunity of executing a Truſt, *viz.* of ſeeing the Cure ſupplied, in caſe of the Patron's neglect, which being performed by the Patron himſelf, the Ordinary can take no advantage by it, 11 *H.* 4. 80. 18 *E.* 3. 21. *a.* 13 *E.* 4. 3. 43 *E.* 3. 11. *a. Trin.* 18 *H.* 7. *Keilewey* 50. And by *Hobart* in *Colt* & *Glover's Caſe*, *p.* 154. 28 & 29 *Eliz. Beverly* v. *Biſhop of Canterbury*, and *Cornwell*, 1 *Anderſon* 148. *Doctor and Student*, *l.* 2. *c.* 36. If one hath the Nomination, and another the Preſentation, and the Six Months being incurred, he that hath the Preſentation only preſenteth to the Biſhop, before the Biſhop hath taken benefit of the Lapſe, without any Nomination made to him, in ſuch caſe the Biſhop is bound to Admit the Clerk, as the Clerk of the very Patron: By *Doderidge* in his *Compleat Parſon*, *Lect.* 12. *fol.* 67.

Or tho' the Patron did not Preſent within his Six Months, but the Ordinary did Collate before the Expiration thereof, the Patron is not thereby barred from Preſenting, but may Preſent after the Six Months be expired, and his Clerk ought to be received, *Co.* 6. *Green's Caſe* 29. & *Boſwell's Caſe* 50. But if the Biſhop, in ſuch Caſe, after the Six Months, and before any Preſentation exhibited, hath made a new Collation, the Patron is barred, *Rolls* 2. *p.* 368. *Co. Litt.* 344.

So tho' Lapſe be incurred to the inferior Ordinary, and the Arch-Biſhop doth Collate within the inferior Ordinary's Six Months, the Patron's Clerk, if he be Preſented, ought to be received; becauſe, the Collation of the Metropolitan is tortious, and doth not put the Patron to his *Quare Impedit*, but is null, and as no Collation to the Patron: By *Rolls*, *in his Abridgment* 2. *p.* 368.

But

But this is doubted of, and objected, That the wrong is here done to the Ordinary only, and not to the very Patron, 11 *H.* 4. 80. The like Law, if Lapſe be accrued to the Metropolitan; for then, if the Patron Preſent to the inferior Ordinary, whilſt the Church remains void, he is bound to receive his Clerk, and the Metropolitan is barred, *Booton* v. *Biſhop of Rocheſter*, *Hutton*, 24. *Doctor and Student*, *l.* 2. *c.* 36. But if either the Ordinary of the Dioceſs, or Metropolitan, hath Collated his Clerk, whilſt the Turn was reſpectively theirs, altho' the Clerk be not Inducted, the Patron's Clerk, if after that Preſented, is not to be Admitted, *Trin.* 10 *Eliz.* *Dyer* 277. Or if the inferior Ordinary, after the time is gone by Lapſe to the Metropolitan, hath Collated his Clerk to the Benefice that is in Lapſe, altho' this Collation be tortious to the Metropolitan, yet it ſeems, that it takes away the Preſentation of the Patron, ſo that he ſhall not Preſent, and is only an Uſurpation upon the Metropolitan: By *Finch*, *Judge at Somerſet-Aſſize*, Sir *Francis Popham* v. *Biſhop of Bath and Wells*, *Rolls* 2. *p.* 368. And thereby the Metropolitan is put out of poſſeſſion, and driven to his *Quare Impedit*, *Co.* 6. *Green's Caſe* 29. *b.* & *Boſwel's Caſe* 50. *Co. Litt.* 344.

It hath been a Queſtion, Whether the Biſhop ought to Admit the Patron's Clerk, after the Title of Lapſe is paſſed from the Metropolitan to the King? *Trin.* 10 *Eliz.* *Dyer* 277. and by *Hobart*, the Patron's Preſentation takes place, after the Church is lapſed to the King, if it be exhibited to the Ordinary before the King's: In *Colt* & *Glover's Caſe* v. *Biſhop of Coventry*, *Hobart* 157. Becauſe, the Patron's Right to Preſent continueth, until the Title by Lapſe be executed, and the King's Title is not veſted in him in this Caſe abſolutely, as other Titles are, but conditionally, *viz.* If he do Preſent before the Patron: Becauſe the King hath it only as Supreme Ordinary, *Hutton* 24. But by others, the Turn by Lapſe is ſo veſted in the King, that if the Patron's, or other Perſon's Clerk be Admitted to a Church, after 'tis come to the King by Lapſe, the King by *Quare Impedit*, may recover the Preſentment, and remove ſuch Clerk, *Mich.* 28 & 29 *Eliz.* *Beverly* v. *Biſhop of Canterbury*, *and others*, 1 *Anderſon* 148. *Trin.* 27 *Eliz.* *Baskervill's Caſe*, *Co.* 7. *p.* 28. 27 *E.* 3. 85. *Mich.* 29 & 30 *Eliz.* *C. B.* *Biſhop of Lincoln's Caſe*, *Brownlow* & *Gouldsborough* 1. 63. *Hil.* 6 *Jac.* *Cumber* v. *Biſhop of Chicheſter*, *cited in the Caſe of the King* v. *the Arch-biſhop of Canterbury* & *Priſt.* *Trin.* 4 *Car.* *C. B.* *Hetley* 125. And this latter Opinion is taken to be the Law. So if the King hath Title by Lapſe, to Preſent to a Prebend of his free Chappel, for that the Dean thereof hath not Collated to it within Six Months, tho' the Dean doth Collate before the King Preſents, yet the King ſhall remove his Clerk, 27 *E.* 3. 8. *b.*

But tho', as hath been ſaid, the King may remove the Patron's, or a Stranger's Clerk, that comes in upon his Lapſe, yet if ſuch Clerk doth die Incumbent of the Church, before the King doth Preſent, the King hath loſt the advantage of the Lapſe, and ſhall not Preſent afterward, or remove the Patron's ſecond Preſentee, *Trin.* 27 *Eliz.* *Baskervil's Caſe*, 7 *Cro.* 28. *Paſch.* 26 *Eliz.* *Beverly v. Arch-biſhop of Canterbury*, *Ower.* ſame Caſe, 1 *Anderſ.* 148. & 3 *Cro.* 44. *Mich.* 2 *Jac.* *King* v. *Biſhop of Winton*, 2 *Cro.* 53. *Mich.* 30 & 31 *Eliz.* *Beverly* v. *Cornwall*, *Moor* 269. *Hil.* 6 *Jac.* *Cumber* v. *Biſhop of Chicheſter* & *Green* 2 *Cro.* 216. *Mich.* 29 & 30 *Eliz.* *Biſhop of Lincoln.* *Owen the Caſe of the King* v. *the Arch-biſhop of Canterbury* & *Priſt.* *Trin.* 4 *Car.* *C. B.* *Hetley* 125. Becauſe the King is to have but one Turn, and that the next Turn, and if the Law ſhould be otherwiſe, the King by ſuffering divers Uſurpations upon his Lapſe, might even diſinherit the very Patron; and the Rule, *Nullum tempus occurrit Regi*, is not to take place where the King is limited to a Time certain.

The

The like Law upon the ſame Reaſon is ſaid to be, if the Church, before the King doth Preſent, be voided by any other means, as by Reſignation, unleſs the Reſignation be by Fraud on purpoſe to barr the King, *Trin.* 6 *Jac. Comber* v. *Biſhop of Chicheſter*, *Brownlow* & *Gouldsborough* 1. 161. and ſame Caſe, 2 *Cro.* 216. *Paſch.* 30 *Eliz. Gouldsborough*, *p.* 83. & 86. Yet on the contrary it is ſaid, that if the Clerk of the Patron, or a Stranger, that is Preſented to a Church in Lapſe to the King, doth after his Induction reſign, it is no prejudice to the King's Turn, *Brownlow* & *Gouldsborough* 1. *p.* 64. *the Caſe of the King* v. *the Arch-biſhop of Canterbury* & *Priſt*, *Trin.* 4 *Car. C. B. Hetley* 125. And ſome diſtinguiſh in this Caſe, betwixt an Avoidance by the Act of God, as Death, (in which Caſe it is paſt Queſtion, that the King's Turn is gone) and the Act and Fault of the Incumbent, as by Reſignation, Deprivation, or the like: And therefore it hath been adjudged, That if he that is Preſented upon the King's Lapſe, doth refuſe to pay the Tenths due from him to the King, and the Refuſal is certified by the Biſhop, whereby the Church is void, the King may then Preſent as to his Turn by Lapſe, or remove another's Preſentee, that comes in upon ſuch Avoidance, *Mich.* 30 & 31 *Eliz. Queen* v. *Biſhop of Lincoln* & *Leigh.* 3 *Cro.* 119. & *Leonard* 4. *Caſe* 105. & *Paſch.* 30 *Eliz. La Royne* v. *L'Eveſque de Lincoln*, *Moor* 259. *and ſame Caſe by Owen.* But *Quære*; for it ſeems moſt reaſonable, that the King ſhould loſe his Turn by Lapſe, if he Preſent not during the Incumbency of the Clerk of him that uſurped upon his Lapſe, whether it become void by his Death, or other means, unleſs there be Fraud in the Caſe; and ſo it was held to be, *per Cur. Trin.* 31 *Eliz. C. B. the Queen* & *Biſhop of Norwich*, 4 *Leon. Caſe* 351.

However, if the Ordinary doth Collate to a Benefice that is lapſed, as well from him as the Patron, to the King, and his Collatee doth die ſeiſed of the Church, it ſeems, that the King may afterwards have his Turn, becauſe the Church was not thereby filled, either againſt the Patron, or the King: Not againſt the King, becauſe the Collation of the Ordinary doth gain no poſſeſſion againſt him; and the King may Preſent without being put to his *Quare Impedit*; but whether (as it ſeems to be) againſt the Patron, *Quære*, by *Rolls Abr.* 2. *p.* 368.

If in the Caſe of Lapſe, or other the like Caſe, when the King hath Right to Preſent but to the preſent Avoidance, and the Church is filled againſt him by Inſtitution, and Induction, ſo that the King is driven to his *Quare Impedit*; and after he hath recovered, he confirms the Incumbent's Eſtate, yet he may Preſent after ſuch Incumbent's Death: For when the King hath recovered, he hath a Right to Preſent uncontrollably by the Record, and may at his Pleaſure ſue forth Execution, and the King's Confirmation, or Grant, that the Incumbent ſhall not be moleſted during his Life, cannot be pleaded by the Patron, in barr of the King's Right to Preſent by Vertue of his Judgment, 9 *E.* 3. 20. & 18 *E.* 3. 21. *the Abbot of Thorney's Caſe there cited*, *Paſch.* 19 *Car.* 2. *Henry Edes* v. *Walter Biſhop of Oxford*, *Vaughan* 26. But if the King hath Preſented for Lapſe, and his Clerk is Inſtituted, and Inducted, and then being ſued, doth loſe his Incumbency by ill Pleading, the King ſhall not Preſent again, for that his Title was once executed, *Mich.* 32 *Eliz. Arundel* & *the Biſhop of Glouceſter's Caſe*, 1 *Leonard* 194.

CHAP.

CHAP. XIII.

Of Uſurpation, and the ſeveral Conſequences thereof; and of the Writ of Right of Advowſon.

AS the Patron by his neglect, doth loſe the Right of Preſenting, upon the account of Lapſe, ſo upon the account of Uſurpation: For thereby the Fee of an Advowſon may be gained, 9 *H.* 6. 30. *b.* 31. that is, not only the Avoidance upon which the Uſurpation is made, but the whole Eſtate of the Advowſon againſt all the World, by *Hobart, Paſch.* 17 *Jac.* in Sir *William Elvis's Caſe* v. *Arch-biſhop of York*, *Hobart* 322. *Hil.* 14 *Car. B. R. Harper* v. *Bailiffs and Burgeſſes of Derby*, *Jones* 427.

That an Uſurpation may be ſaid to be truly ſuch, and to have the effect of gaining the poſſeſſion of an Advowſon, ſeveral things muſt concur; as firſt, it muſt (generally ſpeaking) be initiated by a Preſentment made to the Church: Therefore, if a Perſon affirming himſelf to be Patron of a Church that is void, doth pray the Ordinary to Admit him thereto, (for that he cannot Preſent himſelf) and the Ordinary doth Inſtitute him accordingly, this gains no Poſſeſſion, for that there is no Preſentation, and a Man cannot plead Plenarty of his own Preſentment, 14 *H.* 8. 3. *a.* So if a Biſhop doth Collate without Title to a Church Preſentable, and his Clerk is Inducted, the rightful Patron is not thereby put out of Poſſeſſion, as by Uſurpation; for it appertaining to the Biſhop's Office to provide for the void Church, until ſuch time as the Patron doth make Preſentment of his Clerk thereto, his Collation ſhall be intended only to be but as a Proviſion for the Celebration of Divine Service, during the Vacation: For if the Patron's Clerk, notwithſtanding ſuch Collation, be not received when Preſented, and the Patron brings his *Quare Impedit*, Plenarty by Six Months, in ſuch Caſe, cannot be pleaded againſt the Patron, *Mich.* 3 *Jac. in Boſwell's Caſe*, 6 *Co.* 50. 14 *H.* 8. 3. *Trin.* 44 *Eliz. Green's Caſe*, 6 *Co.* 30. 1 *Inſt. f.* 344. *b. Smallwood* v. *the Biſhop of Coventry, &c.* & *Marſh, Savile, Caſe* 188. And as not one, ſo not two or three more Collations do gain any Poſſeſſion of an Advowſon to a Biſhop, tho' he ſhould not Collate as Ordinary, but as Patron, *Paſch.* 33 *Eliz. Queen* & *Biſhop of York's Caſe*, 1 *Leon.* 226. *and ſame Caſe*, 3 *Cro.* 240. And if the Inheritance of an Advowſon be in a Biſhop, in Right of his Biſhoprick, but the ſame is Leaſed out for Years, or Life, a Collation by the Biſhop, ſhall no more prejudice the Leſſee, than any other Stranger, who hath the Inheritance in himſelf, *Paſch.* 32 *Eliz. Sale* v. *Biſhop of Coventry* & *Marſh*, 1 *Anderſon* 141. & *Savile, Caſe* 188.

Tho' generally, as hath been ſaid, an Uſurpation muſt be initiated by a Preſentment, and not by Collation, yet if a Biſhop doth Collate upon him that hath Right to Collate to a Church, his Collation doth make an Uſurpation and Plenarty by Six Months, and doth put him in whom the Right of Collating was, to his Writ of Right to recover his Advowſon, 17 *E.* 3. 64. *b. Dean of Lincoln's Caſe*, *Mich.* 3 *Jac.* in *Boſwell's Caſe*, 6 *Co.* 50. *Trin.* 44 *Eliz. Green's Caſe*, 6 *Co.* 29. 1 *Inſt.* 344. *b.*

And as an Uſurpation muſt be initiated by a Preſentation, ſo ſuch Preſentation ought to be valid, and not void in Law: Therefore, if a Maſter of a College be Preſented by Maſter and Fellows, or a Dean, by the Dean and Chapter, the Preſentation being void, tho' the Maſter, or Dean, be Admitted, makes no Uſurpation to the diſpoſſeſſing of a rightful Patron, 14 *H.* 8. 3. So

if

if a Church being void, a Stranger doth Preſent his Clerk upon a Simoniacal Contract, and the Clerk is Admitted, Inſtituted, and Inducted thereupon, and Six Months paſs, yet this is not any Uſurpation upon the rightful Patron, altho' that the Clerk was ignorant of the Contract, for that ſuch Preſentation, and Induction are void in Law, and the Clerk is as never Preſented, *Stat.* 31 *Eliz. c.* 6. And in this Caſe the rightful Patron, and not the King, ſhall Preſent, *Co. Litt.* 120. *a.*

And if a Man and his Wife do joyn in a Preſentment to a Church, to which they have no Right, this Preſentation doth gain nothing to the Wife; for the Wife is at the Will of her Husband, and ſo it is but as the Act of the Husband; but otherwiſe it is, when the Wife hath Right, *Paſch.* 15 *Car. C. B. Neſton* v. *Hampton, March Caſe* 146. And for this Reaſon, tho' the King may Preſent by Uſurpation, yet he ſhall be no Uſurper by Preſenting, if in his Letters of Preſentation he doth Preſent by ſome Title which he hath not, ſuch Preſentation being void; but if he Preſent generally, mentioning no Title at all in his Preſentation, and his Clerk be received, and dies, he hath gained a Title by Uſurpation, *Hil.* 17 & 18 *Car.* 2. *Sir John Tuſton* v. *Sir Rich. Temple, Vaughan p.* 14.

That an Uſurpation may have the effect of gaining the Poſſeſſion of the Advowſon to a Stranger, 'tis not neceſſary that the Stranger doth Preſent in his proper Perſon: For if the King doth Preſent in the Right of his Ward, who hath not any Right to an Advowſon, this doth veſt the Inheritance in the Ward by Uſurpation, becauſe the King expreſly Preſented in his Right, 42 *E.* 3. 4. *b.* 43 *E.* 3. 14. *b.* 22 *E.* 4. 9. *b.* *Quære*, For this ſeems contrary to the Books before cited, *viz.* that where the King mentions a Title which he hath not, his Preſentation is void, and ſhall not be any Uſurpation. But however, ſo it is in the Caſe of a common Gardian, *Rolls* 2. *p.* 370. *Contra* 17 *E.* 3. 60. 7 *H.* 4. 26. *b.* And alſo in the Caſe of a Proctor, with reſpect to the Perſon for whom he is Proctor; yea, and tho' he was not his Proctor, if he did Preſent as ſuch, or if he Preſented as Proctor, or as Attorney to another, to a Church whereof himſelf was ſeiſed, it ſhall be an Uſurpation upon himſelf, for ſuch Perſon in whoſe Name and Right he Preſented, 17 *E.* 3. 60, 61. 1 *Inſt.* 52. *a.*

If a Stranger doth Preſent to a Donative being void, and his Clerk thereupon is Admitted, Inſtituted, and Inducted, yet this makes no Uſurpation upon the very Patron, becauſe the Preſentation, and ſo all that followeth thereupon is meerly void; a Donative not being Preſentable, unleſs it be firſt made ſo by the very Patron's Preſentation made thereunto to the Ordinary, *Co. Litt.* 344. *a.*

For the initiating of an Uſurpation, 'tis not enough that a Preſentment be made to a Church, and ſuch Preſentment as is not void, but it muſt be made to a Church that is void; therefore, if a Preſentation be made to a Church appropriate, (which is always full of him to whom the Appropriation is made) or to any other Church full of an Incumbent, and Inſtitution, and Induction be had upon ſuch Preſentment, yet (all being void) no Uſurpation, or Diſpoſſeſſion is made thereby, *Mich.* 18 & 19 *Eliz. Grendon* v. *Biſhop of Lincoln, Plowden* 500.

But tho' the Church muſt be void when the Preſentation is made for the aforeſaid purpoſe, yet it is not neceſſary that it be ſo void to the Patron, that he muſt either preſent or ſuffer a Lapſe; but only ſo, that if the Patron pleaſe, he may preſent: For if an Ordinary doth deprive an Incumbent of a Church, for Crime, or other cauſe, and doth not (as he ought to do) give Notice to the Patron of the Avoidance; yet if a Stranger doth preſent his Clerk, who is In-

ſtituted, and Inducted, and Six Months paſs, the Stranger thereby hath uſurped upon the Patron, and gained a poſſeſſion of his Church: For tho' the Ordinary in the Caſe of a Deprivation, and in like Caſes, may not have the benefit of a Lapſe without Notice, yet in regard that the Church is void and open to the Preſentment of the Patron, altho' no Notice be given thereof, the true Patron againſt Strangers, is bound to take Notice of the Avoidance at his peril, *Trin.* 44 *Eliz. Green* & *Baker's Caſe*, *Roll's* 2. *p.* 369. *Paſch.* 17 *Jac.* in Sir *Will. Elvis's Caſe* v. *Arch-biſhop of York*, *Hobart* 318.

So if an Incumbent of a Church doth reſign his Benefice, and a Stranger preſents his Clerk thereto, who is Inſtituted, and Inducted, and continues Incumbent, without interruption, by Six Months, tho' no Notice was given to the true Patron of the Reſignation, yet this Preſentment and Incumbency makes a complete Uſurpation, ſo that the Clerk cannot be removed; and the Reaſon is, becauſe the Induction is notorious to the Country, and therefore the Patron ought to take Notice of it at his peril, and to uſe his Remedy in time, if he will not loſe his Preſentment and Poſſeſſion, *Paſch.* 33 *Eliz. Serven* v. *Biſhop of Lincoln*, *Noy* 65. and by *Hobart* in Sir *William Elvis's Caſe* v. *Biſhop of York*, *Tayler* & *Biſhop*, *Hobart* 318. And yet 'tis ſaid, that if a Clerk being Inſtituted, and Inducted, doth reſign into the Hands of the Ordinary, by Covin betwixt him the Ordinary, and a Stranger, on purpoſe that the Stranger may preſent *A. B.* to the intent to defeat the very Patron of his Preſentment; and the Stranger doth preſent the ſaid *A. B.* accordingly, and Six Months paſs, this ſhall not be any Uſurpation, for that the Ordinary did not give Notice of the Reſignation, *Trin.* 40 *Eliz. Lacon* v. *Biſhop of Lincoln*, *Rolls* 2. *p.* 369. But I ſuppoſe this Caſe is to be underſtood as it is delivered, *viz.* ſpecially upon the point of Fraud and Contrivance, and not ſo as to contradict the former Caſes.

If one hath a Benefice under the Value of Eight Pounds *per Annum*, and doth (without Diſpenſation take another Benefice incompatible, (in which Caſe the firſt is void only by Canon Law, and ſo is only ſaid to be void as to the Patron, and for his advantage, not diſadvantage; and a Stranger, before the true Patron hath Notice of the Avoidance from the Ordinary, or the Ordinary hath pronounced the Church void, doth get his Clerk Inſtituted and Inducted thereinto, this is no Plenarty againſt the true Patron: By *Hutton Hil.* 9 *Car. King* v. *Prieſt*, *Jones* 336. but *Quære.*) For that 'tis there alſo ſaid, that a Church is much more void by the Conſtitution of *Lateran*, than by particular Deprivation, or Reſignation, for that it is a general Sentence of Deprivation, 2 E. 3. 2. And therefore, I think ſuch Inſtitution, and Induction doth make a Plenarty. But *Quære*, Whether the Patron be put out of Poſſeſſion before Induction for that, 1 *H.* 5. 1. is *Contra*, as vouched in *Hare* & *Buckley's Caſe*, *Plowden* 529.

If a Church be void in the time of War, and a Stranger doth preſent his Clerk thereto, who is Admitted, Inſtituted, and Inducted, and in poſſeſſion by Six Months, yet all is void; and tho' the Stranger doth only preſent in time of War, and his Clerk is Admitted upon that Preſentment in time of Peace, yet the Law giveth regard to the Original Act, that is to ſay, to the Preſentment; and all that followeth thereupon, altho' it were in time of Peace, ſhall be avoided, as being conſtrued to be in time of War, and ſhall not put the rightful Patron out of poſſeſſion, 6 *E.* 3. 41. And upon this Reaſon was *Shelley's Caſe* adjudged in *B. R.* ſaith *Coke*, *Trin.* 43 *Eliz. Bingham's Caſe*, 2 *Co. p.* 93. and *Co.* 6. *Green's Caſe* 30. 1 *Inſt.* 249. *b.* And note, That the time of War doth not only give this Privilege to them that be in War, but to all others within the Kingdom, 1 *Inſt.* 249. *b.*

To

To the gaining of the poſſeſſion of an Advowſon, it is not only neceſſary that a Preſentation be made, and that it be made when the Church is void, and in time of Peace, but Admiſſion, and Inſtitution muſt be had thereupon; for before Inſtitution, and after Preſentation, the true Patron may grant the Advowſon, the Uſurpation not being completed till Inſtitution (as is held by *Hobart*) and to the gaining the Advowſon not without Induction, and the Clerk continuing in Six Months, *Mich.* 30 *Jac.* 6 *Co.* 49. *b. Boſwell's Caſe*, *Hil.* 14 *Car. B. R. Harper* v. *the Bailiffs of Derby*, *Jones* 427. *Paſch.* 15 *Car.* 2. *B. R. Brown* v. *Spence*, 1 *Siderfin* 163. 1 *Keble* 590. But if he doth die within the Six Months, (tho' the Patron cannot preſent before his Death, until he hath recovered) yet after his Death, he may either preſent, or bring his *Quare Impedit*, becauſe the Plenarty did not barr his Action, by reaſon of the Statute *Weſtminſter* 2. *c.* 5. the Six Months not being incurred, Lord *Stanhop's Caſe*, *Hobart* 241.

That an Uſurpation therefore may have the Effects of enabling the Uſurper to plead Plenarty againſt the true Patron upon his *Quare Impedit* brought, and to drive the Patron to his Writ of Right, 'tis not enough that the Uſurper duly preſent, and his Preſentee be Admitted, Inſtituted, and Inducted; but alſo, that the Church be full by the ſpace of Six Months, before any Writ brought to recover the Preſentation, *Paſch.* 17 *Jac.* in Sir *William Elvis's Caſe* v. *Archbiſhop of York, and others*, *Hobart* 322. *Mich.* 13 *Jac. per Cur. Godbolt* 263. For if within ſuch time the Patron doth bring his *Quare Impedit*, or Writ of Darrein Preſentment, as the Caſe may be, Plenarty cannot be pleaded againſt him to barr him, but that he may remove the Uſurper's Clerk, and recover his Preſentment, and Poſſeſſion of the Advowſon, without being driven to his Writ of Right, 1 *Inſt.* 344. *b.* and that by the Statute of *Weſtminſter*, 2 *ch.* 5. For before this Statute at the Common Law, after Inſtitution had into a Church of a Common Perſon, at the Preſentation of a Stranger that had no Right to preſent, the Incumbent was not removable, but only the Advowſon recoverable by a Writ of Right of Advowſon, as appears by the ſaid Statute, by which it is enacted:

That from henceforth one Form of Pleading ſhall be obſerved among Juſtices, in Writs of Darrein Preſentment, and Quare Impedit, **in this reſpect, if the Defendant alledgeth Plenarty of the Church of his own Preſentation, the Plea ſhall not fail by reaſon of the Plenarty, ſo that the Writ be purchaſed within the Six Months.** *Stat.* 13 *E.* 1. *c.* 25. 2 *Inſt.* 360.

But if a Church being void is aliened in Mortmain, and the Perſon to whom it is aliened doth preſent, or he is uſurped upon, yet the Lord may at any time within the Year bring his *Quare Impedit*, and the Uſurpation and Plenarty by Six Months ſhall not barr him, 47 *E.* 3. 11. For in this Caſe he cannot have a Writ of Right of Advowſon, for that he cannot alledge Seiſin in himſelf, nor in his Anceſtor, 21 E. 3. 27.

Alſo by recovery in a *Quare Impedit*, and Execution had, the Poſſeſſion of an Advowſon may be gained, for thereby every other Perſon is put out of poſſeſſion, 9 *H.* 6. 57. *a.* And tho' a *Quare Impedit* be brought, and a Recovery thereupon had againſt an Incumbent alone, without the Patron, if thereupon by Writ to the Biſhop, the Incumbent is removed, and the Clerk of him that recovered Inſtituted, the Patron is thereby put out of poſſeſſion, *Rolls Abr* 2. *p.* 269. *Dubitat'* 9 *H.* 6. 32.

But if Leſſee for Years, or a Guardian bring a *Quare Impedit*, altho' that the Defendant hath a Writ to the Biſhop againſt the Termer, or Guardian, and his Preſentee is accepted, yet the Tenant of the Freehold is not put out of poſſeſſion

thereby, 50 E. 3. 14. *b.* And ſo if the Preſentee of a Stranger being Admitted, Inſtituted, and Inducted into the Church of a rightful Patron, and another Stranger doth bring a *Quare Impedit* againſt the firſt, and recovers, this Recovery is no prejudice to the true Patron who was a Stranger to it, *Hil.* 18 *H.* 7. *Keilwey p.* 49. 1 *Mod. Rep.* 255.

That an Uſurpation may be ſuch as may gain the Fee of an Advowſon, there muſt not be ſuch privity betwixt the Uſurper, and the Perſon upon whom the Uſurpation is made, as doth fruſtrate an Uſurpation as to its Effects; and therefore, firſt, there muſt not be a privity in Blood, for when an Advowſon deſcendeth unto Parceners, tho' one preſent twice, and uſurpeth upon her Co-heir, yet ſhe that was negligent ſhall not be clearly barred, but another time ſhall have her Turn to preſent when it falleth, *Stat. Weſt.* 2. *c.* 5. *viz.* 13 E. 1. 2 *Inſt.* 363. And accordingly 'tis ſaid, that one Coparcener by preſenting alone without the other, cannot uſurp upon the other to the diſpoſſeſſing him, 17 E. 3. 37. *b.* 9 *Eliz. Dyer* 259. *b.* 20 *Dubitat'* 15 E. 3. *Aſſiſe Darrein Preſentment* 11. Yea, and if a *Quare Impedit* be brought by two Coparceners, and the one is ſummoned, and ſevered, and the other doth recover and preſent, this is in the Right of them both, 38 E. 3. 35, 36. So if an Advowſon be aſſigned in Chancery to two Daughters Coparceners, and the eldeſt doth after preſent to the next Avoidance, (I ſuppoſe contrary to the Aſſignment) this ſhall be in her Right as the elder, and not by Uſurpation; for that the firſt Preſentment of common Right doth belong to her, but this ſhall void the Aſſignment in Chancery, 17 E. 3. 30, 38. *adjudged.*

And yet it is ſaid, That if two Coparceners make Partition in Chancery, or Compoſition by Fine, to preſent by Turns, the one may uſurp upon the Turn of the other, 30 E. 3. 15. yet ſuch Uſurpation doth not put the Party out of poſſeſſion upon whom it is made as to the next Turn, but ſuch Party may preſent thereto; and this is not only by the Aid of the Statute of *Weſt.* 2. *c.* 5. but at Common Law, 33 E. 3. *Quare Impedit* 196. 25 *El. Dounam's Caſe*, 4 *Leonard* 86. So tho' ſuch Compoſition be made betwixt three Coparceners, and the eldeſt doth uſurp upon the Turn of the ſecond, and youngeſt, and after doth uſurp again in the Turn of the ſecond, yet the youngeſt may preſent in her next Turn, 13 *E.* 3. *Quare Impedit* 58. For an Uſurpation in this Caſe, is but for the Turn uſurped upon, and doth not put the Perſon uſurp'd upon to her Writ of Right, *F. N.B.* 34 *J.* 22 *E* 4. 9. However, if of three Coparceners, the eldeſt after Partition, doth uſurp in the Turn of the ſecond only, this is not any Uſurpation upon the Turn of the youngeſt, *Keilw.* 1. 2 *Inſt.* 365. *Rolls Abr.* 2. 372, 373. 2 *H.* 7. 4, 5. 22 *E.* 4. 9.

And if of three Coparceners the eldeſt doth preſent in his Turn without Partition, and afterwards a Stranger doth uſurp in the Turn of the ſecond, yet this is not any Uſurpation as to the third, or firſt Coparcener, but only as to the ſecond; and the Law is the ſame, altho' Partition had been made to preſent by Turn, *Mich.* 12 *H.* 7. *Keilwey* 1. Yet by a late Report 'tis ſaid, That the Court inclined to an Opinion, that where Parceners had made Partition to preſent by Turns, and an Uſurpation is in the Turn of one of them, that it ſhould put all out of poſſeſſion, *Paſch.* 35 *Car.* 2. *Anonymus*, 2 *Ventris* 39.

If two Coparceners be of an Advowſon, and they ſeverally grant their parts to two ſeveral Men, the advantage that was between the Parties doth hold place between the Grantees, and ſo the firſt Preſentment ſhall go to the Grantee of the eldeſt, 1 *Inſt.* 166. 186. and ſo of the others, and an Uſurpation of one ſhall not put the other out of poſſeſſion, 22 *E.* 4. 9. But peradventure it ſhall be otherwiſe, if they were meer Tenants in common, and did not derive their Eſtates from Coparceners. And yet the Book is, 22 *E.* 3. 9. *a.* that between Stran-

Strangers in Blood, or where two make Compoſition to preſent by Turns, if the one uſurps upon the Turn of the other, this ſhall not put him out of poſſeſſion. *Anderſon* doubted, but he agreed, That Tenant by Courteſie ſhall have the ſame advantage that his Wife ſhould have had, *Paſch.* 25 *Eliz. Harris* & *Hays* v. *Nichols*, 3 *Cro.* 18. 1 *Inſt.* 167. *b.* 186. *b.*

That an Uſurpation may be ſuch as may gain the Fee of an Advowſon, as there muſt not be a privity in Blood betwixt the Uſurper, and the Perſon upon whom the Uſurpation is made, ſo neither muſt there be a privity in Eſtate betwixt them: For if a Leſſor of an Advowſon doth uſurp upon his Leſſee for Years, this doth only barr the Leſſee of that Preſentment, and doth not out him of his next Turn, and put him to his Writ of Right, and this by reaſon of the privity betwixt them. And upon the ſame Reaſon, if a Man hath three Avoidances granted to him by one Deed, and the Grantor doth uſurp upon the firſt Avoidance, yet the Grantee at another Avoidance may preſent, or have his *Quare Impedit*; for that the Uſurpation made by the Preſentation, *&c.* of the Grantor, did not put the Grantee out of poſſeſſion of all the Avoidances, adjudged *Paſch.* 12 *Car. Legg* v. Sir *Anthony Ager*, *Rolls Abr.* 2. *p.* 371. *Co. Litt.* 249. and the *Caſe of Sir William Elvis* v. *the Arch-biſhop of York*, *Tailer & Biſhop*, *Paſch.* 17 *Jac. Hobart* 322. and *Jones p.* 4. being to the contrary are denied for Law.

So if one Tenant in common of an Advowſon doth preſent alone, this doth not put the other out of poſſeſſion; for at the next Avoidance they may joyn in a Preſentment, *Paſch.* 7 *Jac. Kite* v. *Biſhop of Briſtol*, *Rolls* 2. *p.* 372. *Mich.* 24 & 25 *Eliz. Harris* v. *Nicholls*, 1 *Anderſon* 63. Or if two Joint-Tenants ſeiſed of an Advowſon, and the one doth preſent without the other, this is no Uſurpation upon his Companion; but he may alledge this Preſentment in a *Quare Impedit*, as a Title for himſelf to the next Avoidance, 27 *H.* 8. 11. *b.* And this is by reaſon of the privity that is betwixt them, 1 *Inſt.* 186. *b.* 249. *a. Contra* 27 *H.* 8. by the King's Attorney, and 11 *H.* 4. 54. *Br. Quare Impedit* 52. 3. Or if there be two Joint-Tenants, and the one doth preſent the other, this doth not gain any poſſeſſion, for that it is not ſtrictly and properly a Preſentation, but rather a Prayer to be Admitted, 14 *H.* 8 2. *b.*

But where there is no ſuch privity either in Blood or Eſtate, the Law is contrary; therefore in the Caſe of a Leaſe made of the Advowſon, *&c.* if any other Perſon beſides he that is ſeiſed of the immediate Reverſion in Fee, doth uſurp upon the Leſſee, he thereby gains the poſſeſſion of the whole Advowſon, *Rudd* v. *Biſhop of Lincoln*, *Hutton* 66. and by *Hobart*, *Paſch.* 17 *Jac.* in Sir *Wil. Elvis's Caſe* v. *Arch-biſhop of York*, &c. *Hobart* 322.

So if *A.* doth recover an Advowſon in a Writ of Right, and hath Judgment final, and the Incumbent dying, *B.* by Uſurpation doth preſent to the Church, whoſe Clerk is Admitted and Inſtituted, and then *B.* dieth, *A.* is put out of poſſeſſion, and the Heir of *B.* is not ſo bound by the Judgment, either in Blood, or Eſtate, but that he ſhall preſent, 1 *Inſt.* 238. *a.* So if *B.* doth levy a Fine to *A.* of an Advowſon, to him, and his Heirs, and after the Church becomes void, *B.* preſents by Uſurpation, whoſe Clerk is Admitted and Inſtituted, this ſhall put *A.* the Conuſee out of poſſeſſion; and the reaſon of theſe two Caſes is: For that at the Common Law, every Preſentation to a Church, did put the rightful Patron out of poſſeſſion, and did put him to his Writ of Right, whether the Preſentations were by Title, or without, and therefore albeit the Uſurpation were in both the ſaid Caſes before execution, yet it put the rightful Patron out of poſſeſſion, 1 *Inſt.* 238. *a.*

And if a Grant be made of two next Avoidances, and a Stranger doth uſurp upon the firſt of them, this ſhall be an Uſurpation upon the ſecond Avoidance,

Mich.

Mich. 16 *Jac.* Sir *William Elvis*, and *Taylor's Caſe*, *per Cur. Rolls* 2. *p.* 373. *Hob.* 323. And if Tenant in Tail of a Mannor, to which an Advowſon is appendant, doth grant the next Avoidance, and dying, the Iſſue in Tail doth enter into the Mannor, and thereby doth make void the Grant, if ſuch Grantee doth after preſent by colour of ſuch Grant, that will be an Uſurpation, *Noy* 143.

So if a Dean doth preſent alone without the Chapter, to an Advowſon whereof the Chapter is ſeiſed by themſelves, he thereby uſurps to the diſpoſſeſſing of the Chapter, 17 *E.* 3. 64. *b.* 14 *H.* 8. 2, 3. but *Quære*, Whether at this Day a Chapter can be diſpoſſeſſed?

If two Churches be united by the Aſſent of the Patrons, who thereupon agree for ever to preſent by Turns, and after one of them doth preſent in the Turn of the other, this is an Uſurpation. And the like Law is, if one ſeiſed in Fee of a Mannor, to which an Advowſon is appendant, doth make Compoſition with another by Fine, that he ſhall Preſent every other Turn, and then the one doth preſent in the Turn of the other, *Dyer* 259. 20. And the reaſon of theſe laſt Caſes is, that the Perſons betwixt whom the Uſurpations are made, are neither privy in Blood as Coparceners, nor in Eſtate as Joint-Tenants, Tenants in Common, *&c.*

If an Uſurpation doth gain the Fee of an Advowſon, it muſt not be made upon ſuch Perſons whoſe Advowſons are ſpecially guarded by Law, againſt all prejudice by Uſurpations. And ſuch are firſt, the Advowſons whereof the King is ſeiſed: For altho' the King may uſurp upon others, and gain an Advowſon thereby, 42 *E.* 3. 4. *b.* 43 *E.* 3. 15. 35 *H.* 6. 62. 18 *Eliz. Dyer* 351. 22. *Paſch.* 15 *Car.* 2. *Brown* v. *Spence*, 1 *Siderfin* 193. 1 *Keble* 590. And altho' in ancient time, and ſince by ſome, the Law hath been taken to be, that the King by a double Uſurpation may be put out of poſſeſſion, and for the recovery of his Right ſhall be forced to his Writ, as a Common Perſon ſhall be, *Fitz. tit. Quare Impedit*, *Trin.* 18 E. 3. 47. 151. by *Shard*, *Paſch.* 18 *Eliz. Dyer f.* 351. *Mich.* 13 *Jac. Hughes* 263. 43 E. 3. 14. *Stanford Prerog. c.* 8. 38 E. 3. 3. *Mich.* 2 *Jac. King* v. *Bp of Winton* & *Champion*, 2 *Cro.* 54. And that a Grant of ſuch an Advowſon made by the King, after two Uſurpations, ſhall be void, *Paſch.* 23 *El. C. B. Hughes*, *Mich.* 23 *El.* 4 *Leon. Caſe* 227. yet at this Day the Law ſeems to be ſetled, That neither two, nor twenty Uſurpations do put the King out of the poſſeſſion of his Advowſon, ſo that he ſhall be forced to his Writ of Right, and that a Grant made after ſuch Uſurpations of the Advowſon ſhall be good, *Trin.* 4 *Jac. King* v. *Matthew Brownlow* & *Gouldsborough* 1. 166. *Paſch.* 2 *Jac. King* v. *Biſhop of Wincheſter*, *Noy* 18. *Paſch.* 28 *Eliz. Yardly* v. *Peſcan*, *Owen* 43. *Moor* 338. *Paſch.* 14 *Jac.* by *Hobart* in Lord *Stanhop's Caſe* v. *Biſhop of Lincoln*, *Hobart* 242. *Mich.* 14 *Eliz.* 3 *Leonard* 17. 61. *Mich.* 18 *Eliz.* 4 *Leonard*, *Caſe* 339. *Paſch.* 33 *Eliz. Queen* v. *Arch-biſhop of York*, 1 *Leonard* 226. *Mich.* 38 & 39 *Eliz. Queen* v. *Huſſey*, 3 *Cro.* 519. & *Moor* 421. *Trin.* 44 *Eliz. Green's Caſe*, 6 *Co.* 30. 1 *Inſt. f.* 344. *b.* And this Priviledge extendeth not only to Advowſons of which the King is ſeiſed in Right of his Crown, but to ſuch alſo of which he is ſeiſed in Right of his Duchy, *Paſch.* 33 *El. Queen* v. *Biſhop of York*, 1 *Leon.* 226. *Mich.* 38 & 39 *Eliz. Queen* v. *Huſſey*, 3 *Cro.* 519. *Regiſter* 31. *Contra.*

So if the King hath Right to preſent to a Church, for that the lawful Patron is outlawed, and a Stranger doth uſurp, and Six Months do paſs; yet the King may have his *Quare Impedit* for the Avoidance, and ſhall remove the Uſurper's Clerk, and thereby the Advowſon is re-continued to the rightful Patron, who otherwiſe had been put out of poſſeſſion, and driven to his Writ of Right, 1 *Inſt.* 363. *b.*

And

And by *Hobart*, Uſurpers upon the King's Advowſons are but Intruders, and Treſpaſſers to him; and if the King will, he may charge them by Actions of Account as Bailiffs, and yet may have his Writ of Right of Advowſon. But if the King's Patentee of an Advowſon, doth preſent twice to one Advowſon, and his Clerk be Inſtituted, and Inducted, altho' the Patent is void in Law, ſo that the Advowſon doth not paſs thereby; yet the Patentee hath ſo gained the Advowſon by Uſurpation, againſt all Strangers, that if he be diſturbed at the next Avoidance, he may maintain an Aſſiſe of Darrein Preſentment againſt the Stranger that hath no Title to it, 18 *Eliz. Dyer* 351.

However, it is agreed, that if a common Perſon doth uſurp upon the King, and his Clerk is not only Admitted, and Inſtituted, but alſo Inducted; the King is ſo far diſpoſſeſſed of his Preſentment, that he cannot preſent until the Incumbent is removed; which he may do at any time, while the Incumbent lives, by *Quare Impedit*, but not without Suit; or he may preſent after his Death, as if no Uſurpation had been, *Co* 6. *Green* 30. *Paſch.* 18 *Jac.* by *Hobart*, in Lord *Stanhop's Caſe* v. *Biſhop of Lincoln, and others*, *Hobart* 241, 242. *Mich.* 3 *Jac. Boſwel's Caſe*, 6 *Co.* 49. *b.* 2 *Inſt.* 358. But (as *Popham* ſaid) a Confirmation being made by the King to ſuch Preſentee, is good to eſtabliſh his poſſeſſion, againſt a Recovery in a *Quare Impedit* by the King afterwards; that is, the Clerk as aforeſaid being Inducted, otherwiſe not, 11 *H.* 4. 9. and yet this Confirmation operates not to the amending of the Eſtate of the Uſurper; but if the King doth make to the Uſurper a Releaſe, it is void, *Jenkins, Cent.* 7. *c.* 96. *Trin.* 4 *Jac. King* v. *Matthew Brownlow* & *Gouldsborough* 166.

Alſo Advowſons whereof Biſhops are ſeiſed in Right of their Churches, are guarded by Law againſt all prejudice by Uſurpations, as to their Succeſſors: For if a Biſhop doth ſuffer an Uſurpation, and dies, the Succeſſor may have a *Quare Impedit*, or preſent to the next Turn, by the Aid of the Statute of the firſt of *Elizabeth*, which reſtrains Alienations, and Grants by Biſhops, *Dalton* v. *the Biſhop of Ely*, 2 *Cro.* 673. *Trin.* 17 *Car.* 2. C.B. *Cornwallis* v. *Hood, Carter* 33. And if an Uſurpation be made to a Church in the time of Vacation; this ſhall not prejudice the Succeſſor, to put him out of poſſeſſion, but that at the next Avoidance he may preſent, 1 *Inſt.* 263. *b.* And by *Hobart* and *Jones*, tho' a Biſhop be but a Purchaſer of an Advowſon in Right of his Biſhoprick, and then doth ſuffer an Uſurpation, not having preſented; yet his Succeſſor ſhall not be bound thereby, but may have a *Quare Impedit*, and lay poſſeſſion in the Grantor; but not a Writ of Right, for want of Seiſin, 21 *Jac. Dalton* v. *Pamphlin* & *Biſhop of Ely*, *Leys p.* 80. *ſame Caſe*, 3 *Cro.* 673. & *Jones p.* 46. Or if the Predeceſſor do ſuffer a Recovery to be had againſt him without Title, in a *Quare Impedit*, by his default, or aſſent; or if he ſuffer Fine, and Nonclaim, or Diſſeiſin, and Diſcent, the Succeſſor is aided by this Statute, 1 *Eliz.* Yet altho' the Succeſſor by this Statute of the firſt of *Elizabeth* may preſent, or if he be diſturbed, may have a *Quare Impedit*; yet he ſhall be out of the poſſeſſion of the Advowſon by the Uſurpation, until he hath re-continued it by Preſentment, or Recovery, in a *Quare Impedit*; ſo that before ſuch Preſentment, or Recovery, a Grant thereof made by him ſhall be void, *Mich.* 22 *Jac.* C.B. *Dalton* v. *the Biſhop of Ely*, *Jones* 46. However, ſuch Uſurpations ſhall bind thoſe Biſhops who ſuffer them, and they ſhall thereby be driven to their Writ of Right, or elſe they ſhall loſe their Preſentments for their times to ſuch Advowſons, in *Dalton's Caſe* v. *Pamphlin* in *Leyes* 80. & 2 *Cro. Rep.* 673. *Mich.* 22 *Jac. Dalton* v. *the Biſhop of Ely*, *Jones* 46. And I take the Law to be the ſame, as to all other Eccleſiaſtical Perſons ſeiſed of Advowſons in the Right of their Churches, by the Stat. of 13 *Eliz. c.* 10.

Reſpect

Reſpect being had to theſe Rules, it may be truly ſaid, that the Fee of an Advowſon may be gained by Uſurpation, of which there are divers Effects: For firſt, The poſſeſſion of the Advowſon by Uſurpation, is ſo in the Uſurper, that he that was before the Uſurpation ſeiſed of the Advowſon, hath thereby only a bare Right remaining in him; and therefore he upon whom the Uſurpation is made, before he hath by ſome proper means regained the poſſeſſion of the Advowſon, if he doth make a Grant thereof, or of the thing to which it was appendant, the Advowſon doth not paſs thereby, 16 E. 3. *Quare Impedit* 67, & in *F. N. B.* & by *Hobart*, *Paſch.* 14 *Jac.* in Lord *Stanhop's Caſe* v. *Biſhop of Lincoln*, *Hobart* 241, *and the ſame Book*, 321, 322.

And this holds true in the Caſe of all common Perſons, even of thoſe that are relieved by the Statute of *Weſt.* 2. *c.* 5. made the 13 E. 1. and therefore if one doth uſurp upon a Leſſee for Years, (he in the Reverſion is a Perſon relieved by the ſaid Statute) yet ſuch Uſurpation doth gain the Fee, and doth put him that hath the Inheritance out of poſſeſſion; and ſo it is in all other Perſons Caſes that are within the ſaid Statute of *Weſtminſter*. *Rudd's Caſe* v. *Biſhop of Lincoln*, *Hutton* 66. For tho' the Statute doth give them a poſſeſſory Action for the Recovery of their Preſentment upon an Avoidance after an Uſurpation completed, if the Uſurper doth diſturb them, or to remove his Incumbent, if they ſue within Six Months, (who by the Common Law were as others driven to their Writ of Right, by which they could recover only their Inheritances, and not their Preſentments) yet that Statute doth not make Uſurpations upon the Advowſons of Perſons privileged thereby, to loſe the effect of gaining the poſſeſſion of the Advowſon to the Uſurper, nor doth it enable them to grant ſuch Advowſons, whilſt they do remain diſpoſſeſſed thereof, *Mich.* 3 *Jac.* *Boſwell's Caſe*, 6 *Co.* 49. *Paſch.* 14 *Jac.* Lord *Stanhop* v. *Biſhop of Lincoln*, *Hobart* 241. And therefore, if a Mannor with the Advowſon doth deſcend to any of the Perſons privileged by the ſaid Statute, as to an Infant, and during the Infancy, the Church becoming void, a Stranger doth uſurp, and then the Infant being of full Age, doth Enfeoff a third Perſon of the Mannor; if upon the next Avoidance the Feoffee doth preſent, the Uſurper, or his Aſſigns, may bring their *Quare Impedit*; and ſhall recover; becauſe the Infant (as before ſaid) by Uſurpation was put out of poſſeſſion, and remained ſo at his full Age when he made the Feoffment, and the Advowſon did not paſs, 16 E. 3. *Quare Impedit* 67. *Adams's Caſe cited by Coke in Boſwel's Caſe*, 6 *Co.* 50. & Lord *Stanhop* v. *Biſhop of Lincoln*, *Hob.* 241.

After an Uſurpation, the Perſon uſurped upon (as hath been ſaid) having only a bare Right remaining in him, cannot therefore grant the Advowſon of which he is diſpoſſeſſed, nor the Right remaining in him after the Uſurpation; the reaſon is, for that the Uſurpation being only voidable by Action, the tranſferring of the Right would be the transferring of the Action, which cannot be done by any common Perſon, 16 E. 3. *Quare Impedit* 67. *Adams's Caſe cited by Coke in Boſwel's Caſe*, *Mich.* 3 *Jac.* 6 *Co.* 50. But if ſuch Right doth by Act of Parliament, or other means, come to the King, the King by Prerogative may grant the ſame; but then the Grant thereof muſt be by expreſs, and determinate words, for it will not paſs by the word *Advowſon*, for that it is no Advowſon *de Facto*; nor by the word *Hereditament*, being a word ambiguous, which ſhall never be taken againſt the King in a ſtrange Senſe, nor by the general word of *Rights*, without a ſpecial mention, or recital, of the particular Right, which is meant to be granted, as was reſolved in *Cromer's Caſe*, 8 *Eliz. cited in Doughty's Caſe*, 3 *Co. f.* 11. *Paſch.* 14 *Jac.* Lord *Stanhop's Caſe* v. *Biſhop of Lincoln, and others*, *Hobart* 243, 244.

If an Uſurpation be complete,and the poſſeſſion of the Advowſon be not regained before the Church becomes void,and then the Church doth become void and litigious between the Uſurper, and him that hath the Right, the Ordinary ought to receive the Uſurper's Clerk, and not the Clerk of him that hath the Right only; unleſs he that hath the Right be a Perſon relieved by the Statute of *Weſtminſter* 2. *chap.* 5. but the Ordinary in ſuch Caſes may award a *Jure Patronatus*, and ſo be directed by the Verdict: But if he will chooſe either of the Clerks preſented, he muſt at his peril receive him that hath Right by the Statute: By *Hobart*,in Lord *Stanhop's Caſe* v. *Bp of Lincoln, and others*,*Hob.* 242.

Tho' by Uſurpation the rightful Patron may be diveſted of the poſſeſſion of his Advowſon as aforeſaid; yet thereby (for the moſt part) it is not abſolutely loſt without Remedy, for by divers ways it may be regained by him in whom the Right remains, according as his Caſe ſhall be, (that is, unleſs his Caſe be ſuch as that he hath but a remedileſs Right;) as firſt, by Re-entry: For if a Diſſeiſor of a Mannor to which an Advowſon is appendant, doth preſent to the Advowſon, and his Clerk is Inducted, and after the Diſſeiſee doth re-enter into the Mannor, at the next Avoidance, he may preſent, for this Re-entry defeats the Uſurpation, 3 *H.* 4. 8. 14 *H.* 6. 16. *a.*

And if he re-enter within the Six Months, his Preſentee ſhall be received, and the other outed, 14 H. 6. 24. *a.* but of an Advowſon in groſs, no Re-entry can be in ſuch Caſe, 3 H. 4 8. 14 H. 6. 16. And ſo it is, if a Man being ſeiſed of ſix Acres of Land, to which an Advowſon is appendant, doth die ſeiſed, and they deſcend to another, who is Attaint of Treaſon by Act of Parliament, by which the King doth become ſeiſed of the ſaid Six Acres, and then the Church voiding,a Stranger doth uſurp upon the King, and after the Act of Parliament being repealed, he to whom the ſix Acres did deſcend, is reſtored, and then the Church voids again; the ſaid Uſurpation doth continue not defeated by Repeal and Entry; ſo that neither he that entred, nor his Feoffee, can maintain a *Quare Impedit* againſt him who uſurped before, if he doth diſturb either of them, 28 H. 8. *Dyer* 24. *b.*

Alſo the poſſeſſion of an Advowſon may be regained only by Preſentation, with Inſtitution, and Induction had thereupon at another Avoidance; or if Inſtitution and Induction cannot be obtained upon a Preſentation made to the Ordinary, in ſome Caſes, the poſſeſſion of the Advowſon may be had by Recovery, in a poſſeſſory Action brought after the Refuſal of the Clerk of him that hath the Right: For by the Statute of *Weſtm.* 2. *c.* 5. it is Enacted as followeth:

Whereas of Advowſons of Churches there be but three Original Writs, that is to ſay, one Writ of Right, and two of Poſſeſſion, which be Darrein Preſentment, and Quare Impedit: and hitherto it hath been uſed in the Realm, that when any having no Right to preſent, had preſented to any Church whoſe Clerk was admitted: He that was very Patron could not recover his Advowſon, but only by a Writ of Right, which ſhould be tried by Battail or by great Aſſize, whereby Heirs within age, by fraud, or elſe by negligence of their Wardiens, and Heirs,both of great and mean Eſtate, by negligence or fraud of Tenants by the Courteſie, Women Tenants in Dower, or otherwiſe, for Term of Life, or for Years, or in Fee-tail, were many times diſherited of their Advowſons, or at leaſt (which was the better for them) were driven to their Writ of Right, in which caſe hitherto they were utterly diſinherited:) It is provided, that ſuch Preſentments ſhall not be ſo prejudicial to the right Heirs, or to them unto whom ſuch Advowſons

ought to revert after the death of any Persons: For as often as any, having no Right, doth present, during the time that such Heirs are in Ward, or during the Estates of Tenants in Dower, by the Courtesie, or otherwise for Term of Life, or of Years, or in Tail, at the next Avoidance, when the Heir is come to full age, or when after the death of the Tenants before named, the Advowson shall revert unto the Heir being of full age, he shall have such Action by Writ of Advowson possessory, as the last Ancestor of such an Heir should have had at the last Avoidance happening in his time, being of full age before his Death, or before the Demise was made for Term of Life, or in Fee-tail, as before is said. The same shall be observed in Presentments made unto Churches, being of the Inheritance of Wives, what time they shall be under the power of their Husbands, which must be aided by this Estatute by the Remedy aforesaid. Also Religious Men, as Bishops, Archdeacons, Parsons of Churches, and other Spiritual Men, shall be aided by this Estatute, in case any, having no right to present, do present unto Churches belonging to Prelacies, Spiritual Dignities, Parsonages, or to Houses of Religion, what time such Houses, Prelacies, Spiritual Dignities, or Parsonages be vacant.

Neither shall this Act be so largely understood, that such Persons, for whose Remedy this Statute was ordained, shall have the Recovery aforesaid, surmising that Guardians of Heirs, Tenants in Tail, by the Courtesie, Tenants in Dower, for Term of Life, or for Years, or Husbands, which faintly have defended Pleas moved by them, or against them: Because the Judgments given in the King's Courts shall not be annulled by this Statute, the Judgment shall stand in force, until it be reversed in the Court of the King as erroneous, if Error be found; or by Assise of Darrein Presentment, or by Enquest by a Writ of Quare Impedit, if it be passed, or be annulled by Attaint or Certification, which shall be freely granted. Stat. 13 E. 1. cap. 5.

By which Statute it appears, that at the Common Law, before the same was made, when any having no Right to present, had presented to a void Church, and got his Clerk admitted, the very Patron (being a common Person) was dispossessed thereby of his Advowson, and could not recover the same by any other means, but by a Writ of Right of Advowson; nor could he recover his Presentment by that Writ, nor by *Quare Impedit*, or *Darrein Presentment*; for by the Common Law, the Writs of *Quare Impedit*, and *Darrein Presentment*, did lie in the Case of a common Person only, before the Church was filled, against any one that did disturb the Patron, so that he could not prefer his Clerk; wherefore, by the aforesaid Statute, it was provided generally for all, that if the Defendant alledgeth Plenarty of the Church of his own Presentment, the Plea shall not fail by reason of the Plenarty; so that the Writ be purchased within the Six Months, tho' he cannot recover his Presentment within the Six Months.

Also, by the aforesaid Statute, it is specially provided for some certain Persons, that tho' Usurpations have been by others suffered to be made in former time, to the dispossessing them of their Advowsons; yet such Usurpations shall not be so prejudicial to them, as that they shall be driven to their Writs of Right to recover the possession thereof; but that they may have such Action possessory (if disturbed at the next Avoidance after the Right descends to them,) for the recovery of the possession of their Advowsons, and Presentations, as the Persons that suffered the Usurpations might have had when disturbed, *viz.* an Action by *Quare Impedit*, or *Darrein Presentment*, or as *Hobart* infers in Lord *Stanhop's Case* v. *Bishop of Lincoln*, *Hob.* 238. may present at the first Avoidance that

that hapneth in their time, and ſo regain the poſſeſſion without Action; becauſe the Tenor of the *Quare Impedit*, which by this Statute is given for their Remedy, is, *Quod permittat ipſum præſentare, &c. Rudd* v. *Biſhop of Lincoln*, *Hutton* 66. and by *Richardſon* in *Dixy's Caſe* v. *the Bailiff, &c. of Derby*, *Hetley* 159.

Now the Perſons that are thus ſpecially provided for by the ſaid Statute, are firſt Heirs; that is, ſuch who have an Advowſon by Deſcent, being Heir to ſome of his Anceſtors, *&c.* For the words of the Statute are not, Whoever uſurps upon an Advowſon of Inheritance of an Infant; for that an Eſtate purchaſed, whilſt in the hand of the Purchaſer, that may deſcend, and be inherited from him, is properly called an Inheritance, as well as that which he inherited from another by Deſcent, *Litt. f.* 3. So that Heirs, are to be underſtood here, only in reſpect of ſuch Advowſons to which their Anceſtors had right; by *Hobart*, in Lord *Stanhop's Caſe* v. *Biſhop of Lincoln*, *Hob.* 238. *&c.* and by *Jones* in *Dalton's Caſe* v. *Biſhop of Ely*, *Jones* 48. *Fitz. Nat. Br.* 34. Therefore, if an Heir within Age, hath an Advowſon by purchaſe, he is not remedied in caſe of Uſurpation ſuffered, by this Statute, 1 E. 2. *Fitz. Quare Impedit* 43. 35 *H.* 6. 60. 3 *Jac. Boſwel's Caſe*, 6 *Co.* 50. *b.* and by *Jones* in *Dalton's Caſe*, *Jones* 45. & 2 *Inſt.* 358, And yet, if one ſeiſed of an Advowſon, doth make a Leaſe thereof for Years, and the Reverſion deſcending to the Heir, is by him granted to another; and then the Leſſee doth ſuffer an Uſurpation; after the end of the Leaſe, the Grantee of the Reverſion, when the Church voids, may have his *Quare Impedit*, becauſe he is in *Loco hæredis*, who was relievable if he had kept the Reverſion; by *Hobart*, in Lord *Stanhop's Caſe* v. *Biſhop of Lincoln*, &c. *Hob.* 240.

If a Man doth purchaſe an Advowſon, and before any Preſentation made by him, doth make a Leaſe thereof unto another Perſon, who doth ſuffer an Uſurpation; the Grantee dies, his Heir may have a *Quare Impedit* at the next Avoidance, after the Leaſe ſhall be expired, and may lay the laſt Preſentation in his Father's Grantor, according to the words of the Statute, which are: **That he ſhall have ſuch Action poſſeſſory, as the laſt Anceſtor of ſuch Heir ſhould have had:** For by the Statute, Uſurpations upon the Leſſee are to be counted as none to this purpoſe. But if the Heir (having an Advowſon by Deſcent) being of full Age, doth make a Leaſe thereof to another, who ſuffers an Uſurpation, the Heir, at the next Avoidance after the Leaſe is ended, ſhall not have his *Quare Impedit*, becauſe he being the Maker of the Leaſe is Party to the negligence and wrong: And the word Heirs, throughout this Statute, doth import, that he ſhould be in as Heir of the Reverſion, wronged by the Guardian, and other Tenants, which he could not help: And the laſt Clauſe is more plain, which gives ſuch Action as the Anceſtor ſhould have had before Demiſe; ſo the Demiſe muſt not be made by him that is to be relieved, but by his Anceſtors, Lord *Stanhop's Caſe*, *Hobart* 240, 241. *Fitz. N. B.* 31. *g.* Yet in the 33 H. 6. 12. & 13. in the Caſe of *Humphry de Bohun*, the Reverſioner himſelf had Aid; and in 34 H. 6. 27. *b.* the Prior of *Cornwell* granted two Avoidances, and the Grantee having preſented once, died, and then the Heir of the Grantee, by Uſurpation upon the Executor preſenting to the ſecond Avoidance, when the Church voided again, the Prior that made the Leaſe was aided. But note, that againſt *Hobart* the other Judges are ſaid to hold (tho' not all alike), that Reverſioners as well of full Age, as within Age, and as well of their own Leaſe, as of the Leaſe of their Anceſtors, or Predeceſſors, whoſe Heirs they were, were within the Remedy of the Law, and that the Law preſerved the poſſeſſion for the Reverſioner, tho' not for the Leſſees, and ſo made a kind of baſe Fee by wrong, during the Leaſe in the Uſurper, which was *Hutton*'s Opinion. Things (ſaith

Hobart) hard, and not warranted in his Judgment, *Lord Stanhop's Caſe* v. *Biſhop of Lincoln, and others*, *Hobart* 244. But as to this Difference, *Jones* in *Dalton's Caſe* v. *the Biſhop of Ely*, *Mich.* 22 *Jac.* *Jones* 48. delivers his Opinion thus: If one being a Purchaſer, doth Leaſe for Years, he in Reverſion ſhall not be aided; but if the Leſſor hath his Title by Deſcent, in ſuch Caſe he ſhall be aided. So in the Caſe of the Prior, if he had been Purchaſer, and Leſſor for Life, he had not been aided; but having the Advowſon by Succeſſion, he was within the Remedy: But *Quære*. Vide *Cornwallis* v. *Hood*, *Trin.* 17 *Car.* 2. C. B. *Carter Rep.* 43.

By this Statute, not only Heirs that are in Ward, but alſo ſuch as are not in Ward, are relieved, altho' the Uſurpation be upon the Heir himſelf, the Advowſon being in his own hands, and by Deſcent; by *Hobart & Jones*, in *Dalton's Caſe*, &c. *Jones p.* 45. ſee *Carter Rep.* 43. But then they hold, againſt the other Judges, as before, that Heirs within Age only, are remedied, the Uſurpation being made upon their Advowſons. Alſo *Hobart* holds, that if an Infant-Heir doth ſuffer an Uſurpation, and another Avoidance doth fall in his Nonage, he may, by reaſon of this Statute, either preſent, or have his *Quare Impedit* for that ſecond Avoidance, tho' the words of the Statute be, **When the Heir is come to full Age:** For that Clauſe was put in, to anſwer a particular Caſe of an Heir in Ward, put in the Preamble, where the Guardian had ſuffered the Uſurpation; in which Caſe the Statute ſaw, that the Ward could have no Title 'till his full Age: But if a Guardian doth ſuffer an Uſurpation, and then will ſurrender to his Ward, the Ward ſhall not be relieved at another Turn during his Nonage, becauſe he ſhall be counted in by the Guardian to this purpoſe: But if a Guardian in Soccage, or his Ward, after fourteen Years of Age, ſuffer an Uſurpation, he ſhall be within the relief at any other Turn before Twenty one; and therefore, he doth deny the Opinion of *Thorp*, 16 E. 3. *Fitz. Quare Impedit* 67. Upon this, that it was the meaning of this Law, to ſuccour the weakneſs of an Heir within Age, when he maketh a fault, but not to enforce him to ſuffer a wrong. So he declares his Opinion to be, That if an Uſurpation be made upon one in *Ventre ſa Mere*, at the next Avoidance after his Birth, he ſhall be relieved, contrary to the Iſſue taken, 11 *E.* 3. *Fitz. Quare Impedit* 158. For ſuppoſe (ſaith he) the Heir then in *Eſſe* being a Daughter, was relievable, in reſpect of her Nonage, were it reaſonable, that the Son after born (to whom the wrong is now done), ſhould loſe that relief. Beſides this, the ſpecial Purview of this Statute, for Prelates to be relieved againſt Uſurpations in the Vacation of their Prelacies, is altogether of the ſame nature, and reaſon, *Lord Stanhop's Caſe*, *Hobart* 240.

But it is ſaid, that if one doth uſurp upon an Infant that is an Heir, and the Infant doth come to full Age within Six Months, and doth not remove the Incumbent by Suit, he is out of the Statute: By *Danby & Priſot*, 35 *H.* 6. 62. and by *Hobart*, in *Lord Stanhop's Caſe* 241. Or if an Heir relievable by a *Quare Impedit* upon this Statute, doth die without Heir, the Lord by Eſcheat (ſaith *Hobart*) ſhall not preſent, nor have a *Quare Impedit*, *Lord Stanhop's Caſe* 243.

The ſecond ſort of Perſons, ſpecially provided for as aforeſaid, by this Statute, are Feme Coverts, and yet only ſuch Feme Coverts as are Heirs, becauſe they have only the ſame Remedy given them, which Heirs have by reference thereto; and therefore a Feme Covert being a Purchaſer, is without the Remedy of this Statute, 1 E. 3. *Fitz. Quare Impedit* 43. and by *Hobart* in *Lord Stanhop's Caſe*, *Hob.* 239. 35 *H.* 6. 60. & *F. N.* B. 31. and by *Jones* in *Dalton's Caſe*, *Jones* 45. *Boſwel's Caſe*, 6 *Co.* 50.

The

The third ſort of Perſons expreſly provided for to the aforeſaid purpoſes by this Statute, are Succeſſors of Spiritual Men, in reſpect of their Advowſons uſurped upon in time of vacancy; but if the Advowſon of a Spiritual Perſon be uſurped upon, when it is in the poſſeſſion of a Spiritual Perſon, the Succeſſor hath not the Remedy of this Statute at the next Avoidance; for he that ſuffers an Uſurpation in ſuch Caſe, is driven to his Writ of Right, and then the Succeſſion cannot change it to a *Quare Impedit*, 7 *E.* 3. *Fitz. Quare Impedit* 21. *F.N.B.*38. and by *Hobart*, in Lord *Stanhop's Caſe*,240. and by *Jones* in *Dalton's Caſe* v. *the Biſhop of Ely*, *Jones* 50. But Succeſſors of Biſhops are now remedied, by the Statute 1 *El.See* 2 *Cro*, 673. *Dalton* v. *Biſhop of Ely*, *Jo.*36. *Ley*80. If an Eccleſiaſtical Perſon be ſeiſed of an Advowſon in the Right of his Church, that came to him by Succeſſion, and not by Purchaſe, and doth Leaſe it for Life, or for Years, and his Leſſee doth ſuffer an Uſurpation, the ſame Perſon that made the Leaſe, and alſo his Succeſſor, ſhall be remedied by this Statute of *Weſtminſter* 2. after the expiration of the Term, 34 *H.* 6. 27. 8 *H.* 6. 33. and this, by the Equity of the Statute, by *Jones* in *Dalton's Caſe v.* the Biſhop of *Ely*, *Jones* 48. But *Quære*, for the Statute ſeems only to relieve Spiritual Perſons, when their Advowſons are uſurped upon in time of Vacation, *vide F. N. B.* 34. *m. Cornwallis* v. *Hood*, *Carter* 43. Beſides, the Succeſſors relievable, are Succeſſors of ſingle Corporations, ſuch as Biſhop, Dean, Rector, *&c. Brook Preſentment* 46. *Boſwel's Caſe*, 6 *Co.* 50. *a.* 34 *H.*6.27. but not the Succeſſors of compounded Corporations, as Chapters, *&c.* becauſe the Body doth continue that committed the Laches, by *Hobart*, in Lord *Stanhop's Caſe*, *Hob.* 240.

Beſides, the Perſons provided for by the words of the aforeſaid Statute, (ſome other Perſons) are thought alſo to be relieved by the Equity thereof: And of theſe, are firſt, Tenants in Tail; for if ſuch ſuffer an Uſurpation, after their Death the Iſſue in Tail may have the Remedy given by this Statute, at the next Avoidance that happens, 43 E. 3. 20, 24, 25. *vid.* 46. *Aſſiſe*, *p.* 4. 8 E. 2 *Quare Impedit* 167. 34 H. 6. 20, 27. *Mich.* 3 *Jac. Boſwel's Caſe*, 6 *Co.* 50. 2 *Inſtit.* 359. and by *Hobart* in Lord *Stanhop's Caſe*. By which Tenants in Tail, *Jones* doth underſtand, Tenants in Tail in poſſeſſion: For, ſaith he, Tenants in Tail in Reverſion, are within the Words of the Statute of *Weſtminſter* 2. *Dalton's Caſe & Jones*, *p.* 49. Alſo a Grantee of a next Avoidance, is within the Equity of this Law, tho' he be not a Leſſee for Years, 34 H 6.27. *a.* and by *Hobart* in Lord *Stanhop's Caſe*,240. which ſee there; and by *Jones* in *Dalton's Caſe*,&c. *Jones* 48. 2 *Inſt.*359. And note, that it hath been a doubt, Whether the King be bound by this Statute, ſo, that when he uſurps upon any relievable thereby, the Party grieved be not left to his Remedy at Common Law, 35 H. 6. 62. *Br. Quare Impedit* 18. But in *Magdalen-College Caſe*, in the 11 *Co.* 72. *b.* it was adjudged, That this being a Statute to remedy an Injury, and Wrong, the King was bound thereby: So alſo is my Lord *Coke*'s Opinion, in his Comment upon this Statute, 2 *Inſt.* 359.

Not only the Perſons provided for by the aforeſaid Statute of *Weſtminſter*, may regain the poſſeſſion of their Advowſons, by Preſentation, and Inſtitution, at another Avoidance; but alſo all other Perſons that have been diſpoſſeſſed thereof: For as by Preſentation, and Inſtitution into a void Church, ſuffered by the rightful Patron, the rightful Patron (as hath been ſhewed) may loſe the poſſeſſion of his Advowſon to an Uſurper; ſo, by the ſame means, the Uſurper may loſe the poſſeſſion of the Advowſon which he had gained by Uſurpation again unto the rightful Patron: Otherwiſe, an Uſurper would be better ſecured by Law, in the poſſeſſion of an Advowſon, gained only by Uſurpation, that

than ever the rightful Patron was before the Uſurpation made upon him, 17 E.3.37.*b*. 1 *Inſt*. 194.*a*. 276.*a*. *Cornwallis* v. *Hood*, Carter *Rep*.44. 3 *Bulſtr*.38. But tho' all other Patrons, as well as thoſe Privileged by the Statute of *Weſtminſter*, may by Preſentation, and Inſtitution, regain the poſſeſſion of their Advowſons loſt by Uſurpation, yet with ſeveral Differences: For firſt, Perſons that are within the Statute of *Weſtminſter*, have a Right to preſent, and by having their Clerk Inſtituted, they are no Uſurpers; but all other common Perſons, have not Right to preſent after the Uſurpation is made upon them, unleſs they bring their Writs before a Six Months Plenarty, and thereby recover it; and therefore preſenting, and getting their Clerks Inſtituted, tho' it be to an Advowſon to which they have a Right remaining in them, they are thereby but Uſurpers, 17 E 3.37. *b*.

A ſecond Difference is; That if the Ordinary will not admit the Clerk of a Perſon within the aforeſaid Statute, ſuch Perſon, tho' he hath only a Right, and not the Poſſeſſion of his Advowſon, may bring his poſſeſſory Action, *viz*. either *Quare Impedit*, or *Darrein Preſentment*, and recover both his Preſentation, and Poſſeſſion of his Advowſon thereby. But if any other Patron, not within the benefit of the Statute (ſave the King), doth preſent to his Advowſon when diſpoſſeſſed thereof, and the Ordinary will not receive his Clerk (as he ought not, being bound to receive the Clerk of the Uſurper by the direction of Law) he is without any Remedy.

A third Difference is, That if the Ordinary doth Inſtitute the Preſentee of a Perſon within the Relief of the ſaid Statute, he doth that which he ought to do, and no more than what the Law, if an Action be brought in time, would force him to do, and the Uſurper is thereby diſpoſſeſſed, not only of the Preſentation, but of the whole Fee of the Advowſon, and this without any Remedy; for he can neither maintain a *Quare Impedit*, or bring a *Writ of Right*: But if the Ordinary doth Admit, *&c*. the Preſentee of any common Perſon diſpoſſeſs'd, and not remedied by the ſaid Statute, tho' there may be a Right remaining in him, yet ſuch Admittance is a wrong in Law to the Uſurper, the Right of Preſenting being in him, to all Avoidances that happen during the time the Uſurpation doth continue in force, and not avoided. And though at the Common Law, before the ſaid Statute of *Weſtminſter*, the rightful Patron being out of poſſeſſion, by getting his Clerk Inſtituted, had by Uſurpation re-gained the poſſeſſion of his Advowſon from the Uſurper without remedy, yet at this Day, by reaſon of the ſaid Statute, neither the Poſſeſſion of the Advowſon, nor the Preſentation to the Avoidance, are by ſuch Inſtitution abſolutely gained from the Uſurper, until after Six Months, that Plenarty may be pleaded, if the Uſurper happen to bring his Action: For it is notorious, that after an Uſurpation ſuffered, and Plenarty of the Uſurper's Clerk by Six Months, if the Church becomes void again, before he that hath the Right doth by ſome legal Act regain the poſſeſſion, the Uſurper hath Right to preſent to ſuch Avoidance; and, before the Statute of *Weſtminſter*, if diſturbed, might have had his poſſeſſory Action for the Recovery of the ſame, if he brought ſuch Action before there was a Plenarty by Inſtitution: And now, by the ſaid Statute of *Weſtminſter*, it is ſaid generally, That a Plea ſhall not fail by reaſon of ſuch Plenarty pleaded by a Defendant, if the Writ be purchaſed within the Six Months; and this Caſe of the Uſurper is not by word, or reaſon, excepted out of the ſaid Statute; and ſo accordingly it was adjudged (*per Curiam*), in a Writ of Error; that if one doth uſurp upon a Purchaſer of an Advowſon in Fee, and the Clerk of the Uſurper is in by Six Months, and after the Church voiding, the Purchaſer's Preſentee is Inſtituted.

ſtituted, and Inducted; if the Uſurper doth bring a *Quare Impedit* within the Six Months, againſt the Purchaſer, and his Clerk, this is no Remitter to the Purchaſer, 14 *Car. Harper* v. *Wierſdale*, *Rolls Abr.* 2. *p.* 374. and by *Doderidge* & *Coke Contra Haughton* in *Harris* & *Auſtin*'s Caſe, 1 *Rolls Reports* 210. 3 *Bulſtrode* 38.

As the Poſſeſſion of an Advowſon gained by Uſurpation may be defeated by the Inſtitution of him that hath the Right, in ſuch ſort as is declared; ſo may the Uſurpation be alſo avoided by the Inſtitution of the Preſentee of another Perſon than he upon whom the Uſurpation was made: For if a Feme doth ſuffer an Uſurpation upon her Advowſon, and afterwards doth take an Husband, who preſents to the next Avoidance in the Right of his Wife, (his Clerk being Inducted) this doth veſt the Poſſeſſion in the Wife, 14 H. 6. 24. *a.* So if three Coparceners be of an Advowſon, and the eldeſt doth preſent in her Turn without Partition, and after a Stranger doth uſurp upon the Turn of the ſecond, and then the third doth preſent in her Turn; this doth remit the ſecond, ſo that ſhe may preſent again when it comes to her Turn, as if no Uſurpation had been; for their Right is Joint, and the Uſurpation being avoided by one, it is avoided for all, *Mich.* 12 *H.* 7. *Keilwey* 1. And the ſame Law is, altho' there were a Partition, becauſe the Partition doth not ſever the Inheritance, but is only as to the Poſſeſſion; and therefore they ſhall joyn in a *Writ of Right*, 2 *Rolls Abr. p.* 374. *Contra Mich.* 12 *H.* 7. *Keilwey p.* 1. But if an Advowſon doth deſcend to two Coparceners, and after an Uſurpation is made upon one of them, who doth die without Iſſue, by which her Right doth deſcend to the other Coparcener, this ſhall defeat the Uſurpation without Preſentation, for that ſuch Coparcener cannot have an Action for parcel of the Advowſon, being ſeiſed of the Remnant, 17 E. 3. 22.

The means that a common Perſon (not being privileged by the Statute of *Weſtminſter*), hath for the regaining of his Advowſon, after Uſurpation with Plenarty, is to bring his *Writ of Right of Advowſon*, for the Recovery of the ſame, which he had beſt do before the Church doth void again, leſt he loſe the next Avoidance that ſhall happen after the Uſurpation, for want of poſſeſſion.

If the Patron of an Advowſon doth create a Vicarage out of the ſame lawfully, and after a Stranger doth uſurp upon him in the Parſonage, and afterwards in the Vicarage, and then the Patron doth recover the Advowſon in a *Writ of Right*; yet this Recovery ſhall not defeat the Uſurpation in the Vicarage, for that the Vicarage is not appendant to the Advowſon of the Parſonage, as is implied by the Caſe hereafter next mentioned, becauſe it is put to prove it, 17 E. 3. 51. *b.* But it is to be admitted here, that the Patron of the Parſonage is Patron alſo of the Vicarage.

If there be two Coparceners of an Advowſon, and they do agree to preſent by Turn, each of them in truth hath but a Moiety of the Church; and tho' if either of them be diſturbed, ſhe ſhall have (as is before ſaid), a *Quare Impedit præſentare Idoneam Perſonam ad Eccleſiam*; for that there is but one Church, and one Incumbent; yet in a *Writ of Right of Advowſon* brought by one of them, the Writ ſhall be *De Medietate Advocationis*; for in truth ſhe hath but a Right to a Moiety: But if there be two ſeveral Patrons, and two ſeveral Incumbents in one Church, the one of one Moiety thereof, and the other of the other Moiety, and one part as well of the Church, as of the Town, be allotted to the one, and the other part thereof to the other, each of them ſhall have a *Writ of Right of Advowſon*; *De Advocatione Medietatis.* 1 *Inſt.* 18. *a. Fitz. N. B.* 31. *b.*

But

But tho' this *Writ of Right* be the common Remedy, yet it doth not lie in all Cases, for all common Persons that are out of the Statute of *Westminster*, for every one that may recover by this Writ, ought to count of some Seisin, either in himself, or in his Ancestor; for it is not enough to count of Seisin in any other, 21 E. 4. 1. 1 H. 4. 2. 21 E. 3. 27. *b. Fitz. Nat. Br.* 30. If the Incumbent of the Church hath received the Profits thereof, as the gross Tythes, thereby the Patron is sufficiently seised to maintain this Writ, 21 *E.* 4. 1. *b. Fitz. N.B.* 30. But then, such Incumbent must be complete; that is, not only Admitted, and Instituted, but also Inducted; for that before his Induction, he hath no Estate in the Glebe, nor can he receive any Tythes as Incumbent; and therefore the Patron cannot in his Writ (as he ought) alledge Esplees in himself, as in perception of the gross Tythes, *&c.* 38 E. 3. 9. *Hare* v. *Brikley*, *Plowden* 528. 26 *H.* 8. 3. *a.* And such Seisin ought to be within the Memory of Man, otherwise it is not sufficient to maintain this Writ, 21 E. 4. 1, 2. *b.* Admit, But if a *Writ of Right* be brought by the King, the King may alledge, that he, or his Progenitor, was seised, without shewing any time; because, *Nullum tempus occurrit Regi*, 1 *Inst.* 294. *b.* But the King need not of necessity bring this Writ, in that he cannot be dispossessed by Usurpation, as the Law is now taken, as hath been shewed. But if the Patron be duly seised by presenting once, tho' divers Usurpations be after suffered, yet such Seisin is not thereby defeated, but that he may recover by this Writ, 43 *E.* 3. 15. *a.*

From the aforesaid Particulars it appears, that if a Purchaser doth suffer an Usurpation before any Presentment made by him, and the Six Months to pass without bringing his *Quare Impedit*, the Usurper hath gained the Patronage in Fee, and the Purchaser is without remedy, and can never have this *Writ of Right*, because he cannot count of any Seisin, 10 *Co.* 134. *b.* 43 *E.* 3. 15. *a.* 1 *H.* 4. 2. *b.* 43 *Ass.* 21. *per Thorp.* 32 *E.* 3. *Presentation* 6. 22 E. 4. 9. 1 *Inst.* 349. *b.* And so if a Purchaser in Tail doth suffer an Usurpation, before he doth present, he hath not such an absolute Inheritance as to maintain this *Writ of Right*, 43 *E.* 3. 15. nor can the Issues in Tail, or Lessee for Life, have it upon the same reason, *Rudd* v. *Bishop of Lincoln*, *Hutton* 66. and by *Hobart* in Lord *Stanhop*'s Case, *Hob.* 322. *Fitz. Nat. Br.* 31. *b.* And so in the Case of a Lord that claims to have an Advowson aliened in Mortmain by his Tenant, for that he cannot count of any Seisin in himself, or his Ancestors, but only in his Tenant, which is not sufficient to maintain this Writ, 21 *E.* 3. 27. *b.*

As no Person without the aforesaid Seisin, can maintain this Writ for the recovery of an Advowson from an Usurper, so neither can he have any other Writ, whereby he may recover the same, or any Presentment thereto, (that is, unless he be a Person that is enabled to bring his Writ of *Quare Impedit*, or *Darrein Presentment* by the Statute of *Westminster* 2. (if disturbed in presenting) and by consequence cannot recover the possession of his Advowson), but must give up his Advowson as lost for ever, without remedy, *Trin.* 13 *Jac. Harris* v. *Austin* 3 *Bulstr.* 38. & in 1 *Rolls Rep.* 210.

And this doth hold true of a Purchaser, altho' he be an Heir within Age, or a Feme Covert relieved by the Statute of *Westminster*, as to other Advowsons, by Descent; and also of a Purchaser in Tail, and of a Lessee, altho' the Issue of the Purchaser in Tail, and he in Reversion after the Lease expired, may have their possessory Action for the same Advowson, *Rolls Abr* 2. *p.* 383. *Rudd* v. *Bishop of Lincoln*, *Hutton* 66. and by *Hobart* in Lord *Stanhop*'s Case, *Hob.* 322. And so if he that is seised of an Advowson in Fee, doth Lease the same for Years, and the Lessee, (the Church being void,) doth accept of a Presentation from the Lessor, and thereupon is Admitted and Inducted, altho' the Lessors presenting, (the Lessee consenting thereto, by accepting of a Presentation from

from the Leſſor) is not properly an Uſurpation; yet it hath as great an effect as an Uſurpation made upon the Leſſee, and Plenarty had thereupon: For the Leſſee's Acceptance of the Leſſor's Preſentation, is a Surrender of his Leaſe, 42 *Eliz. Rot.* 105. in Sir *Arthur Capel*'s Caſe, cited in *Hutton* 105. But by *Owen*, who reports this Caſe, the Queſtion was, Whether the Leſſee's accepting of a Preſentation from the Leſſor, was a Surrender, or an Extinguiſhment of the Leaſe; and there 'tis ſaid, That all the Juſtices held, that it could not be a Surrender, but an Extinguiſhment: And alſo 'tis ſaid, That if a Man doth preſent to his own Church, as Proctor to another, by this he loſeth his Advowſon, 42 *Eliz. Rudd* v. *Topſey*, *Rot.* 135. *Owen* 142. ſee *F. N. B.* 35.

But if a Purchaſer hath preſented, and after upon another Avoidance, a Stranger doth uſurp upon him, and Six Months paſs, he may have his Writ of Right of Advowſon before the Church doth void again: But if he doth not bring his Writ of Right, *&c.* before the Church doth void, he cannot, if the Uſurper preſent again, have a *Quare Impedit* for that Avoidance, but may have his Writ of Right: And foraſmuch as he may have an Action for the Advowſon, if he uſurp upon the Uſurper, and his Clerk be in by Six Months, he ſhall be remitted, *Trin.* 13 *Jac. B. R. Harris* v. *Auſtin*, *Rolls* 1. *Rep.* 211. 7 *E.* 3. 2. *a.* 17 *E.* 3. 37. by *Perning*.

Altho' when a Patron hath ſuffered an Uſurper's Clerk to remain in poſſeſſion Six Months, without bringing his *Quare Impedit*, or *Darrein Preſentment*, he cannot, generally ſpeaking, bring either of thoſe Writs, but is driven to his Writ of Right, and is barred of all Remedy, if he cannot ſhew a Poſſeſſion in himſelf, or Anceſtor, ſufficient to maintain that Writ; yet, if after the Plenarty by Six Months, he doth in Fact bring his *Quare Impedit* againſt the Uſurper, and his Incumbent, and they do not plead Plenarty by Six Months, but a *Non ſum informatus* &c. upon which the Patron doth recover his Preſentment, he ſhall be alſo remitted to the Poſſeſſion of his Advowſon, *Mich.* 12 *Jac. Auſtin* v. *Harris*, 3 *Bulſtrode* 38. & *Trin.* 13 *Jac. Rolls Rep.* 210. the ſame Caſe. And ſo the Law is, altho' the Patron was but Purchaſer of the Advowſon, and had never preſented before the Uſurpation, *Trin.* 13 *Jac. Harris* v. *Auſtin*, 3 *Bulſtrode* 38. So if the King doth preſent to an Advowſon of which another is ſeiſed, and after the Six Months, the Patron doth bring his *Quare Impedit* againſt the Incumbent of the King; and the Incumbent not taking the advantage of the Plenarty, the Patron doth recover upon a *Non ſum informatus* pleaded, by this the Advowſon is re-veſted, *Paſch.* 12 *Jac. Auſtin* v. *the Biſhop of London*, *Brownlow* & *Gouldsborough* 1. 165. But if the Patron be a Purchaſer of an Advowſon, and the King doth uſurp upon him, before any Preſentation is made by him, and the Six Months paſs before any *Quare Impedit* is brought againſt the Incumbent, tho' the Patron ſhould afterwards recover in a *Quare Impedit* brought after the Six Months were paſt againſt the Incumbent, upon a *Non ſum informatus* pleaded, without taking advantage of the Plenarty, yet he ſhall not be remitted, becauſe by reaſon of the Uſurpation completed by the Six Months Plenarty, the Purchaſer hath but a remedileſs Right without any Action to recover it, and the King is not Party to the Action, *Mich.* 12 & *Trin.* 13 *Jac. Auſtin* v. *Harris*, *Rolls Abr. p.* 374, & 375. See the Caſe in 3 *Bulſtr.* 38. *Harris* v. *Auſtin. Trin.* 13 *Jac.* the ſame Caſe, *Rolls Rep.* 210.

But if the King doth ſuffer the Clerk of the Purchaſer (who hath recovered as aforeſaid, and removed the King's Clerk by a Writ to the Biſhop) to remain Incumbent until the Church doth void again, and then the King doth preſent; and upon a Writ brought by the Purchaſer, the former Recovery is alledged, altho' it be not ſhewed, that the Writ upon which the Recovery was had, was brought within the Six Months after the Uſurpation; yet whether

the Writ was brought within the ſaid Six Months or not, a Recovery being had, and a Preſentment made thereupon, the Advowſon is gone from the King, and re-veſted in him that hath recovered; becauſe it ſhall be intended, that the Writ was brought within the Six Months, by *Coke*, *Doderidge*, & *Haughton*: For in ſuch Caſe, *Omnia præſumuntur ſolemniter eſſe acta*, *Trin.* 13 *Jac. Harris* v. *Auſtin* 3. *Bulſtrode* 38. and in *Rolls Rep.* 210. And therefore, he that doth alledge, that the Writ was not brought within the Six Months, ought to ſhew it, ſaid *Coke*, in the Caſe before cited.

Tho' the Clerk by the foregoing Diſcourſe, may Judge of the Title to an Advowſon, and ſo know who is the rightful Patron thereof; yet this is alſo to be noted, that not always he in whom the Title to the Advowſon, or to the void Turn is, but ſome other Perſon in his Right is to preſent, or prefer a Clerk to his voided Benefice; and to ſuch Perſon it is, to whom the Clerk that hath it in deſign to make himſelf Incumbent of the vacant Benefice, ought to apply himſelf: For the Lord Chancellor of *England*, or the Lord Keeper of the Great Seal for the time being, may, by Virtue of their Office, preſent to any Benefice that is of the Gift of the King, the Value of which is under Twenty Pounds in the Books of the King's Firſt-Fruits, and Tenths, *Lord Chancellor's Caſe*, *Hobart* 214. But it ſeems, that in ancient time, the Lord Chancellor *&c.* had the Privilege of preſenting but to thoſe Livings only of the King's Gift, that were under the yearly Value of Twenty Marks in the King's Books, 38 *E.* 2. 3. & 8. 9. *Br. Quare Impedit* 65. *Fitz. Nat. Br.* 35. *k.* Yet to ſuch under-valued Benefices as the Lord Chancellor preſents to, the King, if he pleaſe, may immediately give the Preſentment. So if a Feme Covert hath Title to preſent to a Church, ſhe cannot preſent by her ſelf alone, but with her Huſband, and the Preſentment muſt be by the Husband, and Wife in both their Names, and not by the Husband in his Right, and in the Right of his Wife, 28 *H.* 6. 8. *a*, *Quare Impedit* 85. But the Queen is a Feme Sole, as it were exempt from the Perſon of the King, and hath a Capacity to grant, or to preſent to any void Church without the King, when the Title thereto is in her, 18 E. 3. 2. *a.* 3 H. 7. 14. *b.*

Guardian in Soccage, or by Nurture, cannot preſent to a Church in the Right, and Name of the Heir, becauſe he cannot account for it, 29 E. 3. 5. 8 E. 2. *Preſentment* 10. 7 E. 3. 29. 27 E. 3. 79. 1 *Inſt.* 17. *b.* 88. *a.* but by *Daniel*, if the Heir be within Age of Diſcretion, there the Guardian ſhall preſent, *Mich.* 3 *Jac. Shopland* v. *Ridley*, 2 *Cro.* 99. And *Berry* ſaith, he hath ſeen the Guardian preſent in the Name of the Heir, and ſo by *Green*; but Mr. *Hughes* in his *Parſons Law*, makes a *Quære* of it, and ſuppoſeth, it muſt be intended of Guardian by Knight-Service, and not of a Guardian in Soccage, *Hughes Parſons Law*, *c.* 10. *f.* 76. And it is ſaid and agreed, that a Preſentment made by the Guardian, in the Name of the Heir, is a good Title for the Heir in a *Quare Impedit* brought by him, 42 E. 3. *tit. Quare Impedit* 130. Alſo Guardian in Soccage of a Mannor, to which an Advowſon is appendant, if he be diſturbed, ſhall have a *Quare Impedit* in his own Name, altho' that he may not make an Account thereof, *Temp. E.* 1. *Hobart* 132. adjudged: Yet 'tis ſaid by my Lord *Coke*, That the Heir ſhall preſent, of what Age ſoever he be, and not the Guardian, 3 *Inſt.* 156. therefore *Quære.*

If one before the Statute of 27 H. 8. *c.* 10. of Uſes, had enfeoffed another in Fee, to the uſe of the Feoffor, and his Heirs, of a Mannor to which an Advowſon was appendant, the Church becoming void, the Feoffor could not preſent to the Church in his own Name, and the Statute of *Richard* 3. did not aid him; for this Preſentment is not like to a Leaſe for Term of Years, made by the Feoffor to a Stranger, or Feoffment of the Land, or ſuch like, or a Grant of a

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Rent out of the Land, or a Grant of the Advowſon of the Church to another; for this Preſentment is but as a Chattel, and a thing in Action, veſted in theſe Perſons, which be Feoffees of the Mannor, by *Rede* & *Grevil* Juſtices; but *Rede* ſaid, That the Feoffor might preſent in the Name of the Feoffees, *Paſch.* 2 H. 8. *Kel.* 160. See the Statute 27 H. 8. *Of Uſes:* For by that Statute the Feoffee, and not the Feoffor, is to preſent.

If the Parſon of a Church, be Patron of the Vicarage thereof, yet if the Vicarage doth become void, during the vacancy of the Parſonage, the Patron of the Parſonage ought to preſent, 19 E. 2. *Quare Impedit* 178. and (as I conceive) if the Parſonage be filled before the Viçarage, yet the Right of Preſenting to the Vicarage, doth remain in the Patron of the Parſonage (*Quære.*) But it is ſaid, That Perſons Outlawed, and Excommunicated, may preſent to their Churches, and their Preſentations ſhall ſtand good, until ſuch time as they be avoided: And generally, all Perſons that have Ability to grant, or to purchaſe, have Ability alſo to preſent to their vacant Churches, according to their reſpective Rights, *Parſons Law*, *c.* 10. But *Quære*, Whether the Biſhop may not refuſe the Preſentees of Perſons Outlawed, and Excommunicated, and ſo ſuffer their Churches to Lapſe to himſelf?

CHAP. XIV.

Of Ordination: The taking of what Orders neceſſary to make one capable of a Beneſice. Deacons, what Preferments they are capable of.

HAving ſhewed by what means a Church doth become void, and how a Perſon may judge of the Patron's Title to the Advowſon thereof, as things neceſſary to be known, in order to the taking a Title to a Church-Preferment; I come to a Third Thing, alſo, neceſſary to be known and obſerved, in order thereunto, *viz.* That the Perſon that would take an Eccleſiaſtical Beneſice, muſt, to make himſelf capable thereof, be Epiſcopally Ordained, and that as well Prieſt, as Deacon: For altho' in former time, a Lay-man might have taken a Title to a Deanry, Prebendary, or other Beneſice without Cure, *Mich.* 29 & 30 *Eliz. Bland* v. *Maddox*, 3 *Cro.* 79 *Paſch.* 3 *Jac. Fairchild* v. *Gain*, 1 *Brownlow* & *Gouldsborough* 201. And a Deacon might have taken a Title to a Beneſice with Cure, and enjoyed the ſame for the ſpace of one Year after his Induction, without Prieſts Orders given according to the Manner and Form, in, and by the Book of Common-Prayer preſcribed, or formerly by Epiſcopal Ordination, 13 *Eliz. c.* 12. Yet at this Day, neither Lay-man, nor Deacon, is capable of being admitted into any Parſonage, Vicarage, Beneſice, or other Eccleſiaſtical Promotion, or Dignity whatſoever, but muſt obtain the Orders of a Prieſt to qualifie him for the ſame, *Stat.* 14 *Car.* 2. *c.* 4. Neither is a Perſon that is *merè Laicus*, or only a Deacon, capable of a Donative: For altho' that he that hath a Donative, may come into the ſame by Lay-Donation, and not by Admiſſion, and Inſtitution, yet his Function is Spiritual, *Co. Litt.* 344. *a.* in the Caſe of *St. Barien* in *Cornwall*, ſaid to be reſolved, *Rolls Abr.* 2. *p.* 341. So that he that is no more than a Deacon, can only uſe his Orders, either as a Chaplain to ſome Family, or as a Curate to ſome Prieſt,

or as a Lecturer without Title: For the Prebendaries of ſome Prebends in Cathedral, and Collegiate Churches, are to read Lectures there, by the Appointment of the Founders thereof, and may from thence be called Lecturers; but theſe Places are of the Number of Eccleſiaſtical Promotions, to which the Incumbents are Admitted by Collation, or Inſtitution, *&c.* of which a Deacon as aforeſaid is not therefore capable; yet the King's Profeſſor of the Law, within the Univerſity of *Oxford*, may have, and hold the Prebend of *Shiptor*, within the Cathedral Church of *Sarum*, united, and annexed unto the Place of the ſame King's Profeſſor for the time being, altho' that the ſaid Profeſſor be but a Lay-man, *Stat.* 14 *Car.* 2. *c.* 4.

As no Man is capable of a Church-Promotion, but he who is Ordained both Deacon and Prieſt; ſo no Man is to be accounted, or taken to be a lawful Biſhop, Prieſt, or Deacon, in the Church of *England*, or ſuffered to execute any of the ſaid Functions, except he be Called, Tryed, Examined, and Admitted thereunto, according to the Form preſcribed, and ſet forth in, and with the Book of Common-Prayer, and confirmed by Act of Parliament, in the Fourteenth Year of King *Charles* the Second, *Stat.* 14 *Car.* 2. *c.* 4. Or hath had formerly Epiſcopal Conſecration, or Ordination. *See the Preface before the Form of Ordaining.*

Formerly the Rule was, That none ſhould be Admitted a Deacon, unleſs he was One and twenty Years of Age at the leaſt; *See the Preface to the Old Form of Ordaining:* But now no Man may be Admitted to that Order, until he be Three and Twenty Years of Age, unleſs he have a Faculty; *See the Preface to the New Form of Ordaining:* And every one that is to be Admitted a Prieſt, muſt be full Four and twenty Years old, *Stat.* 13 *Eliz. c.* 12. *Preface*, &c.

Regularly, Deacons, and Prieſts, are to be Ordered, only upon the Four Sundays immediately following the Four Ember-Weeks; but at this Day, upon urgent occaſion, Orders both of a Deacon, and Prieſt, may be given on any other Sunday, or Holy-day, by every Dioceſan; but not to be Admitted to the Order of Prieſthood, until he hath been a Deacon for the ſpace of a whole Year; yet, if for reaſonable Cauſes, it ſhall otherwiſe ſeem good to his Biſhop, he may be Admitted to the Order of a Prieſt in a ſhorter time, *Rubr.* No Biſhop ought to Admit any Perſon to the Order of a Deacon, unleſs ſuch whom he ſhall know, either by himſelf, or by ſufficient Teſtimony, to be of Vertuous Converſation, and without Crime: Nor ought he to make any Deacon a Prieſt, unleſs he firſt bring to the Biſhop, from Men known to the Biſhop to be of ſound Religion, a Teſtimonial, both of his honeſt Life, and of his profeſſing the Doctrine expreſſed in the Articles of Religion, agreed upon by a National Synod, in the Year 1562. *Stat.* 13 *Eliz. c.* 12. And hath been found faithful, and diligent, in executing the Office of a Deacon, *Rubr.* No Man ought to be Ordained, unleſs he be Learned in the *Latin* Tongue, and ſufficiently Inſtructed in the Holy Scripture; and being to be made a Prieſt, unleſs he be able to anſwer, and render to the Ordinary, an Account of his Faith in *Latin*, according to the Articles of Religion aforeſaid, or have ſpecial Gift and Ability to be a Preacher, *Stat.* 13 *Eliz. c.* 12. Nor ought any to be Admitted, either to the Order of Deacon, or Prieſt, unleſs he ſhall firſt ſubſcribe to the ſaid Articles, *Stat.* 13 *Eliz c.* 12. and take the Oath of the King's Supremacy, *Stat.* 1 *Eliz. c.* 1. 5 *Eliz. c.* 1. *Rubr.* The Form of which Oath, 'till altered, was in theſe Words:

I A. B. do utterly teſtifie, and declare in my Conſcience, That the Queen's Highneſs, is the only Supream Governour of this Realm, and of all other her Highneſs's Dominions, and Countries, as well in all Spiritual, or Eccleſiaſtical Things or Cauſes, as Temporal; and that no Foreign Prince, Perſon, Prelate, State, or Potentate, hath, or ought to have any Juriſdiction, Power, Superiority, Preheminence, or Authority, Eccleſiaſtical or Spiritual, within this Realm: And therefore, I do utterly renounce and forſake all Foreign Jurisdictions, Powers, Superiorities, and Authorities; and do promiſe, that from henceforth, I ſhall bear Faith and true Allegiance to the Queen's Highneſs, her Heirs, and lawful Succeſſors, and to my power ſhall aſſiſt, and defend all Jurisdictions, Privileges, Preheminencies, and Authorities, granted, or belonging to the Queen's Highneſs, her Heirs, and Succeſſors, or united, and annexed to the Imperial Crown of this Realm. So help me God, and by the Contents of this Book.

Alſo the Oath of Obedience is commonly Adminiſtred by Biſhops to Perſons by them Ordained; the Form of which Oath was, 'till altered, as followeth:

I A. B. do truly, and ſincerely, acknowledge, profeſs, teſtifie, and declare in my Conſcience, before God, and the World, That our Sovereign Lord King James, is lawful, and rightful King of this Realm, and of all other his Majeſty's Dominions, and Countries; and that the Pope, neither of himſelf, nor by any Authority of the Church, or See of Rome, or by any other means with any other, hath any Power, or Authority, to depoſe the King, or to diſpoſe any of his Majeſty's Kingdoms, or Dominions; or to authorize any Foreign Prince to invade or annoy him, or his Countries, or to diſcharge any of his Subjects of their Allegiance and Obedience to his Majeſty; or to give Licence, or Leave, to any of them, to bear Arms, raiſe Tumult, or to offer any Violence, or Hurt, to his Majeſty's Royal Perſon, State, or Government, or to any of his Majeſty's Subjects within his Majeſty's Dominions.

Alſo, I do ſwear from my Heart, That notwithſtanding any Declaration, or Sentence of Excommunication, or Deprivation made or granted, or to be made or granted by the Pope, or his Succeſſors, or by any Authority derived, or pretended to be derived from him, or his See, againſt the ſaid King, his Heirs, or Succeſſors, or any Abſolution of the ſaid Subjects from their Obedience: I will bear Faith, and true Allegiance to his Majeſty, his Heirs, and Succeſſors, and him, and them will defend, to the uttermoſt of my power, againſt all Conſpiracies, and Contempt whatſoever, which ſhall be made againſt his, or their Perſons, their Crown, and Dignity, by reaſon, or colour of any ſuch Sentence, or Declaration, or otherwiſe, and will do my beſt endeavour to diſcloſe, and make known unto his Majeſty, his Heirs, and Succeſſors, all Treaſons, and traiterous Conſpiracies, which I ſhall know, or hear of, to be againſt him or any of them.

And I do further ſwear, That I do from my Heart abhor, deteſt, and abjure, as impious, and heretical, this damnable Doctrine, and Poſition, That Princes which be excommunicated, or deprived by the Pope, may be depoſed, or murthered by their Subjects, or any other whatſoever.

And I do believe, and in my Conſcience am reſolved, That neither the Pope, nor any Perſon whatſoever, hath power to abſolve me of this Oath, or any part thereof; which I acknowledge by good and full Authority to be law-

lawfully miniſtred unto me, and do renounce all Pardons, and Diſpenſations to the contrary; And all theſe things I do plainly and ſincerely acknowledge and ſwear, according to theſe expreſs words by me ſpoken, and according to the plain and common Senſe and Underſtanding of the ſame Words, without any Equivocation, or mental Evaſion, or ſecret Reſervation whatſoever; And I do make this Recognition and Acknowledgment, heartily, willingly and truly upon the true Faith of a Chriſtian. So help me God. Stat. 3 Jac. 1. cap. 4.

But theſe two Oaths are now both repealed and abrogated by the Statute of 1 *W. & M. Seſſ.* 1. *cap.* 8. and new Oaths are thereby appointed. And all Perſons, who were obliged to take the ſaid abogated Oaths, are now to take the Oaths appointed by this Statute, in ſuch manner, at ſuch times, before ſuch Perſons, in ſuch Courts or places, as they ſhould or ought to have taken the ſaid abrogated Oaths, or either of them, in caſe they had not been abrogated; And that every perſon, who ſhall neglect or refuſe to take the ſame, ſhall incur and be liable to the ſame Penalties, Forfeitures, Diſabilities, as by any Statute was appointed, for or upon neglect or refuſal to take the former abrogated Oaths.

And the Oaths required now to be taken by this Statute, are in theſe Words following:

I A. B. do ſincerely promiſe and ſwear, That I will be faithful and bear true Allegiance to his Majeſty King William. So help me God.

I A. B. do ſwear, That I do from my Heart abhor, deteſt and abjure as impious and Heretical that damnable Doctrine and Poſition, That Princes excommunicated or deprived by the Pope, or any Authority of the See of *Rome*, may be depoſed or murdered by their Subjects, or any other whomſoever.

And I do declare, That no Foreign Prince, Perſon, Prelate, State or Potentate hath, or ought to have, any Juriſdiction, Power, Superiority, Pre-eminence or Authority Eccleſiaſtical or Spiritual within this Realm. So help me God.

If any Impediment, or great Crime be objected againſt him that is to be made, either Prieſt or Deacon, at the time that he is to be ordained, the Biſhop is bound to ſurceaſe from ordering him, until the Party accuſed ſhall be found clear of that Crime, *Rubr.* If a Perſon, that doth deſire to be ordered a Prieſt, or Deacon, be a Baſtard, he is not without Diſpenſation to be ordered, 11 H. 4. 78. *a.* But the King, as well as the Arch-Biſhop, may diſpenſe with ſuch Perſon, ſo that he may be admitted to Holy Orders, 5 *Co. de Jure Eccleſiaſtico*, and in *Horſful and Walle's Caſe*, *Paſch.* 9 *Jac. Davis* 73. But if ſuch Perſon be ordained, and made Parſon of a Church, altho' he is deprivable, yet, if he doth obtain a Diſpenſation from the King, or Arch-Biſhop, before he be deprived, he ſhall retain the Benefice, 11 H. 4. 38, 76, 77, 60,

For the preventing of Orders to be given to unworthy Perſons, it hath been Enacted, That if any Perſon or Perſons whatſoever, ſhall, or do, at any time after the end of this Seſſion of Parliament, receive or take, any Mony, Fee, Reward or any other Profit, directly or indirectly, or ſhall take any Promiſe, Agreement, Covenant, Bond or other Aſſurance, to receive any Mony, Fee, Reward or any other Profit, directly or indirectly, either

ther to him, or themselves, or to any other of their, or any of their Friends (all ordinary and lawful Fees only excepted) for, or to procure the ordaining or making of any Minister or Ministers, or giving of any Orders, or License or Licenses to Preach, that then every Person and Persons so offending, shall for every such Offence, forfeit and lose the Sum of forty pounds of lawful Mony of England; and the Party so corruptly ordained or made Minister, or taking Orders, shall forfeit and lose the Sum of ten Pounds. And if at any time within seven years next after such corrupt entring into the Ministry, or receiving of Orders, he shall accept or take any Benefice, Living or Promotion Ecclesiastical, that then immediatly from and after the Inducting, Investing or Installation thereof or thereinto had, the same Benefice, Living and Promotion Ecclesiastical shall be eftsoons meerly void; and that the Patron, or Person to whom the Advowson, Gift, Presentation or Collation shall by Law appertain, shall and may, by vertue of this Act present, or collate unto, give and dispose of the same Benefice, Living, or Promotion Ecclesiastical, in such sort to all intents and purposes, as if the Party so inducted, invested or installed had been, or were naturally dead, any Law, Ordinance, Qualification or Dispensation to the contrary notwithstanding. The one Moiety of all which Forfeitures shall be to our Sovereign Lady the Queen her Heirs, and Successors; and the other Moiety to him or them that will sue for the same, by Action of Debt, Bill, Plaint or Information in any of her Majesty's Courts of Record, in which no Essoin, Protection, Priviledge or Wager of Law shall be admitted or allowed. Stat. 31 Eliz. cap. 6.

It appertaineth to the Office of a Deacon, in the Church where he shall be appointed, to serve in assisting the Priest in Divine Service, and in Distribution of the Communion, to read the Holy Scriptures and Homilies in the Church, to instruct the Youth in the Catechism, in the absence of the Priest to baptize Infants, and to preach, if he be admitted thereunto by the Bishop, *Rubrick.* And also to bury the Dead, and solemnize Marriage, *Cosin's Tables, Tab.* 12. But before he be four and twenty years of Age he may not be admitted to preach, nor to baptize, nor to administer the Lord's Supper, and all Tolerations, Dispensations, Qualifications and Licences whatsoever to be made to the contrary hereof, are meerly void in Law, as if they never were, *Stat.* 13 *Eliz. c.* 12.

If a Deacon be of the Age aforesaid, yet neither he, nor any person may presume to consecrate and administer the Holy Sacrament of the Lord's Supper, before such time as he shall be ordained Priest according to the form and manner, in, and by the Book of Common Prayer prescribed, unless he have formerly been made Priest by Episcopal Ordination, upon pain to forfeit for every Offence the Sum of One Hundred Pounds; one Moiety thereof to the King's Majesty, the other Moiety thereof to be equally divided between the Poor of the Parish where the Offence shall be conmmitted; and such Person or Persons as shall sue for the same, by Action of Debt, Bill, Plaint or Information, in any of his Majesty's Courts of Record, wherein no Essoin, Protection or Wager of Law shall be allowed, and to be disabled from taking and being admitted into the Order of Priest, by the space of one whole year next following. But this Penalty doth not extend to the Foreigners or Aliens of the Foreign Reformed Churches allowed, or to be allowed, by the King's Majesty, his Heirs and Successors in *England*, *Stat.* 14 *Car.* 2. *c.* 4. **Nor to any Person dissenting from the Church of** England, (**except Papists and Popish Recusants**) **in Holy Orders, or pretended Holy Orders;**

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nor to any Preacher or Teacher of any Congregation of Diſſenting Proteſtants, taking the Oaths, and ſubſcribing, and making the Declaration, as by the Act is directed, Stat. 1 W. & M. cap. But *Quære*, Whether it be lawful or ſafe, for one that is but a Deacon, to aſſiſt a Prieſt in the Diſtribution of the Communion; for if that be conſtrued to be an Adminiſtration thereof, it is prohibited to a Deacon, and by doing it he forfeits One Hundred Pounds, *Stat.* 14 *Car.* 2. *c.* 4. for the Words of the Statute are, **Nor may he preſume to conſecrate or adminiſter,** &c.

A Prieſt by his Ordination receives Authority to preach the Word, and adminiſter the Holy Sacraments in the Congregation where he ſhall be lawfully appointed thereunto, *Rubr. Stat.* 1 *Mar. c.* 3. Yet notwithſtanding he may not preach without the Licence either of the King, or his reſpective Arch-Biſhop, Biſhop or other lawful Ordinary, or one of the Univerſities of *Oxford* or *Cambridge*, *Stat.* 1 *Mar. c.* 3. 14 *Car.* 2. *c.* 4. 13 *Eliz. c.* 12. But a Licence by the Biſhop of any Dioceſs is ſufficient, although it be only to preach within his Dioceſs, the Statute not requiring any Licence by the Biſhop of the Dioceſs where the Church is, *Paſch.* 15 *Car.* 2. *B. R. Brown.* v. *Spence.* 1 *Keble* 503. But if a Perſon, that is a meer Lay-man, be admitted and inſtituted to a Benefice with Cure, and doth adminiſter the Sacraments, Marry, *&c.* theſe, and all other Spiritual Acts, performed by him during the time that he continues Parſon in Fact, are good, ſo that the Baptized by ſuch Perſon, are not to be re-baptized, nor Perſons married by him, to be married again to ſatisfie the Law, *Paſch.* 42 *Eliz. B. R. Coſtard* v. *Windet*, 3 *Cro.* 775. and by *Moor the ſame Caſe.* 606.

CHAP. XV.

Of Preſentations, Nominations, Collations, Election, Inſtitution and Induction; and of Donatives.

IT being declared in the foregoing Chapters, what things are to be known, and obſerved by a Perſon that would take a Title to an Eccleſiaſtical Benefice; in order thereunto, I come now to ſpeak particularly of the ſeveral ways or means by which ſuch Title may be taken, or by which a Perſon may make himſelf the lawful and complete Incumbent of a Church Promotion.

The Ways or Means by which a Clerk may become the lawful Incumbent of a Church, are either ſuch, as that one of them muſt be obſerved by every one that will ſettle himſelf by legal Title in any Eccleſiaſtical Benefice, or ſuch as are only to be uſed to open his way, in caſe the Clerk is ſtopped in his Proceedings by any of thoſe Means by which a Title may be had. The Ways by which a legal Title is taken, are either ordinary or extraordinary; the ordinary Ways or Means are by Preſentation, Inſtitution, or Collation, and Induction, or by Donation, or laſtly by Election and Confirmation.

The firſt thing to be done then, and which is the moſt uſual way of taking a Title, is to obtain the Preſentation of him that ought to preſent to the void Benefice, with Admiſſion, Inſtitution, and Induction thereupon. The Patron's Preſentation is the Nomination of a Clerk unto the Biſhop or Ordinary

nary for the time to be by him admitted, and inſtituted into the Church, or Benefice that is void, *Hughs Abr. Tit. Advowſon* 132. Preſentation, Nomination and Collation are ſometimes in Law uſed for the ſame thing, 14 H. 7. 22. and yet they are commonly diſtinguiſhed; for Preſentation is an Offering of the Clerk to the Ordinary, and as is before ſaid, Nomination may be the Offering of a Clerk to him that may and ought to preſent him to the Ordinary, by reaſon of a Grant made by him that hath the power of Preſenting, obliging him thereunto; and Collation is the giving of the Church to the Clerk, and is that Act by which the Ordinary doth admit and inſtitute a Clerk to a Church, or Benefice of his own Gift, in which caſe there is no Preſentation. If Preſentation or Nomination be made in Writing, it is not properly a Deed, but an Inſtrument in the Nature of a Letter Miſſive to the Biſhop or Ordinary to exhibit to him a Clerk to have a Benefice voided, *Co. Lit.* 120. *a.* and it is uſually in this, or the like Form, when it is made to the Arch-Biſhop of *Canterbury*: *Reverendiſſimo in Chriſto Patri & Domino Domino* A. *Permiſſione Divina Cantuarienſi Archiepiſcopo totius Angliæ Primati & Metropolitano ejuſve in abſentia Vicario ſuo in rebus Spiritualibus generali; aut alicuicunque in hac parte ſufficientem authoritatem habenti.* If it be made to the Ach-Biſhop of *York* the Word *totius* is to be omitted: If to any other Biſhop it muſt ſay, *Reverendo in Chriſto Patri & Domino Domino* P. *Permiſſione Divina Epiſcopo ejuſve in abſentia Vicario ſuo in Spiritualibus generali, aut alicuicunq; in hac parte ſufficientem authoritatem habenti. Prænobilis* A. B. *Baro de* C. *verus & indubitatus Patronus Rectoriæ Eccleſiæ Parochialis de* D. *ſalutem in Domino ſempiternam ad Eccleſiam Parochialem de* D. *prædict. veſtræ Dioceſis modo per mortem naturalem* E. F. *ultimi Incumbentis ibidem vacantem, & ad meam Præſentationem pleno Jure ſpectantem; Dilectum mihi in Chriſto* G. H. *Sacræ Theologiæ Profeſſorem Paternitati veſtræ præſento, humiliter ſupplicans ut præfatum* G. H. *ad dictam Eccleſiam admittere, ipſumq; in Rectoriam ejuſdem Eccleſiæ inſtitui, & induci facere, cum ſuis Juribus & pertinentiis univerſis, cæteraq; omnia & ſingula peragere & adimplere in hac parte, quæ ad veſtrum munus Epiſcopale pertinere videbantur dignemini cum favore In cujus rei teſtimoniumm, &c.* If it ſay (*ad Rectoriam*) it is as good as if it be (*ad Eccleſiam*) *Trin.* 8 *Jac. King* v. ----- 2 *Cro.* 248. And the Preſentation being made in this Form, if the Biſhop be inhibited, or the See voided, before Inſtitution is had of the immediate Biſhop, yet the Preſentation is good to the Metropolitan or other Guardian of the Spiritualties.

If the King doth grant a Preſentment by his Letters Patents by theſe Words *Damus, Concedimus*, without any Words of Preſentment, yet it ſeems, that this ſhall amount to a Preſentment, and to be a ſufficient Warrant to the Biſhop to inſtitute the Clerk preſented, 2 *Rolls Abr.* 353. *Dubitatur* 19 E. 3. *Quare Impedit* 60. And it is not material what Seal is put to the Preſentation; and yet it is ſaid, that a Preſentation made by the King under the Exchequer Seal is not good, *Trin.* 8 *Jac. King* v. ------- 2 *Cro.* 248. However if the King doth preſent *pleno Jure* by his Letters Patents under the great Seal of *England*, to a Church Parcel of his Dutchy of *Lancaſter*, it is as good as if it had been made under the Dutchy Seal, *Trin.* 8 *Jac. King* v. *Emerſton, Brownlow & Goldsborough* 1. 162. 2 *Rolls Abr. p.* 182. *The King* v. *the Biſhop of Lincoln, Mich.* 11 *Jac. Moor* 874. So if it had been made under the Privy Seal without the Broad Seal, though I think thoſe that have Livings of the King above value have both, *Trin.* 8 *Jac. King* v. ------ 2 *Cro.* 248. The reaſon of theſe Caſes ſeems to be, becauſe nothing is granted or given by a Preſentation, it being but a Commendation of a Clerk to the Ordinary, or a Declaration of the King's Will, and not any Intereſt, and may be made as

well by the word of the Patron only (unleſs a Corporation aggregate be Patron) for they muſt preſent under their Common Seal, 13 *H.*8.12. *Br. Corporation* 81. as by an Inſtrument in writing, 19 *E.* 3. *Quare Impedit* 60. 38 *E.* 3. 3. *Trin.* 8 *Jac. King* v. -------- 2 *Cro.* 248. *Co. Litt.* 120. *Dubitat' Mich.* 1649. *Canes* & *Osby*'s Caſe, *Stiles p.* 156. And that not only in the Caſe of the King, but alſo of a common Perſon, *Mich.* 21 *Car.* 2. *B. R. Clerk* v. *Heath*, 1 *Siderfin* 426. 2 *Keble* 484 *Co. Litt.* 120. That is, if the Patron be in the preſence of the Ordinary: However, the King may preſent to a Living by his Letter, *Mich.* 1649. *Stiles p.* 156. 2 *E.* 1. *Rot. patentium Membrana* 5.

The Clerk being furniſhed with a Preſentation, he is to apply himſelf to his Ordinary for Admiſſion, and Inſtitution; and the Biſhop of the Dioceſs within which is the void Church, for the moſt part, is the Ordinary, by whom he ought to be Admitted, and Inſtituted; and tho' the Church is lapſed to the Metropolitan, yet if the Patron doth preſent before the Metropolitan collate his Clerk, his Preſentation may be directed to the Ordinary of the Dioceſs, who may thereupon inſtitute the Clerk preſented, *Rolls Abr.* 2. *p.* 348. *Contra H.* 41 *Eliz.* B. *R.* by *Popham.* But when the See is void, the Dean, and Chapter, or other Guardian of the Spiritualties, by Cuſtom have the Authority of Admitting and Inſtituting; or if the See being full, the Arch-Biſhop viſiting his inferior Biſhop, doth him inhibit, during his Viſitation, (as the uſe is) and a Church within the Dioceſs viſited, doth lapſe to the Ordinary of the Dioceſs, the Biſhop, and not the Metropolitan, ſhall have the benefit thereof, and the Biſhop may not collate his Clerk, (becauſe by the Inhibition his Power of Juriſdiction is ſuſpended) but muſt preſent him to the Metropolitan, who ought to inſtitute him, *Trin.* 13 *Car. B. R.* between *Dodſon* & *Lynn*, agreed by the Civilians. But this Caſe being argued upon another point, was not reſolved, *Intrat. Trin.* 11 *Car. Rot.* 446. *Rolls Abr.* 2. *p.* 357. Admiſſion and Inſtitution may alſo be made by a Commiſſary, having a Deputation to that purpoſe, 3 *E.* 3. 5. & 6. and may be by another Perſon than the Ordinary, *Rolls* 2 *Rep.* 100.

The Ordinary, whoever he be, that doth admit the Clerk, is firſt to examine him, that he may be able to judge of his Ability to ſerve the Cure of the Church to which he is preſented, 14 *H.* 7. 22. 4 E. 3. *Quare Impedit* 128. *Doctor and Student, c.* 26. *l.* 2. But the Ordinary is not bound inſtantly upon Requeſt made, to examine the Preſentee, *&c.* but may appoint a convenient time and place for the Clerk to attend him to be examined, 15 *H.* 7. 6. 7. 14 *H.* 7. 22. And by the Canon made, 1 *Jac. c.* 95. it is Ordained, **That although the Ordinary in former times, had two Months given him to enquire, and inform himſelf of the ſufficiency and quality of every Clerk, the Ordinary ſhall have but Eight and twenty Days only for that purpoſe,** *Rolls Abr.* 2. *p.* 355. And the Common Law doth allow him time to be adviſed, 14 *H.* 7. 22. 15 *H.* 7. 6. 7.

After the Clerk is examined (if he be to be admitted unto a Benefice with Cure), he is to ſubſcribe the Articles of Religion, commonly called the Thirty Nine Articles, agreed upon in Convocation in the Year 1562. And this Subſcription muſt be made in the preſence of the Ordinary, (and not of his Chaplain, or Secretary only), and that alſo before the Clerk is admitted to the Benefice to which he is preſented, *Stat.* 13 *Eliz.* 12. And the Ordinary is not bound to offer the Articles to the Clerk to be by him ſubſcribed, and to require him to do it, but the Clerk is himſelf to offer to ſubſcribe them; and in this Caſe, upon the Clerk's neglect to ſubſcribe the Articles, the Church remains void, as never full of ſuch Clerk, and no Sentence of Deprivation is neceſſary, by reaſon that he never was Incumbent, but the Admiſſion, and Inſtitution,

ſtitution are void; but otherwiſe it is, upon neglect, or refuſing to read the Articles, *Trin.* 24 *Eliz. the Queen* v. *Biſhop of Lincoln* & *Cock*, 1 *Anderſon Caſe* 136.

And in ſubſcribing unto the ſaid Articles, the Clerk ſhould remember that it hath been enacted, that----**Whereas the Six and thirtieth Article of the Nine and thirty Articles aforeſaid, is in theſe words following: (That the Book of Conſecration of Arch-Biſhops, and Biſhops, and Ordaining of Prieſts, and Deacons, lately ſet forth in the time of King** Edward **the Sixth, and confirmed at the ſame time by Authority of Parliament, doth contain all things neceſſary to ſuch Conſecration and Ordaining, neither hath it any thing that of it ſelf is ſuperſtitious and ungodly; and therefore, whoſoever are Conſecrated, or Ordered, according to the Rites of that Book, ſince the Second Year of the aforenamed King** Edward, **unto this time, or hereafter, ſhall be Conſecrated, or Ordered according to the ſame Rites; we decree all ſuch to be rightly, orderly, and lawfully Conſecrated and Ordered.) It is alſo enacted, That all Subſcriptions hereafter to be had, or made unto the ſaid Articles, by any Deacon, Prieſt, or Eccleſiaſtical Perſon, or other Perſon whatſoever, who by any Law now in force, is required to ſubſcribe unto the ſaid Articles, ſhall be conſtrued, and taken to extend, and ſhall be applied (for, and touching the ſaid Six and thirtieth Article) unto the Book, containing the Form and Manner of Making, Ordaining, and Conſecrating of Biſhops, Prieſts, and Deacons, in this Act mentioned, in ſuch ſort, and manner, as the ſame did heretofore extend unto the Book ſet forth in the time of King** Edward **the Sixth, mentioned in the ſaid Six and thirtieth Article; any thing in the ſaid Article, or in any Statute, Act, or Canon heretofore had, or made to the contrary thereof, in any wiſe notwithanding,** Stat. 14 Car. 2. c. 4.

Alſo every Perſon before his, or their reſpective Admiſſion to be Incumbent, or have poſſeſſion of any Deanry, Canonry, or Prebend, in any Cathedral, or Collegiate Church, Maſterſhip, or other Headſhip, Fellowſhip, Chaplain's Place, or Tutor's Place of, or in any Hoſpital, Publick Profeſſor's, or Reader's Place in any College, not in either of the two Univerſities, or to any Parſonage, Vicarage, or any other Eccleſiaſtical Dignity, or Promotion, Curate's Place, Lecturer's Place, publick or private School, or to teach any Youth in any Houſe, or private Family, as a Tutor, or Schoolmaſter, ought before his reſpective Arch-Biſhop, Biſhop, Ordinary of the Dioceſs, to have ſubſcribed all the Declaration, or Acknowledgment following, *Scilicet.* -----**I** A. B. **do declare, That it is not lawful upon any Pretence whatſoever, to take up Arms againſt the King; and that I do abhor that traiterous Poſition, of taking Arms by his Authority againſt his Perſon, or againſt thoſe that are Commiſſionated by him; and that I will conform to the Liturgy of the Church of** England, **as it it is now by Law eſtabliſhed: And I do declare, that I do hold, there lies no Obligation upon me, or on any other Perſon, from the Oath, commonly called,** The Solemn League and Covenant, **to endeavour any change, or alteration of Government, either in Church, or State, and that the ſame was in it ſelf an unlawful Oath, and impoſed upon the Subjects of this Realm, againſt the known Laws and Liberties of this Kingdom.** And after ſuch Subſcription made, every Parſon, Vicar, Curate, or Lecturer, ſhall procure a Certificate under the Hand and Seal of the reſpective Arch-Biſhop, Biſhop, or Ordinary of the Dioceſs (who are bound to make and deliver the ſame) teſtifying as much, to the end the ſame may be read in his Pariſh-Church. But after the Five and twentieth Day of *March*, which ſhall be in the Year of our Lord God 1682, there ſhall be omitted in the ſaid Declaration, or Acknow-

ledgment, ſo to be ſubſcribed, and read theſe words following, *Scilicet*.---And **I do declare, That I do hold there lies no Obligation on me, or any other Perſon, from the Oath commonly called,** The Solemn League and Covenant, **to endeavour any change or alteration of Government, either in Church, or State, and that the ſame was in it ſelf an unlawful Oath, and impoſed upon the Subjects of this Realm, againſt the known Laws and Liberties of this Kingdom.** So as none of the Perſons aforeſaid, ſhall from thenceforth be at all obliged to ſubſcribe, or read that part of the ſaid Declaration, or Acknowledgment, *Stat.* 14 *Car.* 2. *c.* 4. And by the Statute, 1 *W.* & *M. Seſſ.* 1. *cap.* 8. ſo much of this Declaration, as is expreſſed in theſe words, (*viz.*) **I A. B. declare, That it is not lawful upon any Pretence whatſoever, to take up Arms againſt the King; and that I do abhor that traiterous Poſition, of taking Arms by his Authority, againſt his Perſon, or againſt thoſe that are Commiſſioned by him, ſhall not from henceforth be required or enjoined, nor any Perſon ſuffer any Forfeiture, Penalty, or Loſs, by the not ſubſcribing the ſame.** So that at this Day, no part of this Declaration, or Acknowledgment, is to be ſubſcribed unto, except this only part of it, (*viz.*) **That I will conform to the Liturgy of the Church of England, as it is now by Law eſtabliſhed.**

Likewiſe, every Perſon, and Perſons, that at any time ſhall be preferred, promoted, or collated to any Arch-Biſhoprick, or Biſhoprick, or to any other Spiritual, or Eccleſiaſtical Benefice, Promotion, Dignity, Office, or Miniſtery, within this Realm, or any other the King's Dominions, before he, or they, ſhall take upon him, or them to receive, uſe, exerciſe, ſupply, or occupy any ſuch Arch-Biſhoprick, Biſhoprick, Promotion, Dignity, Office, or Miniſtery, ſhall make, take, and receive the Oaths of Supremacy and Allegiance, before ſuch Perſons as have, or ſhall have Authority to admit any ſuch Perſon, to any ſuch Office, or Miniſtery; or elſe before ſuch Perſon, or Perſons, as by Commiſſion under the Great Seal of *England* ſhall be named, aſſigned, or appointed, to adminiſter the ſaid Oaths. And if any ſuch Perſon, or Perſons, as at any time hereafter ſhall be promoted, preferred, or collated to any ſuch Promotion, Spiritual, or Eccleſiaſtical Benefice, Office, or Miniſtery, ſhall, and do peremptorily, and obſtinately, refuſe to take the ſame Oath ſo to him to be offered, that then he, or they ſo refuſing, ſhall preſently be judged, diſabled in the Law, to receive, take, or have the ſame Promotion, Spiritual, or Eccleſiaſtical, within this Realm, or any other the King's Dominions, to all intents, conſtructions, and purpoſes, *Stat.* 1 *Eliz. c.* 1. & *Stat.* 1 *Will.* & *M. c.* 8.

It is alſo uſual for the Ordinary that doth admit, and inſtitute, to require of the Preſentee, to take this Oath as followeth: **I N. N. do ſwear, that I have made no Simoniacal Contract, Payment, or Promiſe, directly, or indirectly, by my ſelf, or by any other, to my knowledge, or with my conſent, to any Perſon, or Perſons whatſoever, for, or concerning the procuring, and obtaining of this Eccleſiaſtical Dignity, Place, Preferment, Office, or Living, (reſpectively, and particularly naming the ſame whereinto he is to be admitted, inſtituted, collated, inſtalled, or confirmed), nor will at any time hereafter, perform, or ſatisfie any ſuch kind of Payment, Contract, or Promiſe, made by any other, without my knowledge or conſent: So help me God, through Jeſus Chriſt.)** But as the Law now ſtands, I conceive, the Ordinary ought not, nor may not, tender, or adminiſter the ſaid, or the like Oath, by reaſon that it hath been enacted, ----**That it ſhall not be lawful for any Arch-Biſhop, Biſhop, Vicar-General, Chancellor, Commiſſary, or any other Spiritual or Eccleſiaſtical Judge, Officer, or Miniſter, or any other Perſon, having, or exerciſing Spiritual, or Eccleſiaſtical Juriſdiction, to tender, or adminiſter** unto

unto any Perſon whatſoever, the Oath uſually called, the Oath Ex Officio, or any other Oath, whereby ſuch Perſon to whom the ſame is tendered, or adminiſtred, may be charged, or compelled, to confeſs, or accuſe, or to purge him, or her ſelf, of any criminal matter, or thing, whereby he, or ſhe, may be liable to any Cenſure, or Puniſhment, any thing in this Statute, or any other Law, Cuſtom, or Uſage heretofore to the contrary hereof, in any wiſe notwithſtanding, Stat. 13 Car. 2. c. 12. And yet probably (altho' the words of this Statute ſeem to take away the uſe of the aforeſaid Oath) its Makers had no Conſideration of it, in paſſing thereof; therefore (*Quære.*)

If the Biſhop by Examination doth find the Clerk capable of the Benefice, after he hath ſeen other Matters performed by him, which are required of him, in order thereunto, he is to admit, and inſtitute him: Admiſſion is nothing elſe but the Ordinary's Declaration, that he doth approve of the Preſentee, as a fit Perſon to ſerve the Cure of the Church, to which he is preſented; and Inſtitution, is that Act by which he doth commit to him the Cure thereof.

It is not of neceſſity, that the Examination, Admiſſion, or Inſtitution be made by the Ordinary within the Dioceſs in which the Church is; for the Juriſdiction of the Ordinary, as to ſuch matters, is not local, but follows the Perſon of the Ordinary where-ever he goes, *Hil.* 9 *Car. Cort* v. *Biſhop of St. Davids*, *Jones* 331. *Owen* & *Prichard*'s Caſe, 1 *Cro.* 341. *Hutton*'s Caſe, *Hobart* 15. *Parſons Counſellor* 8, 9. 21 E. 4. 14. The Clerk being Inſtituted, the Inſtitution is good without any After-Act, yet the Ordinary is wont to make Letters Teſtimonial thereof; but what Seal the Ordinary doth make uſe of in that Caſe is not material, *Hil.* 9 *Car. Cort* v. *Biſhop of St. Davids*, *Jones* 331. *Owen* & *Prichard*'s Caſe, 1 *Cro.* 341.

After Inſtitution is had, Induction muſt be obtained, which is the putting the Clerk in poſſeſſion of the Church, and is that Act by which he is made Complete Incumbent: And therefore the Biſhop, or other Ordinary, Inſtituting, doth make a Mandate to that Perſon who hath the Right, and upon whom doth lie the Duty of Inducting, thereby requiring him to induct the inſtituted Clerk into his Benefice, 38 E. 3. 3. *b.* *Parſons Counſellor* 8, 9. But ordinarily, the Arch-Deacon is the Perſon to whom the Biſhop is to direct his Mandate, as being he who ought to induct, or give poſſeſſion unto the Clerks inſtituted to any Churches within his Arch-Deaconry, 38 E. 3. 3. *b.* But the Biſhop may direct his Mandate to ſuch other Clergy-men as he pleaſes to make Induction, *Parſons Counſellor* 8. And by Preſcription, or Compoſition, others as well as Arch-Deacons, may make Inductions; for by Preſcription the Dean and Chapter of *Litchfield* do make Induction, and ſo do the Dean and Chapter of St. *Paul*'s, 11 H. 4. 9. And if Induction be made by the Biſhop, when it doth appertain to the Dean and Chapter by Preſcription, the Induction is void, 11 H. 4. 9. *Contra* 11 H. 6. *Quare Impedit* 162. And yet it is ſaid to be granted, that where a Dean and Chapter have uſed to make Induction to a Prebend, upon Preſentation by the Biſhop, or others; yet if the Biſhop doth induct the Prebend, it is good at the Common Law; for that he is Officer, and Ordinary immediate to the Court, and the Court ſhall not take Conuſance of the peculiar Juriſdiction, 11 H. 4. 7. *Preſentation al Eſgliſe* 13. It is ſaid, that an Induction made by the Patron is void, 11 H. 4. 10. *Parſons Counſellor* 8. But this, I ſuppoſe, is to be underſtood, when it is done of his own Authority, without ſpecial Privilege: For I doubt not, but that a Biſhop may give Induction as well as Inſtitution to a Benefice of his own Giſt, where the Right of Induction to Benefice within his own Dioceſs is in him; or however, that the Arch-Deacon may induct to a Benefice within his Arch-Deaconry, altho' he

he be Patron thereof; nevertheleſs, the Rule is *Modus & Conventio vincunt legem*; and therefore, tho' *De Jure Communi*, neither Biſhop, nor Arch-Deacon, may induct a Clerk to their Benefices of which they are Patrons, yet by Preſcription, or Compoſition, their Induction in ſuch Caſe muſt be good. And accordingly, tho' the Biſhop of *Chicheſter* doth admit the Dean of the exempt Juriſdiction of *Battell* within that Dioceſs, and doth commit to him the Cure, and Juriſdiction of that Church, yet the Patron thereof is to inſtitute, and induct the Dean, and the Patrons accordingly, have given the Deans Inſtitution and Induction for ſome Hundreds of Years, and without queſtion ſuch Inſtitution, and Induction is good; but this Deanry was originally given to the Incumbent as a Donative only by the Patron, and the Biſhop admits or approves of the Patron's Preſentee, and commits to him the Cure and Juriſdiction by Compoſition only.

If the King doth grant one of his free Chapels, the Grantee ſhall be put in poſſeſſion by the Sheriff of the County, and not by the Ordinary of the Place, 14 H. 4. 11. *b.* And in ſome places a Prebend ſhall have poſſeſſion without Induction, as at *Weſtminſter*, where the King makes Collation by his Letters Patents, and thereupon the Party enters upon the Prebend without other Induction, and good; and in ſome places, the Biſhop makes the Induction, in ſome places others make it, and the Uſage generally ſhall hold place, 11 H 4. 7. *Preſentation al Egliſe* 13. For the moſt part the Arch-Deacon doth not give Induction in his proper Perſon, but ſends a Mandate for the Induction of the Clerk; which, if it be made, *Univerſis & ſingulis Rectoribus Vicariis Clericis & literatis infra Archidiaconatum meum ubicunque conſtitutis*, and a Miniſter, or Preacher, who is not reſident within that Arch Deaconry, doth upon ſuch Mandate make the Induction, the Induction is good; and the Opinion of four Doctors of Law was ſhewed to the Court accordingly, *Trin. 7 Jac. Chriſtopher Dean*'s Caſe, *Noy* 134.

By Admiſſion, and Inſtitution alone, the Church is full againſt all Perſons but the King; yea, and againſt the King too, as 'tis ſaid by ſome Books, if he claim from a common Perſon, or that the Right of preſenting to the Church be not truly in him, 13 *Jac. Hitching* & *Glover*'s Caſe, *Rolls* 191 & 227. and thereby the Clerk hath Authority, and is obliged to attend the Cure of Souls belonging thereto, 22 *H.* 6. 27. 44 E. 3. 3. 11 H. 4. 9. 33 *H.* 6. 13. 38 E. 3. 4. 33 H. 6. 24. 21 E. 4. 34. *b.* 13 *Jac. Hitching* & *Glover*, 1 *Rolls* 227. *Hil.* 14 & 15 *Jac. Hutchins* v. *Glover*, 2 *Cro.* 463. *Mich.* 15 *Jac. Rone*'s Caſe, *Popham* 133. *Mich.* 19 & 20 *Eliz. Dyer* 360. 4 *Eliz. Dyer* 217. 62. 6 *Co.* 159. *Boſwell*'s Caſe, 4 *Co.* 79. *b.* 7 *Co.* 26. 6 *Co.* 41. *Dar.* 82. *b.* Alſo, he that is inſtituted, may enter into the Glebe, and take the Tythes before Induction, and hath Right to have them againſt any Stranger, by *Coke* in *Hitching* & *Glover*'s Caſe, *Paſch.* 13 *Jac. Rolls* 1 *Rep.* 227. And yet before Induction, he hath not, nor is ſeiſed of the Temporalties of the Church, ſo that he may grant or ſue for any of them, 22 H. 6. 27. 38 E. 3. 4. *Trin.* 20 *Eliz. Hare* v. *Bickly*, *Plowden* 528. But after Induction is had, the Church is full as well againſt the King, as againſt any other Perſon, *Hil.* 11 *Jac. Needler* v. *Winton* & *Needler* 1. *Brownlow* & *Gouldsborough* 163. 38 E. 3. 4. 13 *Jac. Hitching* & *Glover*'s Caſe, 1 *Rolls* 227. 4 *Eliz. Dyer* 217. 33 H. 6. 24. 6 *Co.* 49. *b.* 7 *Co.* 26. And the Temporalties, as Tithes, Glebe, and Oblations, are actually inveſted in him, as is ſhewed elſewhere.

Tho' the Clerk be ſaid to be Incumbent to all Purpoſes, by due Admiſſion, Inſtitution, and Induction; yet for the perfecting, or at leaſt continuing his Title, other things remain to be afterwards punctually performed by him at his peril; for it hath been enacted, That every Perſon that ſhall hereafter be pre-

preſented or collated, or put into any Eccleſiaſtical Benefice or Promotion within this Realm of England, Dominion of Wales, or Town of Berwick upon Tweed, ſhall in the Church, Chapel, or Place of Publick Worſhip, belonging to his ſaid Benefice, or Promotion, within two Months next after that he ſhall be in the actual poſſeſſion of the ſaid Eccleſiaſtical Benefice, or Promotion, without ſome lawful Impediment to be allowed, and approved by the Ordinary of the place hinder, and that within one Month after ſuch Impediment removed, upon ſome Lord's Day, openly, publickly, and ſolemnly read the Morning and Evening Prayers appointed to be read by, and according to the ſaid Book of Common-Prayer, at the times thereby appointed, and after ſuch Reading thereof, ſhall openly, and publickly, before the Congregation there aſſembled, declare his unfeigned Aſſent, and Conſent, unto all things therein contained, and preſcribed, according to this Form of Words, and no other: ------I A. B. do here declare my unfeigned Aſſent, and Conſent, to all, and every thing contained, and preſcribed in, and by the Book entituled, The Book of Common-Prayer, and Adminiſtration of the Sacraments, and other Rites and Ceremonies of the Church, according to the Uſe of the Church of England; together with the Pſalter, or Pſalms of David, Pointed as they are to be ſung or ſaid in Churches; and the Form, or Manner of Making, Ordaining, and Conſecrating of Biſhops, Prieſts, and Deacons, Stat. 14 Car. 2. c. 4.

Alſo, every Parſon, and Vicar, muſt publickly, and openly, read the aforeſaid Certificate of his declaring, that he will conform to the Liturgy of the Church of *England*, as it is now by Law eſtabliſhed; mentioned before, *f.* 107,& 108. together with the Declaration, or Acknowledgment it ſelf, concerning which the Certificate is made of his ſubſcribing thereto, upon ſome Lord's Day, within three Months then next following, in his Pariſh-Church where he is to officiate, in the preſence of the Congregation there aſſembled, in the time of Divine Service, *Stat.* 14 *Car.* 2. 4.

And note, That altho' the aforeſaid Certificate to be had under the Hand and Seal of the Biſhop, ſhould contain the very words of the Declaration, or Acknowledgment, to be read together with it, yet it may be a Queſtion, Whether by only reading ſuch Certificate, which doth contain the Declaration as a part thereof, be all that the Statute of 14 *Car.* 2. 4. doth require in this Caſe? Or, Whether after the Certificate is read, that doth contain the Declaration, or Acknowledgment, and ſo is read with it, the Parſon, or Vicar, be not alſo obliged again to read the Declaration, or Acknowledgment apart, thereby making a Declaration of the Contents thereof at that time? And if the Deſign of the Act be, that the Parſon, or Vicar, ſhould only inform the People, what he had ſubſcribed before the Biſhop, then it may be ſufficient to read it only as a part of the Certificate; but if it be the meaning of that Law, as I conceive it is, that he ſhould make a Verbal Declaration, or Acknowledgment, in the preſence of the People, of that which he hath ſubſcribed before the Biſhop, (as in the Caſe of the Thirty Nine Articles), to read the Form of the Declaration in the Certificate as a part thereof, is no making of any Verbal Declaration; and therefore, that it ought to be read again alone, if that be the meaning of the Statute; however, it is moſt ſafe ſo to do.

And it is alſo enacted, That every Perſon hereafter to be admitted to a Benefice with Cure, except that within two Months after his Induction, he doth publickly read the Thirty Nine Articles of Religion, agreed upon by the Convocation, Anno Domini 1592, in the ſame Church where he ſhall have Cure, in the time of Common-Prayer there, with Declaration of his unfeign-

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ed Aſſent thereto, ſhall be upon ſuch Default, ipſo facto, deprived, Stat. 13 El. *c.* 12. And this Declaration of unfeigned Aſſent, muſt be abſolute; for if he ſhould add, ſo far forth as they are agreeable to the Word of God, or the like, his Declaration of Aſſent is not what the Law doth require, *Mich.* 32 & 34 *Eliz. Smith* v. *Clerke*, 3 *Cro.* 252. 4 *Inſt.* 324. In the Caſe of *Brown* v. *Spence*, *Paſch.* 15 *Car.* 2. *B. R.* 1 *Keble* 502. it was held *per Cur.* that the reading the Thirty Nine Articles in the Church-Porch, was ſufficient (the Divine Service being read there alſo) by reaſon of the Denial of the Key of the Church. But it is made a *Quære*, Whether reading the ſaid Thirty Nine Articles at a reputative Hamlet-Church, belonging to the principal Church, the principal Church being kept ſhut, that the Clerk cannot enter thereinto, be a ſufficient reading to ſatisfie the Statute?

And note that it is ſaid, That the aforeſaid Certificate, together with the Declaration, or Acknowledgment, and alſo the Thirty Nine Articles, ſhall be read, and the Aſſent thereto given, in time of Common-Prayer; and that therefore theſe are not to be neglected, until Divine Service, or Common-Prayer is ended.

The Articles of Religion to be ſubſcribed before Admiſſion, and to be read, *&c.* in time of Divine Service are as followeth:

I. Of Faith in the Holy Trinity.

THere is but one living and true God everlaſting; without body, parts, or paſſions; of infinite power, wiſdom, and goodneſs; the maker and preſerver of all things, both viſible and inviſible. And in unity of this Godhead there be three perſons, of one ſubſtance, power, and eternity; the Father, the Son, and the Holy Ghoſt.

II. Of the Word, or Son of God, which was made very Man.

THE Son, which is the Word of the Father, begotten from everlaſting of the Father, the very and eternal God of one ſubſtance with the Father, took man's nature in the womb of the bleſſed Virgin, of her ſubſtance: ſo that the two whole and perfect natures, that is to ſay, Godhead and manhood, were joyned together in one Perſon, never to be divided, whereof is one Chriſt, very God and very man, who truly ſuffered, was crucified, dead and buried, to reconcile his Father to us, and to be a ſacrifice, not only for original guilt, but alſo for actual ſins of men.

III. Of the going down of Chriſt into Hell.

AS Chriſt died for us, and was buried; ſo alſo is it to be believed, that he went down into hell.

IV. Of the Reſurrection of Chriſt.

CHriſt did truly riſe again from death, and took again his body, with fleſh, bones, and all things appertaining to the perfection of mans nature, wherewith he aſcended into heaven, and there ſitteth, until he return to judge all men at the laſt day.

V. Of the Holy Ghoſt.

THE Holy Ghoſt, proceeding from the Father and the Son, is of one Subſtance, Majeſty, and Glory with the Father and the Son, very and eternal God.

VI. Of the Sufficiency of the Holy Scriptures for Salvation.

HOly Scripture containeth all things neceſſary to ſalvation: ſo that whatſoever is not read therein, nor may be proved thereby, is not to be required of

of any man, that it ſhould be believed as an Article of the Faith, or be thought requiſite or neceſſary to ſalvation. In the name of the holy Scripture, we do underſtand thoſe Canonical Books of the Old and New Teſtament, of whoſe Authority was never any doubt in the Church.

Of the Names and Number of the Canonical Books.

Geneſis.
Exodus.
Leviticus.
Numbers.
Deuteronomy.
Joſhua.
Judges.
Ruth.
The I. Book of Samuel.
The II. Book of Samuel.
The I. Book of Kings.
The II. Book of Kings.
The I. Book of Chronicles.
The II. Book of Chronicles.
The I. Book of Eſdras.
The II. Book of Eſdras.
The Book of Eſther.
The Book of Job.
The Pſalms.
The Proverbs.
Eccleſiaſtes.
The Song of Solomon.
The four greater Prophets.
The twelve leſſer Prophets.

And the other Books, (as Hierome *ſaith) the Church doth read for example of life, and inſtruction of manners; but yet doth it not apply them to eſtabliſh any Doctrine; ſuch are theſe following:*

The III. Book of Eſdras.
The IV. Book of Eſdras.
The Book of Tobias.
The Book of Judith.
The reſt of the Book of Eſther.
The Book of Wiſdom.
Jeſus the Son of Sirach.
Baruch the Prophet.
The Song of the Three Children.
The Story of Suſanna.
Of Bel and the Dragon.
The Prayer of Manaſſes.
The I. Book of Maccabees.
The II. Book of Maccabees.

All the Books of the New Teſtament, as they are commonly received, we do receive and account them Canonical.

VII. Of the Old Teſtament.

THE Old Teſtament is not contrary to the New: for both in the Old and New Teſtament, everlaſting life is offered to mankind by Chriſt, who is the only Mediator between God and man, being both God and man. Wherefore they are not to be heard, which feign that the old Fathers did look only for tranſitory Promiſes. Altho' the Law given from God by Moſes, *as touching Ceremonies and Rites, do not bind Chriſtian Men, nor the civil Precepts thereof ought of neceſſity to be received in any Commonwealth: yet notwithſtanding no Chriſtian man whatſoever, is free from the obedience of the Commandments which are called Moral.*

VIII. Of the Three Creeds.

THE three Creeds, Nice *Creed,* Athanaſius *Creed, and that which is commonly called the Apoſtles Creed, ought throughly to be received and believed: for they may be proved by moſt certain warrants of holy Scripture.*

IX. Of Original Birth, or Sin.

ORiginal Sin ſtandeth not in the following of Adam (*as the* Pelagians *do vainly talk*), *but it is the fault and corruption of the nature of every man, that naturally is ingendred of the Off-ſpring of* Adam, *whereby man is very far gone from original righteouſneſs, and is of his own nature inclined to evil, ſo that the fleſh luſteth always contrary to the ſpirit; and therefore in every perſon born into this world, it deſerveth God's wrath and damnation. And this infection of nature doth remain; yea, in them that are regenerated, whereby the luſt of the fleſh,*

called in Greek, Φρόνημα σαρκὸς, *which ſome do expound the wiſdom, ſome ſenſuality, ſome the affection, ſome the deſire of the fleſh, is not ſubject to the Law of God. And altho' there is no condemnation for them that believe and are baptized, yet the Apoſtle doth confeſs, that concupiſcence and luſt hath of it ſelf the nature of ſin.*

X. Of Free-Will.

THE condition of man after the fall of Adam, *is ſuch, that he cannot turn and prepare himſelf by his own natural ſtrength and good works to faith and calling upon God: wherefore we have no power to do good works pleaſant and acceptable to God, without the grace of God, by Chriſt preventing us, that we may have a good will, and working with us when we have that good will.*

XI. Of the Juſtification of Man.

WE are accounted righteous before God, only for the merit of our Lord and Saviour Jeſus Chriſt by faith, and not for our own works, or deſervings. Wherefore, that we are juſtified by faith only, is a moſt wholſome Doctrine, and very full of comfort, as more largely is expreſſed in the Homily of Juſtification.

XII. Of Good Works.

ALbeit that good works, which are the fruits of Faith, and follow after Juſtification, cannot put away our ſins, and endure the ſeverity of God's judgment, yet are they pleaſing and acceptable to God in Chriſt, and do ſpring out neceſſarily of a true and lively faith, inſomuch that by them a lively faith may be as evidently known, as a tree diſcerned by the fruit.

XIII. Of Works before Juſtification.

WOrks done before the grace of Chriſt, and the inſpiration of his Spirit, are not pleaſant to God, foraſmuch as they ſpring not of Faith in Jeſus Chriſt, neither do they make men meet to receive grace, or (as the School-Authors ſay) deſerve grace of congruity: yea, rather for that they are not done as God hath willed and commanded them to be done, we doubt not but they have the nature of ſin.

XIV. Of Supererrogation.

VOluntary Works beſides, over and above God's Commandments, which they call Works of Supererrogation, cannot be taught without arrogancy and impiety: For by them Men do declare, That they do not only render unto God as much as they are bound to do, but that they do more for his ſake, than of bounden duty is required: whereas Chriſt ſaith plainly, When ye have done all that are commanded to you, ſay, We are unprofitable ſervants.

XV. Of Chriſt alone without Sin.

CHriſt in the truth of our nature, was made like unto us in all things (ſin only except) from which he was clearly void, both in his fleſh and in ſpirit. He came to be a Lamb without ſpot, who by ſacrifice of himſelf once made, ſhould take away the ſins of the world: and ſin (as St. John *ſaith) was not in him. But all we the reſt (altho' baptized, and born again in Chriſt) yet offend in many things; and if we ſay, we have no ſin, we deceive our ſelves, and the truth is not in us.*

XVI. Of Sin after Baptiſm.

NOT every deadly ſin willingly committed after Baptiſm, is ſin againſt the holy Ghoſt, and unpardonable. Wherefore the grant of Repentance is not to be denied to ſuch as fall into ſin after Baptiſm. After we have received the Holy Ghoſt, we may depart from grace given, and fall into ſin, and by the grace of God (we may) ariſe again, and amend our lives. And therefore they are to be condemned, which ſay, they can no more

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ſin as long as they live here, to deny the place of forgiveneſs to ſuch as truly repent.

XVII. Of Predeſtination and Election.

PRedeſtination to life, is the everlaſting purpoſe of God, whereby (before the foundations of the world were laid) he hath conſtantly decreed by his Counſel, ſecret to us, to deliver from curſe and damnation, thoſe whom he hath choſen in Chriſt out of mankind, and to bring them by Chriſt to everlaſting ſalvation, as veſſels made to honour. Wherefore they which be endued with ſo excellent a benefit of God, be called according to God's purpoſe by his Spirit working in due ſeaſon: they through grace obey the calling: they be juſtified freely: they be made ſons of God by adoption: they be made like the image of his only begotten Son Jeſus Chriſt: they walk religiouſly in good works, and at length by God's mercy they attain to everlaſting felicity.

As the godly conſideration of Predeſtination, and our Election in Chriſt, is full of ſweet, pleaſant, and unſpeakable comfort to godly perſons, and ſuch as feel in themſelves the working of the Spirit of Chriſt, mortifying the works of the fleſh, and their earthly members, and drawing up their mind to high and heavenly things, as well becauſe it doth greatly eſtabliſh and confirm their faith of eternal ſalvation, to be enjoyed through Chriſt, as becauſe it doth fervently kindle their love towards God: So, for curious and carnal perſons lacking the Spirit of Chriſt, to have continually before their eyes the ſentence of God's Predeſtination, is a moſt dangerous downfal, whereby the Devil doth thruſt them either into deſperation, or into wretchleſneſs of moſt unclean living, no leſs perilous than deſperation.

Furthermore, we muſt receive God's promiſes in ſuch wiſe as they be generally ſet forth to us in holy Scripture: and in our doings, that will of God is to be followed, which we have expreſly declared unto us in the Word of God.

XVIII. Of obtaining eternal Salvation only by the Name of Chriſt.

THey alſo are to be had accurſed, that preſume to ſay, That every man ſhall be ſaved by the Law or Sect which he profeſſeth, ſo that he be diligent to frame his Life according to that Law, and the Light of Nature: for holy Scripture doth ſet out unto us only the Name of Jeſus Chriſt, whereby Men muſt be ſaved.

XIX. Of the Church.

THE viſible Church of Chriſt is a Congregation of faithful Men, in the which the pure Word of God is preached, and the Sacraments be duly miniſtred, according to Chriſt's Ordinance, in all thoſe things that of neceſſity are requiſite to the ſame.

As the Church of Jeruſalem, Alexandria, *and* Antioch, *have erred: So alſo the Church of* Rome *hath erred, not only in their living and manner of Ceremonies, but alſo in matters of Faith.*

XX. Of the Authority of the Church

THE Church hath power to decree Rites or Ceremonies, and Authority in controverſies of Faith: and yet it is not lawful for the Church to ordain any thing that is contrary to God's Word written, neither may it ſo expound one place of Scripture, that it be repugnant to another. Wherefore, altho' the Church be a Witneſs and a Keeper of Holy Writ, yet as it ought not to decree any thing againſt the ſame, ſo beſides the ſame, ought it not to enforce any thing to be believed for neceſſity of ſalvation.

XXI. Of the Authority of General Councils.

GEneral Councils may not be gathered together without the commandment and will of Princes. And when they be gathered together (foraſmuch as they be an Aſſembly of men, whereof all be not governed with the Spirit and Word

of God) they may err, and ſometimes have erred, even in things pertaining unto God. Wherefore things ordained by them as neceſſary to ſalvation, have neither ſtrength nor authority, unleſs it may be declared that they be taken out of holy Scripture.

XXII. Of Purgatory.

THE Romiſh Doctrine concerning Purgatory, Pardons, Worſhipping and Adoration, as well of Images, as of Relicks, and alſo Invocation of Saints, is a fond thing vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the Word of God.

XXIII. Of Miniſtring in the Congregation.

IT is not lawful for any man to take upon him the Office of publick Preaching, or Miniſtring the Sacraments in the Congregation, before he be lawfully called, and ſent to execute the ſame. And thoſe we ought to judge lawfully called and ſent, which be choſen and called to this Work by men who have publick Authority given unto them in the Congregation, to call and ſend Miniſters into the Lord's Vineyard.

XXIV. Of ſpeaking in the Congregation, in ſuch a Tongue as the People underſtandeth.

IT is a thing plainly repugnant to the Word of God, and the Cuſtom of the Primitive Church, to have publick Prayer in the Church, or to miniſter the Sacraments in a Tongue not underſtood of the people.

XXV. Of the Sacraments.

SAcraments ordained of Chriſt, be not only badges or tokens of Chriſtian mens Profeſſion; but rather they be certain ſure Witneſſes, and effectual ſigns of Grace, and Gods good will towards us, by the which he doth work inviſibly in us, and doth not only quicken, but alſo ſtrengthen and confirm our Faith in him.

There are two Sacraments ordained of Chriſt our Lord in the Goſpel; that is to ſay, Baptiſm, and the Supper of the Lord.

Thoſe five commonly called Sacraments, that is to ſay, Confirmation, Penance, Orders, Matrimony, and Extreme Unction, are not to be counted for Sacraments of the Goſpel, being ſuch as have grown, partly of the corrupt following of the Apoſtles, partly are States of Life allowed in the Scriptures: but yet have not like nature of Sacraments with Baptiſm and the Lord's Supper, for that they have not any viſible Sign or Ceremony ordained of God.

The Sacraments were not ordained of Chriſt to be gazed upon, or to be carried about, but that we ſhould duly uſe them. And in ſuch only as worthily receive the ſame, they have a wholſom effect or operation: but they that receive them unworthily, purchaſe to themſelves damnation, as St. Paul *ſaith.*

XXVI. Of the Unworthineſs of the Miniſters, which hinder not the Effects of the Sacraments.

ALtho' in the viſible Church the evil be ever mingled with the good, and ſometime the evil have chief Authority in the miniſtration of the Word and Sacraments; yet foraſmuch as they do not the ſame in their own Name, but in Chriſt's, and do miniſter by his Commiſſion and Authority, we may uſe their Miniſtry, both in hearing the Word of God, and in the receiving of the Sacraments. Neither is the effect of Chriſt's Ordinance taken away by their wickedneſs, nor the Grace of God's Gifts diminiſhed from ſuch, as by Faith, and rightly do receive the Sacraments miniſtred unto them, which be effectual, becauſe of Chriſt's Inſtitution and Promiſe, altho' they be miniſtred by evil men.

Nevertheleſs, it appertaineth to the Diſcipline of the Church, that enquiry be made of evil Miniſters, and that they be accuſed by thoſe that have knowledge of of their Offences: and finally, being found guilty, by juſt Judgment be depoſed.

XXVII. Of Baptiſm.

BAptiſm is not only a Sign of Profeſſion, and Mark of Difference, whereby Chriſtian men are diſcerned from others that be not Chriſtened: but it is alſo a Sign of Regeneration or new Birth, whereby, as by an inſtrument, they that receive Baptiſm rightly, are grafted into the Church: the Promiſes of the forgiveneſs of ſin, and of our adoption to be the Sons of God, by the Holy Ghoſt, are viſibly ſigned and ſealed: Faith is confirmed, and Grace increaſed by vertue of Prayer unto God. The Baptiſm of young Children is in any wiſe to be retained in the Church, as moſt agreeable with the Inſtitution of Chriſt.

XXVIII. Of the Lord's Supper.

THE Supper of the Lord is not only a Sign of the Love that Chriſtians ought to have among themſelves one to another: but rather it is a Sacrament of our Redemption by Chriſt's death: Inſomuch, that to ſuch as rightly, worthily, and with Faith receive the ſame, the Bread which we break, is a partaking of the Body of Chriſt: and likewiſe the Cup of Bleſſing, is a partaking of the Blood of Chriſt.

Tranſubſtantiation (or the change of the ſubſtance of Bread and Wine) in the Supper of the Lord, cannot be proved by holy Writ: but it is repugnant to the plain words of Scripture, overthroweth the nature of a Sacrament, and hath given occaſion to many Superſtitions.

The Body of Chriſt is given, taken, and eaten in the Supper only after an heavenly and ſpiritual manner. And the mean whereby the Body of Chriſt is received and eaten in the Supper, is Faith.

The Sacrament of the Lord's Supper was not by Chriſt's Ordinance reſerved, carried about, lifted up, or worſhipped.

XXIX. Of the Wicked which eat not the Body of Chriſt, in the uſe of the Lord's Supper.

THE wicked, and ſuch as be void of a lively Faith, altho' they do carnally and viſibly preſs with their teeth (as St. Auguſtin *ſaith) the Sacrament of the Body and Blood of Chriſt: yet in no wiſe are they Partakers of Chriſt, but rather to their condemnation do eat and drink the Sign or Sacrament of ſo great a thing.*

XXX. Of both Kinds.

THE Cup of the Lord is not to be denied to the Lay People: For both the Parts of the Lord's Sacrament, by Chriſt's ordinance and commandment, ought to be miniſtred to all Chriſtian men alike.

XXXI. Of the one Oblation of Chriſt finiſhed upon the Croſs.

THE Offering of Chriſt once made, is that perfect redemption, propitiation, and ſatisfaction for all the ſins of the whole world, both original and actual, and there is none other ſatisfaction for ſin, but that alone. Wherefore the Sacrifices of Maſſes, in the which it was commonly ſaid, that the Prieſt did offer Chriſt for the quick and the dead, to have remiſſion of pain or guilt, were blaſphemous fables, and dangerous deceits.

XXXII. Of the Marriage of Prieſts.

BIſhops, Prieſts, and Deacons, are not commanded by God's Law, either to vow the eſtate of ſingle Life, or to abſtain from Marriage: Therefore it is lawful for them, as for all other Chriſtian men, to marry at their own diſcretion, as they ſhall judge the ſame to ſerve better to godlineſs.

XXXIII. Of Excommunicate Perſons, how they are to be avoided.

THat Perſon which by open denunciation of the Church, is rightly cut off from the unity of the Church, and excommunicated, ought to be taken of the whole multitude of the faithful, as an Heathen and Publican, until he be openly reconciled by Penance, and received into the Church by a Judge that hath Authority thereunto.

XXXIV. Of the Traditions of the Church.

IT is not neceſſary that Traditions and Ceremonies be in all places one, or utterly like; for at all times they have been divers, and may be changed according to the diverſity of Countries, Times, and Mens Manners, ſo that nothing be ordained againſt God's Word. Whoſoever through his private Judgment, willingly and purpoſely doth openly break the Traditions and Ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common Authority, ought to be rebuked openly, (that other may fear to do the like) as he that offendeth againſt the common Order of the Church, and hurteth the Authority of the Magiſtrate, and woundeth the Conſciences of the weak Brethren.

Every particular or National Church, hath Authority to ordain, change, and aboliſh Ceremonies or Rites of the Church, ordained only by mans Authority, ſo that all things be done to edifying.

XXXV. Of Homilies.

THE Second Book of Homilies, the ſeveral Titles whereof we have joyned under this Article, doth contain a godly and wholſome Doctrine, and neceſſary for theſe times, as doth the former Book of Homilies, which were ſet forth in the time of Edward *the Sixth; and therefore we judge them to be read in Churches by the Miniſters, diligently and diſtinctly, that they may be underſtood of the People.*

Of the Names of the Homilies.

1. OF the right Uſe of the Church.
2. Againſt Peril of Idolatry.
3. Of repairing and keeping clean of Churches.
4. Of Good Works, firſt of Faſting.
5. Againſt Gluttony and Drunkenneſs.
6. Againſt Exceſs of Apparel.
7. Of Prayer.
8. Of the Place and Time of Prayer.
9. That Common Prayers and Sacraments ought to be miniſtred in a known Tongue.
10. Of the Reverend Eſtimation of God's Word.
11. Of Alms-doing.
12. Of the Nativity of Chriſt.
13. Of the Paſſion of Chriſt.
14. Of the Reſurrection of Chriſt.
15. Of the worthy receiving of the Sacrament of the Body and Blood of Chriſt.
16. Of the Gifts of the Holy Ghoſt.
17. For the Rogation-Days.
18. Of the State of Matrimony.
19. Of Repentance.
20. Againſt Idleneſs.
21. Againſt Rebellion.

XXXVI. Of Conſecration of Biſhops and Miniſters.

THE Book of Conſecration of Archbiſhops and Biſhops, and Ordering of Prieſts and Deacons, lately ſet forth in the time of Edward *the Sixth, and confirmed at the ſame time by Authority of Parliament, doth contain all things neceſſary to ſuch Conſecration and Ordering: neither hath it any thing that of it ſelf is ſuperſtitious and ungodly. And therefore, whoſoever are conſecrated, or ordered according to the Rites of that Book, ſince the Second Year of the aforenamed King* Edward, *unto this time, or here-*

hereafter ſhall be conſecrated or ordered according to the ſame Rites we decree all ſuch to be rightly, orderly, and lawfully conſecrated and ordered.

XXXVII. Of the Civil Magiſtrates.

THE Queen's Majeſty hath the chief Power in this Realm of England, *and other her Dominions, unto whom the chief Government of all Eſtates of this Realm, whether they be Eccleſiaſtical or Civil, in all Cauſes doth appertain, and is not, nor ought to be ſubject to any foreign Juriſdiction.*

Whereas we attribute to the Queen's Majeſty the chief Government, by which Titles we underſtand the Minds of ſome ſlanderous Folks to be offended: We give not to our Princes the miniſtring either of God's Word, or of the Sacraments, the which thing the Injunctions alſo lately ſet forth by Elizabeth *our Queen, do moſt plainly teſtifie: but that only Prerogative which we ſee to have been given always to all godly Princes in holy Scriptures by God himſelf;* that is, *that they ſhould rule all Eſtates and Degrees committed to their charge by God, whether they be Eccleſiaſtical or Temporal, and reſtrain with the Civil Sword the ſtubborn and evil doers.*

The Biſhop of Rome *hath no Juriſdiction in this Realm of* England.

The Laws of this Realm may puniſh Chriſtian men with Death for heinous and grievous Offences.

It is lawful for Chriſtian men, at the commandment of the Magiſtrate, to wear Weapons, and ſerve in the Wars.

XXXVIII. Of Chriſtian Mens Goods which are not common.

THE Riches and Goods of Chriſtians are not common, as touching the Right, Title, and Poſſeſſion of the ſame, as certain Anabaptiſts *do falſly boaſt. Notwithſtanding, every man ought of ſuch things as he poſſeſſeth, liberally to give Alms to the Poor, according to his ability.*

XXXIX. Of a Chriſtians Man's Oath.

AS we confeſs, that vain and raſh Swearing is forbidden Chriſtian men by our Lord Jeſus Chriſt, and James *his Apoſtle: So we judge that Chriſtian Religion doth not prohibit, but that a man may ſwear when the Magiſtrate requireth, in a cauſe of Faith and Charity, ſo it be done according to the Prophets teaching, in Juſtice, Judgment, and Truth.*

It is convenient, that the Clerk be able, upon any occaſion, to make Proof of his being Inducted, and of the time thereof, and alſo of his due performance of all theſe things to be done by him after his Induction; and therefore, that he have ſome intelligent Perſons whom he may truſt, preſent when he is Inducted; and (if it may be) the ſame Perſons preſent at ſuch time, when he ſhall perform the other Matters required by the Law to be performed in his Pariſh-Church; and that they may be able to teſtifie, that all things are done as they ought to be, the Clerk may cauſe them to read with him, or to obſerve as he reads the Morning and Evening Prayers, (which he is to read exactly according as they are appointed to be read on the Day he reads by the ſaid Book) and let him alſo give them a Copy of his Certificate, under the Hand and Seal of the Biſhop, and of the Declarations which he is to read; and alſo, provide for them, a Book containing the Thirty Nine Articles, to the end that they may read them with him, or obſerve that he doth read them as he ought to do; and then that he procure them to ſet their Hands to the Book of Articles, and that he read a true Copy of the Articles; for otherwiſe, if their Teſtimony be wanted, it will be hard for them to depoſe, that he read a true Copy of the Articles, and that all things were done according to Law: And it is alſo adviſable, that the Clerk doth keep the ſaid Book ſubſcribed, and alſo doth make a Wri-

a Writing to be ſubſcribed by his Witneſſes, after this, or the like Form:

WE whoſe Names are under-written, do hereby declare, That A. B. Rector of C. within the Dioceſs of D. was in the preſence of us, Inducted into his Church of B. C. aforeſaid, by D. E. Rector of F. on the Day of in this preſent Year, by Virtue of certain Letters of Induction, made under the Hand and Seal of G. F. Arch Deacon of J. within the Dioceſs aforeſaid, for that purpoſe directed,------Univerſis & ſingulis Rectoribus, *&c.* Alſo, that the aforeſaid A. B. on the Day of within the ſaid Year, being a Lord's Day, did read in his Pariſh Church aforeſaid, openly, publickly, and ſolemnly, the Morning and Evening Prayers, appointed to be read, by, and according to the Book intituled, The Book of Common Prayer, &c. at the time thereby appointed; and after ſuch Reading thereof, did, openly, and publickly, before the Congregation there aſſembled, declare his unfeigned Aſſent, and Conſent, to the uſe of all things therein contained, and preſcribed, according to this Form, (ſetting down the Form to be uſed *Verbatim*;) alſo, that he did publickly, and openly, on the Day and Year aforeſaid, in his Pariſh-Church aforeſaid, in the preſence of the Congregation there aſſembled, in the time of Divine Service, read a Certificate, under the Hand and Seal of the Right Reverend Father in God, A. Lord Biſhop of C. in theſe words, (inſerting the very Words of the Certificate) which was atteſted by J. B. and after the Reading thereof, at the ſame time, and in the ſame place, the Congregation being preſent, did read the Declaration, or Acknowledgment contained in the ſaid Certificate: And laſtly, That on the Day and Year aforeſaid, he did read the Articles of Religion, commonly called the Thirty Nine Articles, agreed upon in Convocation in the Year 1562, in his Pariſh-Church aforeſaid, in the time of Common-Prayer there, and did declare his unfeigned Aſſent thereto. And theſe things we promiſe to teſtifie upon our Corporal Oaths, if at any time we ſhall be duly called thereunto. In Witneſs hereof, we have hereunto ſet our Hands, this Day of in the Year of our Lord, &c. See the *Parſons Counſellor* 73, 74.

Tho' I adviſe the Clerk ſo to order his buſineſs, as to be able to prove all things to be performed by him, of which the Law requires his performance; yet this, I ſuppoſe, is only neceſſary for him to do, in caſe he ſhall be put to prove, that he did read and declare, *&c.* in ſuch due manner as the Law appoints, which in ſome Caſes he ſhall be put to do; yet a Parſon ſuing for Tythes in the Spiritual Court, the Defendant pleaded, That the Parſon had not read the Thirty Nine Articles according to the Statute; and the Court put the Defendant to prove this Negative; and upon a Motion for a Prohibition, *Coke*, and *Doderidge* ſaid, That the Law doth preſume, That a Parſon hath read the Articles, becauſe otherwiſe he is to loſe his Benefice; and where the Law doth preſume the Affirmative, the Negative ſhall be proved, *Mich.* 12 *Jac. B. R. Monke* v. *Butler*, *Rolls* 1 *Rep.* 83. So in a Writ for Tythes upon the *Stat.* 2 *E.* 6. the Defendant's Councel inſiſted, That the Plaintiff ought to prove his Admiſſion, Inſtitution, and Induction, reading of the Articles, *&c.* but it was ruled by the Judge, who tried the Cauſe at the Aſſizes at *York*, that he ſhould not then be put to it, for thoſe things ſhall be preſumed; and if otherwiſe, the Defendant is to prove it, *Clayton Rep.* Caſe 83. So in a *Quare Impedit*, the Plaintiff declares, That the Earl of *Lincoln* was ſeiſed of the Church of *B.* and preſented the Defendant, who after accepted a ſecond Living,

ving, and was inſtituted thereunto, *&c.* and it was adjudged, that this was well enough, without ſaying he ſubſcribed the Declaration in the preſence of the Biſhop, (*Præter Vaughan* Chief Juſtice) *Paſch.* 25 *Car.* 2. *Com. B.* Earl of *Lincoln* & *Clyſam*, 3 *Keble* 152. So in an *Ejectione firme*, for the Rectory of *Amunſham*, it was inſiſted on by the Councel for the Defendant, that the Plaintiff ought to prove his Reading, and Subſcribing the Articles, *&c.* within the time appointed by the Statute: But it was ruled by the Court, that the proving Admiſſion, Inſtitution, and Induction, were ſufficient in that Action, *Mich.* 16 *Car.* 2. *Snow, Leſſee of Dr. Crawley* v. *Phillips*, 1 *Siderfin* 220.

The aforeſaid Method is to be obſerved, in taking a Title to any Benefice that is preſentative, and ſuch for the moſt part are Parſonages, and Vicarages, Arch-Deaconries, and Prebends, tho' commonly Arch-Deaconries, and Prebends, are given by Biſhops, who do therefore prefer to them by Collation, which is the ſame thing with Inſtitution, ſaving that no Preſentment is made; but if an Arch-Deaconry, or Prebend, be in the Gift of a Lay-man, the Patron doth preſent to the Biſhop, who doth inſtitute in like manner as to another Benefice, *Paſch.* 32 *Eliz. Sale* v. *Biſhop of Coventry* & *Marſh*, 1 *Anderſon* 241. And then the Dean and Chapter do induct them; that is, after ſome Ceremonies, place them in a Stall in the Cathedral Church, to which they belong, whereby they are ſaid to have *Locum in Choro*. So a Deanry may be preſentable, 17 *E.* 3. 40. and an Hoſpital, 21 *E.* 3. 6. *b.* and alſo a Chapel, 14 *H.* 3. *Quare Impedit* 183. And all thoſe that take Titles to any of the aforeſaid Benefices, are to read, and declare, as is before directed; to wit, Parſons, Vicars, *&c.* in their Parochial Churches, Arch-Deacons, and Prebendaries, in their reſpective Cathedral Church; ſo are they to ſubſcribe, as is ſaid, before the Ordinary; ſaving that he who takes a Title for any Arch-Deaconry, or Prebend, is not thereby obliged to ſubſcribe, and read the Thirty Nine Articles, a Prebendary not being a Benefice with Cure; and an Arch-Deaconry, altho' it be a Benefice with Cure, yet is not ſuch a Benefice with Cure, as ſeems to be intended by the Statute, 13 *Eliz. c.* 12. that Statute intending only ſuch Benefices with Cure, as have Pariſh-Churches belonging to them: But they that accept of Arch-Deaconries, Prebends, or any other Eccleſiaſtical Preferments, are obliged at, or before their Admiſſion, *&c.* thereto, to ſubſcribe the Declaration, or Acknowledgment, herein before mentioned, (altho' Arch-Deaconries be not expreſly mentioned in the Statute) by reaſon that the Perſons taking Arch-Deaconries muſt be in Holy Orders, and all Perſons in Holy Orders, taking any Eccleſiaſtical Dignity, or Promotion, as is in the Statute expreſſed, are required to ſubſcribe the ſame Declaration. *See the Stat.* 14 *Car.* 2. *c.* 4.

The ſecond way or means by which the Title to an Eccleſiaſtical Benefice is to be had, is by Donation, and the Benefices ſo to be conferred and taken, are called Donatives; and they are ſo called, becauſe the Patron in conferring them, doth not make a Preſentment of his Clerk to any Ordinary, to the end to have him admitted, and inſtituted by him, and ſo inducted by the Arch-Deacon, or other Perſon; but tho' the Patron be a Layman, doth by his Inſtrument in writing, immediately confer the ſame upon his Clerk, *Da.* 1. 46. *b.* and this conferring is as the Biſhop conferring a Benefice, called Collation, in *Fairchild* & *Gair*'s Caſe, *Paſch.* 3 *Jac. Yelverton* 60. the ſame Caſe, 1 *Brownlow* & *Gouldsborough* 202. But the Benefice to which Biſhops do collate, are not of the ſame nature with theſe Donatives: For a Benefice that is given by a Biſhop's Collation, whilſt in the poſſeſſion of a Biſhop, is preſentative when in a Lay-hand; and a Biſhop's Clerk is inducted as any other Patron's Clerk is: But theſe Donatives, in whoſe Hands ſoever they be, are generally

nerally given only by Donation, and the Clerk to whom the ſame is given, needs no ſuch Induction, *Hil.* 41 *Eliz. Quarles* v. *Fairchild*, 3 *Cro.* 653. And if a Donative be given without a limitation of Eſtate, for Life, or otherwiſe, the Gift is good, and the Grantee hath as large an Eſtate therein by ſuch Grant, as if it had been granted to him expreſly for Life, or he had come to it by Election, or by Inſtitution, and Induction; for a Spiritual Benefice cannot be granted for Years, or at Will; for then the Freehold thereof might be always in perpetual Abeyance, which inconvenience the Law will not ſuffer, *Paſch.* 5 *Jac. B.R. Davis f.*45,46. And tho' generally theſe Donatives be in themſelves to be had only by the Patron's Collation; yet if the true Patron of ſuch a Donative, doth once preſent to the Ordinary of the reſpective Dioceſs, and doth ſuffer Admiſſion, and Inſtitution thereupon, he thereby hath made it always preſentable, *Paſch.* 3 *Jac. Fairchild* v. *Gair*, 2 *Cro.* 63. *Co. Litt.* 344. *a.* And hath made it alſo for ever to become a Benefice with Cure of Souls, *Clerk*, v. *Heath*, *Mich.* 21 *Car.* 2. *B. R.* 2 *Keble* 556. And this holds not only in the Caſe of common Patrons of Donatives, but in the Caſe of the King alſo by Latch, in his Argument of *Cremer* & *Burnet*'s Caſe, *Paſch.* 1651. *Stiles* 172. But the King hath many Donatives in *Wales*, whereunto the Parſons are preſented and inſtituted by the Biſhop; as was ſaid by Sir *Jeffery Palmer*, the King's Attorney-General, in the ſaid Caſe of *Clerk* v. *Heath*, as reported, 1 *Siderfin* 426. But if a Stranger, who hath no Title, doth preſent a Clerk to the Ordinary, who is inſtituted, and inducted, this is ſo far from making the Donative preſentable for the future, that it doth not ſo much as intitle the Clerk to it, for 'tis meerly void, *Co. Litt.* 344. *a. Hil.* 41 *Eliz. Quarles* v. *Fairchild*, 3 *Cro.* 653. *Rolls Abr.* 2. 342.

There is not any one particular ſort of Eccleſiaſtical Preferments, that are peculiarly ſaid to be Donatives; for ſome of all ſorts may be Donative, as well as Preſentative, or Elective; for Biſhopricks were Donative in *England* before the time of King *John*, *Rolls* 2. *p.*342. 1 *Inſt.* 344. *a.* And a Deanry may: For thoſe Deanries that were tranſlated from Priories, and Covents, or which were founded after the Diſſolution of Abbies, and Monaſteries, by King *Henry* the Eighth, or other Kings of this Realm, are now Donative, and by the King's Letters Patents the Deans are inſtalled, 1 *Inſt.* 344. *Dyer* 273. *Parſons Law*, *cap.* 2. So a Prebendary may be Donative, as at *Weſtminſter*, in the Chapel of the King: When a Prebend is void, it is ſaid, that the King ſhall make Collation of his Clerk by a Patent, *Et luy envoyera ove Cell*; and by force thereof he ſhall take poſſeſſion, 11 *H.* 4. 9. without any Inſtitution, or Induction, *Rolls Abr.* 2 *Part p.* 356. Alſo a Benefice with Cure of Souls, may be a Donative, as the Rectory of *Briary*, or *Burien* in *Cornwall*, *Hil.* 41 *Eliz. Quarles* v. *Fairchild*, 3 *Cro.* 653. *Paſch.* 3 *Jac. Fairchild* v. *Gair*, 2 *Cro.* 63. And ſo the Church of the Tower of *London*, is a Cure of Souls, and the King's Donative, *Mich.* 9 *Car. Fletcher* & *Muckaller*'s Caſe, *Rolls Abr.*341. *Co. Lit.* 344. And this alſo appears by what is ſaid in the Caſe of *Clerk*, v. *Heath*, 1 *Siderfin* 426. But tho' a Church Parochial, having Cure of Souls, may be a Donative, yet no meer Lay-man was capable thereof by the Common Law, but a Clerk in Holy Orders, *Co. Litt.* 344. cited *Hil.* 1 *Jac.* in *Fairchild* & *Gaire*'s Caſe, *Rolls Abr.* 2. *p.* 341. becauſe, tho' he may come in by Lay-Donation, and not by Admiſſion and Inſtitution, yet his Function is Spiritual; and now by the Stat. 14 *Car.* 2. he is not capable of any Donative, unleſs he be a Prieſt lawfully ordained; becauſe every Donative muſt be either Parſonage, Vicarage, Benefice, or other Eccleſiaſtical Promotion, or Dignity, and ſo is within the ſaid Statute, 14 *Car.* 2. *c.* 4.

Tho'

Tho' a Clerk taking Title to a Donative, doth not, or need not apply himſelf to the Ordinary for Admiſſion thereto, yet I conceive, that he ought (what Donative ſoever he takes) at, or before his Admiſſion to be Incumbent, or have poſſeſſion thereof, to ſubſcribe before his reſpective Arch-Biſhop, Biſhop, or Ordinary of the Dioceſs, the Declaration enjoined to be ſubſcribed by Stat. 14 *Car.* 2. *c.* 4. that is, ſo much of it as is now in force; and if the Donative be either Parſonage, or Vicarage, to have a Certificate under the Hand and Seal of the Perſon before whom he ſubſcribed; and to read the ſame with the Declaration aforeſaid, in the Church belonging to his Donative, (*Quære.*) So ought he to take the Oath of Supremacy, before he takes the Donation, *viz.* before ſuch Perſon who hath Authority to admit him thereto, who is his Patron, or before ſuch Perſon as ſhall by Commiſſion under the Great Seal have Authority to miniſter the ſaid Oath, *Stat.* 1 *Eliz. c.* 1. And if his Donative be a Benefice with Cure, he that takes it ought firſt to ſubſcribe the Thirty Nine Articles in the preſence of the Ordinary; which, I ſuppoſe, is to be underſtood of the Ordinary of the Dioceſs, and not of his Patron, altho' the Patron hath the power of viſiting, and correcting him, and not the Ordinary, for he hath nothing to do therewith, 1 *Inſt.* 344. *a.* & *Fairchild* v. *Gayre*, 2 *Cro.* 63. and it is ſafe for him to read the ſaid Article, within two Months after he hath poſſeſſion, as is before directed, and declare his Aſſent thereto, altho' the words of the Statute be---(**Within two Months after his Induction**), and he is not inducted, at leaſt in the ordinary way, leaſt it be ſaid, that his Caſe is however within the Reaſon and Equity of the Statute, and therefore that the Statute extends to it, and he ought to read the Morning and Evening Prayers in his Church, within two Months after he ſhall be in actual poſſeſſion of his Donative; and the Form of giving Aſſent and Conſent thereto, for this is clearly the Statute, 14 *Car.* 2. *c.* 4.

The third way or means of taking a Title to an Eccleſiaſtical Preferment, is by Election, and Confirmation, and this is the way by which a Title is had to the greateſt Dignities in the Church, *viz.* Arch-Biſhopricks, and Biſhopricks, Conſecration being alſo made, where the Perſon promoted was not a Biſhop before: And in what manner Arch-Biſhops, and Biſhops ſhall be made, and ſetled in their Dignities, hath been declared by Act of Parliament, *viz.* 25 *H.* 8. *c.* 20. But Biſhop Suffragans are not in like manner to be made, but by way of Preſentation, according to the Direction of an Act made for that purpoſe. *See Stat.* 26 *H.* 8. *c.* 14. Alſo the ancient Deans of Chapters come into their Deanries as Biſhops now do, by a *Conge de Eſlier* from the King, and are confirmed by their reſpective Biſhop, 1 *Inſt.* 95. *a. Parſons Law*, *c.* 2. And the Perſons taking theſe ancient Deanries, are to ſubſcribe the aforeſaid Declaration, or Acknowledgment, to take the Oath of Supremacy before they are admitted, and to read the Morning and Evening Prayers in their reſpective Cathedral, and the Form of Aſſent and Conſent thereto, within two Months after their Inſtallment, *Stat.* 14 *Car.* 2. *c.* 4.

CHAP. XVI.

Of Unions of Churches.

THE extraordinary Ways or Means by which an Eccleſiaſtical Perſon may have a Title to a Benefice in the Church, are, either by procuring an Union to be made of a Church, to the Church or Benefice of which he was before poſſeſſed, or by cauſing another Benefice to be appropriated to him and his Succeſſors, as Incumbents of another Church, or by *Commendam recipere*. Concerning the Union of two Churches into one, two Acts of Parliament have been made, the words of which, ſo far as they touch this Matter, are as followeth:

Where in divers and ſundry Places within this Realm of England, there be many and ſundry Parſonages, the Glebes, Tythes, and yearly Revenues, and Profits whereof, be not ſufficient to find a Prieſt, or Curate, to ſerve, or miniſter to the Pariſhioners thereof, within a Mile, or leſs, of the Church; of which poor Parſonages, there is in many Places, another Church pertaining to another Pariſh, ſtanding as neceſſary, and commodiouſly, for the acceſs of the Pariſhioners of the other poor Pariſh, as their own doth.

And forasmuch as the Charges for the Maintenance of two ſuch Churches, and Chapels, with all manner of Reparations, Ornaments, and other accuſtomed Duties pertaining to a Church, be much greater than may be well raiſed, or born, amongſt ſuch poor Pariſhioners, and might, and ſhould be eaſed and remedied, by the uniting, and knitting of ſuch Churches in one.

It may therefore pleaſe the King's Royal Majeſty, with the Aſſent of his Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, that it may be enacted and eſtabliſhed, That an Union, or Conſolidation of two Churches in one, or of a Church and Chapel in one, the one of them not being above the yearly value of ſix Pounds, as it is rated and valued at to the King's Highneſs, in his Court of the Firſt-Fruits, and Tenths, and not diſtant from the other above one Mile, in any place, or places within this Realm of England, may be from henceforth had, or made, by the aſſent of the Ordinary, or Ordinaries of the Dioceſs where ſuch Churches and Chapels ſtand in; and by the aſſents of the Incumbents of them, and of all ſuch as have a juſt Right, Title, and Intereſt, to the Patronages of the ſame Churches and Chapels, being then of full Age: And that all ſuch Unions, and Conſolidations, had, or made of two Churches in one, or of a Church or Chapel in one, as is aforeſaid, ſhall be good, ſufficient, lawful, firm, ſtable, and available in the Law, to remain, endure, and continue for ever, united and knit in one, in ſuch Manner and Form, as by Writing, or Writings, under the Seals of ſuch Ordinaries, Incumbents, and Patrons, it ſhall be declared and ſet forth.

And be it further enacted by the Authority aforeſaid, That all Unions and Conſolidations, of all Churches and Chapels, which have heretofore been united, or knit together in one, by the aſſent of the Ordinaries, Incumbents, and true and lawful Patrons in Fee-ſimple of them, as is aforeſaid, ſhall alſo remain,

remain, and be from henceforth adjudged and deemed in the Law, to endure and continue for ever, united and knit in one, without any diſſolution, undoing, unknitting, or repeal of them, or any of them, by any manner of means or way.

Saving unto the King's Majeſty, his Heirs and Succeſſors, all the Tenths and Firſt-Fruits of all ſuch Churches and Chapels as be heretofore united or conſolidated in one, or that hereafter ſhall be united and conſolidated in one, according to the ſame, or ſuch like Rates and Valuations as the ſame Churches and Chapels, or any of them now are rated or valued at to the King's ſaid Majeſty, in his ſaid Highneſs's Court of the Firſt-Fruits and Tenths; provided always, That all Unions and Conſolidations, and every of them hereafter to be had or made of any Church, or Chapel, within any City, or Town-Corporate, within this Realm of England, without the aſſent of the Mayor, Sheriffs, and Commonalty of the City where ſuch Churches, Church, or Chapel, be, or ſhall be; or without the aſſent of ſuch Bodies Corporate of other Towns-Corporate, where ſuch Churches, Church, or Chapel, be, or ſhall be, by the Names of their Corporations in writing, under their Common Seal, ſhall be clearly void, and of no force nor effect; any thing before expreſſed, or any Ordinance, Law, Cuſtom, or Statute to the contrary thereof, in any wiſe notwithſtanding.

Provided alſo, That where the Inhabitants of any ſuch poor Pariſh, or the more part of them, within one Year next after the Union or Conſolidation of the ſame Pariſh, by their writing, ſufficient in the Law, ſhall aſſure the Incumbent of the ſaid Pariſh, for the yearly Payment of ſo much Money, as with the Sum that the ſaid Pariſh is rated and valued at in the King's Highneſs's ſaid Court of the Firſt-Fruits and Tenths, ſhall amount to the full Sum of Eight Pounds Sterling, to be levied and paid yearly by the ſaid Inhabitants to the ſaid Incumbent and his Succeſſors, that then all ſuch Unions, or Conſolidations, hereafter to be had or made, of any ſuch poor Pariſh as is aforeſaid, ſhall be void and of none effect; any thing Statuted, or Ordained to the contrary hereof in any wiſe notwithſtanding.

Provided always, That this ſaid Proviſo ſhall not extend to any Union or Conſolidation of any Church or Chapel, had, or made before the making of this Statute; any thing in the ſaid Proviſo mentioned to the contrary thereof notwithſtanding, Stat. 37 H. 8. c. 21.

Foraſmuch as the ſetled Proviſion for Miniſters in moſt Cities and Towns Corporate within this Realm, is not ſufficient for the Maintenance of able Miniſters fit for ſuch Places, whereby mean and ſtipendary Preachers are entertained to ſerve the Cures there, who wholly depending for their Maintenance upon the good will and liking of their Auditors, have been, and are hereby under temptation of too much complying, and ſuiting their Doctrines, and teaching to the Humour, rather than the Good of their Auditors, which hath been a great occaſion of Faction and Schiſm, and of the Contempt of the Miniſtry. The Lords and Commons in Parliament aſſembled, being deeply ſenſible of the ill conſequence thereof, and piouſly deſiring able Miniſters in ſuch places, and a competent ſetled Maintenance for them, by the Union of Churches; which is alſo become neceſſary, by reaſon of the great Ruin of many Churches and Pariſhes in the late ill Times, and otherwiſe, do therefore moſt humbly beſeech your moſt excellent Majeſty, that it may be enacted, and be it enacted, by the King's moſt excellent Majeſty, by, and with the Advice and conſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That in every City,

City, or Town Corporate, and their Liberties within the Kingdom of England, and Dominion of Wales, which have a Mayor and Aldermen, and particular Justices of the Peace, by Charter, or Commission; or Bailiff, or Bailiffs, or other chief Officer, or Officers, and other Assistants by like Charter; and where two, or more Churches, or Chapels, or a Church and a Chapel, and the Parishes thereunto belonging, do lie within the said Corporation, or Liberties thereof, convenient to be united. In such Cases the Bishop of the Diocels where such Parish and Parishes are, with the Consent of the Mayor, Aldermen, and Justices of the Peace, Bailiff, or Bailiffs, or other chief Officer, or Officers, or the major part of them, and of the Patron, or Patrons of such Church, or Churches, Chapel, or Chapels, shall, or may, according to due Form of Law, unite the said Churches or Chapel, or Church and Chapel, or any of them; and shall appoint at which Church, or Chapel, Churches, or Chapels, the said Parishioners and Inhabitants of the said Parishes, or Places, to which the said Churches, or Chapels, or Church, and Chapel do belong, shall usually meet for the Worship of God; and which of the said Churches, or Chapels, or Church, or Chapel, shall be united and annexed unto the other, which shall be the Church presentative, unto which all Presentations shall thereafter be only made, and unto which the Parishioners shall resort as their proper Church. And after such Order made, the said Churches, or Chapels, or Church and Chapel, shall accordingly for ever stand united. And the Parishioners, Land-holders, and Inhabitants of the said Parishes, and Places belonging to such Churches, or Chapels, or Church and Chapel so united and annexed, shall, as they, or any of them become void, and from thencefoward, pay all such Tithes, and other Duties, as belong, or did belong to the Incumbent of any of the said Churches, or Chapels, or Church and Chapel so united and annexed unto the Incumbent of the said presentative Church, or Chapel, unto which the said other Churches, or Chapels, or Church, or Chapel, shall be so united and annexed.

And it is hereby also enacted, That notwithstanding any such Union to be made by virtue hereof, each of the Parishes so united shall continue distinct, as to all Rates, Taxes, Parochial Rites, Charges, and Duties, and all other Privileges, Liberties, and Respects whatsoever, other than what is herein before-mentioned and specified, and Church-Wardens shall be Elected and Appointed for each Parish, as they were before such Union made.

And it is further enacted and provided, That where one or more of the said Churches, or Chapels, or Church and Chapel so united and annexed, shall be full at the time of making such Union, that the said Union shall take effect for every such Church, or Chapel, upon the first Avoidance after such Union made. And that the several Patrons of the said Churches and Chapels so united, shall, and may present by Turns to that Church only which shall remain, and be presentative from time to time, in such order as the said Bishop, with the consent of the said Mayor, Aldermen, and Justices of Peace, Bailiff, or Bailiffs, or other chief Officer, or Officers, within such Parishes, or the major part of them, and of the Patron, or Patrons of such Church, or Churches, Chapel, or Chapels, shall determine and decree for the preservation of their respective Rights therein, respect being therein had to the Differences of the value of the yearly Maintenance belonging to such Churches or Chappels, or any of them, saving unto the King's Majesty, his Heirs and Successors, all the Tenths and First-Fruits of all such Churches and Chapels so to be united according to the Rates and Valuations at which the said Churches and Chapels are rated and valued, in the Office of First-Fruits

and

and Tenths, in his Majesty's Court of Exchequer: And also, reserving all Procurations and Pensions to all Persons to whom they are now, and have been formerly, or shall be hereafter due and payable; any thing herein contained notwithstanding.

Provided always, That no Union of Parishes, or Places to be made, by virtue of this Act, shall commence, or be effectual in Law, until it be Registred in the Register-Book of the Bishop of the Diocese, which the Register is hereby required to do.

Provided always, That no Union made by virtue hereof, shall be good and effectual, where the setled Maintenance belonging to the Parsons, Vicars, and Incumbents of the Church, or Chapel, or Churches, or Chapels so united, shall exceed the Sum of One hundred Pounds per Annum clear, and above all Charges and Reprizes; unless the respective Parishioners, or the major part of them, under their Hands, desire otherwise.

Provided always, and be it enacted, That every Minister setled as aforesaid, the Incumbent of any Church, or Chapel, or Churches and Chapels united according to this Act, shall be the full and lawful Incumbent thereof, to all intents and purposes, so as such Minister be a Graduate in one of the Universities of this Kingdom, Stat. 17 Car. 2. cap. 3.

Before either of these Statutes were made, it was lawful for the Ordinary, by the Assent of the Patrons, to unite or consolidate two Churches; and this by *Gaudy* and *Fenner*, without the King's Licence precedent, or Confirmation subsequent, especially if the Churches were poor: But, say they, the Ordinary, with the Consent of the Patrons, without the King's Confirmation, could not have made an Union of Churches, which had sufficient to maintain an Incumbent each of them by it self; but by the Consent of the King, Patrons, and Ordinary, an Union may be made of any Churches, of whatsoever value they be; yet the Ordinary is the principal Actor in the Union, and if the King's Consent be either precedent, or subsequent, it sufficeth, 40 *E.* 3. 28. *a.* 50 *E.* 3. 26. 32 *H.* 6. 22. 4 *H.* 7. 6. 9 *H.* 6. 22. *Br. Ab. Appropriation, &c.* 2. *Mich.* 38, 39 *Eliz. Austen* & *Twine*'s Case, *Rolls Abr. p.* 778. *the same Case*, *Moor* 408. & 661. & 3 *Cro.* 500. *Parsons Law*, *c.* 28. And so it doth suffice to have the Patron's Consent before the Union; for it is not material which of them doth begin the Union, if the words be sufficient, altho' that the Ordinary be the principal Agent; for that he saith, *Unimus*, and hath the Cure of the Souls, *Rolls Abr.* 2. *p.* 778. But the Civilians, Doctor *Steward*, and Doctor *Crompton*, agreed, that by the express Text of the Canon Law, the Ordinary, with the Patron's Assent, might have made an Union of two Churches, altho' either of them were worth One hundred Pounds *per Annum*, and sufficient to maintain a Minister by it self, and that such Unions might have been made, without the Pope's Confirmation: And by *Steward*, if an Union had been unlawfully made by the Pope's Confirmation, it had been for ever good; and such Authority as the Pope had, the King now hath by the Statute: But *Crompton* said, That an Union made upon a supposed and pretended Poverty, which appears to be false, and the Ordinary to be deceived, is void; and so if a Surmise be, that the two Churches be distant but one Mile, that there are but few Inhabitants, and that one of the Churches is in decay, the Surmises being false, the Union is void; and if the Inhabitants of one Parish do sue in the Spiritual Court, to compel those of the other Parish to come to their Church, a Prohibition lies, *Mich.* 9, 10 *Car.* Sir *Robert Mordent* & *Dobson*'s Case, *Rolls Abr. p.* 2, 778. However, the Court at length agreed, That such Unions as might have been lawfully made before *Statute* 37 H. 8. *c.* 21.

may

may at this Day be made, and that ſuch Authority is not taken away, nor reſtrained, but limited what Union may be made without the King, becauſe the ſaid Statute is in the Affirmative, and not with a Negative, and then a Statute never takes away the Common Law, 33 *H.* 8. *Dyer* 50. 4 & 5 *Philip & Mary*, *Dyer* 135. And ſo the way of uniting Churches at Common Law, before the Statute remains good at this Day, *Trin.* 37 *Eliz. Auſtin* v. *Twyne*, 3 *Cro.* 500. But *Hobart* declares his Opinion, That if a Man hath one Benefice with Cure, of the yearly Value of Eight Pounds, or above, he cannot, without Qualification, and Diſpenſation, procure another with Cure to be united to it after, tho' they make but one Benefice, and this by reaſon of the Statute, 21 *H.* 8. *c.* 13. *Colt* & *Glover*'s Caſe, *Hob.* 158. But I rather think, that the Statute is not prohibitory of perpetual Unions, but hath reſpect to temporary Unions only, as for the Life of one Incumbent, which the Arch-Biſhop may make, and ſometimes hath made, *Mich.* 41 *Eliz. Queen* v. *Page* & *Biſhop of London*, 3 *Cro.* 719. In which Caſe, I ſuppoſe, that the Churches are not ſo much united together, as that the Inhabitants of the one Church ſhall be compelled to hear Divine Service, *&c.* in the other Church, as united in the Incumbent; but only that the Incumbent may have the Profits of both, and provide for the Cure of both during his Incumbency, and the Churches do remain diſtinct Cures notwithſtanding; and after the preſent Incumbent's Title ceaſeth ſhall be capable of diſtinct Incumbents again, as formerly.

The Clauſe in the ſaid Statute, 17 *Car.* 2. *c.* 3. which provides, **That all Unions, and every of them, hereafter to be made in corporate Towns, without the conſent of the Magiſtrates, ſhall be clearly void; any thing before expreſſed, or any Ordinance, Law, Cuſtom, or Statute, to the contrary thereof in any wiſe notwithſtanding**; ſeems to me to extend to all Unions whatever that ſhall be made, *viz.* as well to thoſe which ſhall be made with the King's Confirmation, as unto thoſe that ſhall be made according to the Direction of this Statute, becauſe the Words thereof are general, and with a *Non Obſtante*, (*Quære.*)

If the Churches, or Church and Chapel, be in two Dioceſſes, both Ordinaries muſt concur to make the Union, 11 *H.* 7. *f.* 8, & 26. in *Grendon*'s Caſe, *Plow.* 497. *b.* and ſo muſt both Patrons in all Unions, 11 *H.* 7. 8. 6 *H.* 7. 13. 46. *Aſſ. plt.* 4. 50 *E.* 3. 26. 48 *E.* 3. 28. And if either of the Patrons be a Biſhop, the Aſſent of his Dean and Chapter muſt be alſo had, *Paſch.* 10 *Car. B. R. Leigh* & *Hellier*'s Caſe, *Rolls Abr.* 2. *p.* 357.

A Church may be united unto another, before it be void, if the words be proper for that purpoſe; and he that hath the Church to which the other is united, may enter into the Church ſo united, when it doth become void, without any other Donation, or Induction, as was done, when a Chapel being full was united to *Magdalen*-College in *Oxford*, 11 *H.* 7. 8. yet it is ſaid, that an Union ought to be made when the Church is void, or elſe the Union is void, and that the Law is the ſame as to an Appropriation, by *Keble Br. Abr. Appropriation*, &c. 5. For an Appropriation may be made by apt words, when the Church is full, *viz.* by words which may ſerve to appropriate it after it becomes void, *Grendon* v. *Biſhop of Lincoln*, &c. *Plowden* 499. *b.* If the Patron of the Rectory of *A.* having purchaſed the Advowſon of the Rectory of *B.* and at all times after hath preſented to the Church of *A. Cum Capella de B.* yet ſuch preſenting time out of Mind, ſhall not make, or have the effect of an Union, but the Church of *B.* ſtill remains a diſtinct Church, and ſhall go in Lapſe notwithſtanding ſuch preſenting, and the Freehold thereof will be in ſuſpence, and not in the Patron as Diſſeiſor; for the Patron's Entry in the Vacation, doth not gain any Freehold, *Savile*, *f.* 17. *Caſe* 46.

Upon

Upon an Union made, it muſt be appointed who ſhall preſent next after the ſaid Union, one of the Patrons, or both, or joyntly, or ſeverally by turns, and upon ſuch Union and Agreement made by Inſtruments or Writings, under the Hands and Seals of the Patrons, Ordinaries and Incumbents, (if the Churches be then full) each of the Patrons if he be diſturbed, may have his *Quare Impedit.* And although by the Union the incumbency of one Church be loſt and extinguiſhed, yet the Patronage doth remain ſtill in being; and therefore if an Annuity be granted out of the Church of *B*, and afterwards the Church of *B* is united to the Church of *A*; if the Grantee of the Annuity doth releaſe to the Patron of the Church of *A*, the Annuity is not thereby extinct, but a releaſe to the Patron of the Church of *B* will extinguiſh the Annuity, *Parſon's Law.* 172. *Doctor and Student.* 116. *b.* If the poſſeſſions of a Prebend be united unto a Deanry, yet the Prebend it ſelf remains in being as to the Office, and as diſtinct from ſuch Deanry, *Dyer* 10 *Eliz.* 235. But if a Church Parochial be duly united unto a Prebend in a Cathedral Church by the Biſhop, *&c.* and a Clerk is collated to the Prebend, and after inſtalled in the Cathedral, although that the Pariſh Church be not in the ſame Dioceſs with the Cathedral; yet the Clerk thereby hath poſſeſſion thereof, without any Preſentation, Inſtitution, or Induction, becauſe by the Union, the Pariſh Church is become the Corps of the Prebend, *Paſch.* 10 *Car. B. R. Leigh* and *Hellier*'s Caſe. *Rolls. Abr. p.* 2. *p.* 357. And a Chappel it ſeems may be united to the Preſident and Scholars of a College and their Succeſſors, as was agreed by all except (*Townſend*) who ſaid that a thing United, ſhall be United to a thing of the ſame Nature; and the Chappel and College being dead things, might therefore be United, but not a Chappel to the Preſident, *&c. Br. Appropriation*, &c. 9. After an Union is made, if any Queſtion doth ariſe concerning the Validity thereof, this may not be tryed in the Temporal, but only in the Spiritual Court, unleſs ſuch Union as is reſtrained by the Statutes aforeſaid, *Trin.* 37 *Eliz. Auſtin* v. *Twyne*, 1. *Cro.* 500.

By the Union of two Churches Parochial, the Pariſhes were not thereby United, but remained diſtinct as before; and the Reparation alſo continued to be ſeveral, *Hob.* 67. But by the Statute, 4 & 5 *W.* & *M. cap.* 12. The Pariſhioners of the Church United, are made Contributory to the Repairs and Ornaments of the Church to whom the Union is made. The Words of which Statute are as followeth:

Whereas by an Act of Parliament, made in the Seventeenth Year of King Charles the Second, of Bleſſed Memory, Proviſion was made for the Uniting Churches in Cities and Towns Corporate: And forasmuch as it is highly reaſonable that Pariſhioners of Pariſhes whoſe Churches are demoliſhed, and either before or afterwards United to other Churches, ſhould be Contributors towards the Repairs and other Parochial Charges of ſuch other Church, to which by Vertue of the ſaid Act they are United.

Therefore be it Enacted, by the King and Queens moſt Excellent Majeſties, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament Aſſembled, and by the Authority of the ſame; That where any Churches heretofore have been, or hereafter ſhall be United by Virtue of the ſaid Act; and one of the ſaid Churches ſo United, was at the time of ſuch Union, or ſhall afterwards be Demoliſhed; that in all ſuch Caſes, as often as the Church which was or ſhall be made the Church Preſentative, and to which the Union was or ſhall be made, ſhall be out of Repair, or there ſhall be need of decent Ornaments for the performance of Divine Service therein; that the Pariſhioners of the Pariſh whoſe Church

shall then be Down or Demolisht, shall bear and pay towards the charges of such Repairs and decent Ornaments, such Share and Proportion as the Arch-bishop or Bishop that shall make such Union, shall by the same Union direct and appoint. And for want of such Direction and Appointment, then one third part of such charges of the Repairs and decent Ornaments which shall be made or provided; and the same shall be Rated, Cared and Levyed, and in default thereof, such Process and Proceedings shall be had and made against him or them, as if it were for the Reparation and finding decent Ornaments for their own Parish-Church, if no such Union had been made, any Law, Custom, Usage or Opinion to the contrary heretofore notwithstanding.

CHAP. XVII.

Of Appropriations; and of Vicarages and their Endowments.

THE second extraordinary Way or Means, by which a Title to an Ecclesiastical Benefice may be had, is by procuring an Appropriation to be made of a Benefice to an Ecclesiastical Person and his Successors, of some Church preferment of which he is possessed? An Appropriation can be only made to a Body Politick or Corporate Spiritual that hath Succession, and thereby that Ecclesiastical Body is perpetual incumbent of the Benefice Appropriated, and for ever shall enjoy all Glebe, Tythes, and other Profits belonging thereto, and hath therewith the Charge of the Souls belonging unto the Parish where the Church appropriated is; upon which it is, that an Appropriation regularly ought only to be made to a Spiritual Person, or at most, to aggregate Bodies Spiritual that consists of Priests; in that there is no difference betwixt a Church Appropriate and not Appropriate, saving that a Church Appropriated is annex'd to the Corporation or Person to whom it is Appropriated, and his or their Successors for ever; but a Church not Appropriated, is had only for the Life of the Incumbent thereof; and therefore, those that have Appropriations, can no more grant their Title of Appropriation to others whereby to make the Grantees become perpetual Incumbents of them as Appropriators, than Incumbents of Churches presentable, can convey by their sole Act their Incumbencies to others; but both may equally make Leases of the Profits thereof.

To the making of an Appropriation, it is requisite; first, that the Right, Title and absolute Inheritance of the Advowson of the Church Appropriate, be in such Spiritual Bodies Politick or Corporate to whom the Appropriation is made, and who thereby is to be perpetual Incumbent of the Church, for otherwise such Spiritual Body is not capable of the Appropriation. If one (as a Church Man) being a Spiritual Corporation, is seized of an Advowson, to him and his Heirs, doth purchase License of Appropriation, and gets the Church appropriated to him and his Successors; the Appropriation is void, and the Advowson will descend to his Heirs: For in this Case, if he would have the Church to be appropriated to him and his Successors, he must first alien it to another, and then after License of Mortmain, repurchase it to him and his Successors, *Hughs Abr. Title Appropriation.* 38 *H.* 6. 21. *a. Br. Abr. Appropriation, &c.* 3. 14 *H.* 4. 14. And if the King doth grant to a Spiritual Corporation, to hold a Church to their proper use for ever, of which Church the King himself is seized of the Advowson at the time of the

Grant

Grant made; this ſhall not enure to a grant of the Church or Advowſon, and then to an Appropriation, but the King is deceived, and the Grant is void, *Rolls Abr.* 2. *p.* 196.

It is alſo requiſite, that the conſent of the Ordinary be had thereto, whom in Law is looked upon as the principal Actor, becauſe the Act of Appropriation is a thing Spiritual, and the Ordinary hath the Spiritual Juriſdiction; and it is alſo ſaid to concern the Souls of the Pariſhioners, of which the Biſhop within his Dioceſs hath charge; alſo the Biſhop hath an Intereſt in reſpect of Laps, *Rolls Abr.* 1. *p* 238. 6 *Ed.* 3. *Quare Impedit* 197. And that which the Biſhop as immediate Ordinary may do, the Pope as ſupream Ordinary uſed to do without the Biſhop, and ſuch Authority and Juriſdiction as the Pope had uſed within this Realm, our Kings have, as was acknowledged by Parliament, *Anno* 25 *H.* 8. and other Statutes; ſo that the King may uſe and exerciſe all that Power that the Pope was want to uſe within this Realm, and by conſequence, and may make Appropriations without the Biſhop; yea, and the King alone as ſupream Patron, might have made Appropriation without the Pope, 17 *Ed.* 3. *Fitz. Quare Impedit.* 19. 11 *H.* 4. And yet it is ſaid that an Appropriation made by King *William* the Conqueror alone, is not good, 7 *Ed.* 3. *Quare Impedit*, 19. However, neither Biſhop nor King can make Appropriations without the conſent of the Patron, who ought to agree to the Appropriation to make it good. 11 *H.* 7. 8. 6 *H.* 7. 13. 46 *aſſ. p.* 4. 50 *Ed.* 3. 26. 40 *Ed.* 3. 28. 29 *Ed.* 3. 10. and his acceptance of the Ordinaries Order, and his Execution of what he hath Ordained, is a Declaration of his Conſent, and all ſhall be intended to be done at his requeſt: If there be a Leſſee for Years of an Advowſon, the aſſent of him in Reverſion to appropriate the Church, will not bind the Leſſee for Years during his Term, 29 *Ed.* 3. 10.

But beſides the Ordinary, and Patron, the King, (not only as ſupream Ordinary but as King) muſt conſent to every Appropriation of a Church. *Mich.* 16 *Jac. B. R. Popham.* 145. *Mich.* 1649. *Styles, p.* 156. *Stat.* 15 *R.* 2. *Chap.* 6. *Stat.* 4 *H.* 4. *Chap.* 12. Becauſe his Intereſt is concerned therein, all Advowſons being held of the King, either mediately or immediately, as all Land within this Realm is, and all poſſibility of having either Preſentation or Eſcheat, as Lord immediate, or mediate, or Laps as ſupream Patron is taken away by Appropriation, in regard that the Church can never after be void of an Incumbent, *Hill.* 44 *Eliz. Robinſon*, v. *Bedle*, 1 *Cro.* 873. And this Conſent of the King muſt be declared by his Licenſe, and the King cannot make ſuch Licenſe without matter of Record, *Mich.* 1649. *Styles p.* 156. And note, that the King's Licenſe of Appropriation is to be made to the Body Spiritual, to which the Church is to be Appropriated, and not to the Biſhop, *&c.* and is to be made generally, *Priddle* and *Napper*'s Caſe, 11. *Co.* 11. *B.* For though the Rector be alive at the time of the Licenſe, yet he may dye or reſign before the Appropriation is made, in the Biſhop of *Canterbury*'s Caſe, *Trin.* 38 *Eliz. B. R.* 2. *Coke* 47. And it is ſaid, that an Appropriation may be made by the King alone, where he is Patron, but by no other Patron, *Trin.* 16 *Jac. B. R. Popham.* 145.

If any Appropriation be made without the King's Licenſe, it hath been held the Appropriation is good, not Mortmain, 21 E. 3. 5. *Plowd.* 499. 47 E. 3. 11. And by *Jones*, *Paſch.* 2 *Car. B. R. Copes* v. *Bedford*, *Palmer. p.* 406. But the King may ſeize the Advowſon, and ſhall have the Preſentments to the avoidances thereof in the name of a Diſtreſs until Fine be paid to the King for making the Appropropriation without his Licenſe, by the Opinion of (*Shard.*) See *Plowden*, *Plowd.* 499. but *Quære*, and by (*Stone*) if the Advowſon of the Church

appropriated, be held of the King as of his Crown, or as an Eſcheat, the Charter that doth not mention of what tenure it is, ſhall be void, and the King ſhall not be barred of his Preſentment thereby, 19 E. 3. *Fitz. tit. Grant.* 58. But if an Abbey had been ſeized of an Advowſon in Fee, held of a common Perſon, an Appropriation might have been made thereof to them by the King and the Ordinary, without the aſſent of the Lord of whom it was held, 21 E. 3. 5. *Br. Abr.* Appropriation, *nu.* 6.

The moſt proper time for the making of an Appropriation, is when the Church is void, becauſe then it may be executed preſently; yet the Parties aforeſaid concurring thereto, an Appropriation may be made as well when the Church is full, as when it is void; that is, that if it be made by ſuch apt Words as ſhall ſerve to Appropriate it after it is void, *Co.* 11. *Priddle* and *Napper*'s Caſe, 11. *Plowd.* 499. *b.* 50 E. 3. 26, B. & 27. As to ſay that the Patron who is a Spiritual Perſon, after that the Church ſhall become void, ſhall be Parſon, and may retain the Glebe, and the profits of the Church to his proper uſe, *&c.* and ſuch Patrons ſhall be taken to be Incumbents, without any other Admiſſion or Inſtitution, and may enter upon the Profits of the Church without Induction, but if ſuch Appropriation be not made by words *in futuro*, it is void.

So if a Spiritual Corporation be ſeized of an Advowſon in Fee, and the Church being full of an Incumbent, the King doth give Licenſe to appropriate it, without any mention of the Incumbent, and after the Ordinary doth appropriate it accordingly; ſo that after the death of the Incumbent, ſuch Spiritual Corporation and his Succeſſors may hold it to their proper uſes. In this Caſe, although the Licenſe of the King be general without mention of the Incumbent, yet the Appropriation being afterwards well made, *viz.* by proper Words, this is a good Licenſe, and a good Appropriation, *Co* 11. *Priddle* and *Napper* 11. *Mich.* 16. *Car. B. R. Foe* and *Haſellriggs Rolls Abr.* 1. *p.* 239. Or if the King doth give Licenſe to a Spiritual Corporation to purchaſe the Advowſon of a Church in Fee, and to appropriate it to him and his Succeſſors; and then he having purchaſed the Advowſon, doth preſent his Clerk to the Church, who is inſtituted and inducted, if afterwards the Biſhop doth appropriate the Church to him and his Succeſſors, this is a good Appropriation, notwithſtanding the preſentation made by the Purchaſer, upon which an Incumbency was had betwixt the Licenſe and the Appropriation, *Mich.* 16. *Car. B. R. Foe* and *Haſellrigg*'s Caſe, *Rolls Abr.* 1. *p.* 239. For moſt of the aforeſaid points of Law concerning Appropriations, See *Grendon*'s Caſe, *Mich.* 18 and 19 *Eliz. Plowden.* 499, *&c.* By which Caſe in *Plowden* it appears, That if the King being ſeized of an Advowſon in right of his Crown, doth by his Letters Patents, grant to a Dean and Chapter the ſame Advowſon when the Church is full; he may alſo in the ſame Letters Patents, by his ſupream Eccleſiaſtical Authority, for himſelf, his Heirs and Succeſſors, Grant, and give Licenſe unto the ſame Dean and Chapter, and their Succeſſors, to hold the Rectory of the ſaid Church immediately after it becomes void, to them and their Succeſſors for ever, without the moleſtation of the King or his Succeſſors; and without any Preſentation, Inſtitution, or Induction of any Incumbent to the ſaid Rectory at any time after: And further, by the ſame Letters Patents, by his ſupream Authority aforeſaid, for himſelf, his Heirs and Succeſſors, he may appropriate the ſame Church to ſuch Dean and Chapter, by the Words in *Rectoriam & Eccleſiam de B. prædict', pro ut vacare ex tunc contigerit, ac omnia & ſingula Maneria, Meſſuagia, Glebas, Decimas,* &c. *eiſdem Decano & Capitulo & ſucceſſoribus ſuis, ac dictæ Eccleſiæ ſuæ Cathedrali Appropriamus, Conſolidamus, Unimus & Incorporamus. Habendum, Gaudendum, & convertendum eaſdem Rectoriam, & Eccleſiam de B. prædict, ac omnia & ſingula*

ſingula præmiſſa iiſdem Rectoriæ, & Eccleſiæ ſpectant' & pertinent' iiſdem Decano & Capitulo, & Succeſſoribus ſuis ut prædict' eſt in proprios uſus ſuos, abſque aliqua Præſentatione, Nominatione, Inductione, ſive admiſſione alicujus Incumbentis, aut aliquorum Incumbentium ad eandem Eccleſiam extunc impoſterum fiendum, &c. But *Dyer* objected in this Caſe, That theſe Words are inſufficient to make an Appropriation, for that they do not make the Dean and Chapter Parſon of the Church, but that it ſhould have been ſaid, That after the Church ſhall be void of the preſent Incumbent, the Dean and Chapter ſhall be Parſon thereof, inaſmuch as in Suits brought by and againſt them, they ought to be named Parſons. But it was anſwered, that the Words aforeſaid do imply as much; and *Hobart* ſaith that it was reſolved in this Caſe, that the perfect Word to make an Appropriation, is to make him Parſon, yet if the ſame be expreſſed by a Periphraſis like thereunto, this will ſerve, *Colt* and *Glover*'s Caſe, *Hobart* 148, 307. It was alſo objected by *Dyer*, that there was not in the Grant of the Advowſon to the Dean and Chapter, the Clauſe of *Non obſtante* the Statutes of Mortmain, and the King's Grant cannot be taken to two Intents, as agreed in the Aſſize, *inter Baget* and *Swirington*, 9 *Ed.* 4. *fo.* 6. 11. To which it was anſwered, that the Clauſe of *Non obſtante* was in the Patent, though not pleaded, and that the Patent had been however good, becauſe the King being the Head of the Law, is not to be ſuppoſed ignorant of the Law; and the Patent is *Ex certa ſcientia*, which amounts to ſuch Clauſe, and the King's Grant may enure to two intents, unleſs one be a forreign matter, and therefore the giving Lands to a Villain by the King, ſhall not manumit him; and Judgment was given that the Patent was good: However, it is ſafeſt, that it be expreſly ſaid, that he to whom the Church is appropriated, ſhall be Parſon, and that in all Grants of Advowſons from the Crown to any Spiritual Parſon and his Succeſſors, the Clauſe of *Non obſtante* that Statute be inſerted, or that a Precedent Licenſe be had, and that theſe matters be pleaded when any Action is brought concerning the ſame. If the King had given Licenſe to a Guardian and Chaplains of a Chantery, to purchaſe an Advowſon to them and their Succeſſors, and to have it appropriated to them and their Succeſſors; and afterwards the Biſhop doth appropriate it to the Guardian of the Chantery and his Succeſſors. If the Chantery had been known as well by the name of the Guardian, and Succeſſors as by the name of the Guardian, Chaplains and Succeſſors, and ſo all one Corporation, this is a good Appropriation, *Mich.* 16 *Car. B. R. Foe* and *Haſellrigg*'s Caſe, *Rolls Abr.* 1. *p.* 240. But *Quære*; how a Corporation aggregate, and a Corporation Sole may be one Corporation Politick.

That an Appropriation be duly made, it is neceſſary that a Vicar be well and ſufficiently endowed; for it hath been Enacted as followeth. *Item*, **Becauſe divers damages and hindrances oftentimes have happened, and daily do happen to the Pariſhioners of divers places by the appropriation of Benefices of the ſame places. It is agreed and aſſented, That in every Licence from henceforth to be made in the Chancery, of the appropriation of any Pariſh Church, it ſhall be expreſly contained and compriſed, that the Dioceſan of the place, upon the appropriation of ſuch Churches ſhall ordain, according to the value of ſuch Churches, a convenient ſum of Mony to be paid and diſtributed yearly of the fruits and profits of the ſame Churches by thoſe that will have the ſaid Churches in proper uſe, and by their Succeſſors, to the poor Pariſhioners of the ſaid Churches, in aid of their living and ſuſtenance for ever; and alſo that the Vicar be well and ſufficiently endowed.** *Stat.* 15. *R.* 2. *Ch.* 6.

And

And it was further Ordained, that the Statute of appropriation of Churches, and of the endowment of Vicars in the same, made the Fifteenth Year of King Richard the second, be firmly holden and kept, and put in due Execution: and if any Church be appropriated by license of the said King Richard, or of our Lord the King that now is, sithence the said fifteenth year, against the form of the said Statute, the same shall be duly reformed according to the effect of the same Statute betwixt this and the Feast of Easter next coming. And if such Reformation be not made within the time aforesaid, that the appropriation and license thereof made be void, and utterly repealed and adnulled for ever, except the Church of Hadenham, in the Diocess of Ely; which for to eschew divers damages, discords, and debates, that have been before this time betwixt the Bishop of Ely, and the Archdeacon of Ely, upon the exercise of their Jurisdiction (as it was openly declared by the same Bishop, in presence of the King, and Lords in Parliament) was of late appropried by the licence of the King our Lord, to the Archdeacon and his Successors to do Divine Service, keep hospitality, and to support other charges as pertaineth. Moreover, it is ordained and stablished, That all the Vicarages, united, annexed or appropried, and the licenses thereof had, after the first year of the said King Richard, how well soever that they which have united, annexed or appropried such Vicarages, be in possession of the same Vicarages, or by vertue of such licenses may in any wise be in possession of the same in any time to come, they shall be also utterly void, revoked, repealed, adnulled and disappropried for ever. And that from henceforth in every Church so appropried or to be appropried, a secular person be ordained Vicar perpetual, canonically institute and induct in the same, and convenably endowed by the discretion of the Ordinary to do Divine Service, and to inform the people, and to keep hospitality there, (except the Church of Hadenham aforesaid.) And that no religious be in any wise made Vicar in any Church so appropried, or to be appropried by any means in time to come. *Stat.* 4 *H* 4. *Ch.* 12.

It is said, that when the King doth make a Licence, for the Appropriation of a Church, it ought to be with a Condition to endow a Vicar, and that the endowment of the Vicar may be by distinct Instrument from the Appropriation, so that it be made at the same time with the Appropriation, *Mich.* 1649. *Styles p.* 156. But though the King may not make such a Licence without the aforesaid Condition, yet the Parson appropriate (because he must be Parson and Patron both) with the Ordinary, may create a Vicarage, and endow it without the assent of the King, although that the Vicar shall be a Corporation, because he is a Corporation by the Common Law, *Rolls Abr.* 2. *p.* 334. 8. *R.* 2. *Annuity* 53. *Contra*, 17 *Ed.* 3. 51. But the Ordinary cannot create a Vicarage without the assent of the Patron, 16 *Ed.* 3. *Quare Impedit.* 145. 5 *Ed.* 2. *Quare Impedit.* 195. and *Pasch.* 16 E. 3. *Monstrans, de Faits* 166. *per Par.* So if a Dean and Chapter, or other like Corporation, as Nuns, *&c.* be Parsons appropriate, they may with the Ordinary create a Vicarage, although that they themselves have not the Cure of Souls, *Grenden's* Case, *Plowden* 497. And if the Appropriation be duly made when the Church is full, I suppose that a Vicarage may be then created, at least if the Incumbent consent, 8 *R.* 2. Annuity 53. But not so, as to bind or lessen the profits of the present Incumbent; however 'tis clear, that in the time of the Vacation, the Patron of the Parsonage and the Ordinary alone may create a Vicarage, 8 *R.* 2. Annuity 53. And an Endowment was pleaded to be by Parson and Ordinary, 40 E. 3. 28.

When

When a Vicarage is created, the Parſon (and not the Patron of the Parſonage) of common right is Patron of the Vicarage, for that the Vicarage is derived out of the Parſonage, *Rolls Abr.* 2. *p.* 336. *Dubitatur.* 17 E. 3. 51. 6. *contra*, 5 E. 2. *Quare Impedit.* 165. But *Quære*, how one Perſon can be Parſon, *viz.* Appropriate, and another ſaid to be Patron of the Parſonage appropriated, ſeeing as is ſhewed; the Inheritance of the Advowſon of a Church appropriated, muſt be in the Spiritual Corporation to whom the Appropriation is made; in which caſe it is clear, that the Parſon appropriate creating a Vicarage, is Parſon thereof, 17 E. 3. 51. And 'tis ſaid, that a Parſon appropriate is Patron of the Vicarage, 11 *H.* 6. 18. *b.* 17 E. 3. 51. *b.* As where an Abbot or Prior is Parſon appropriate, 19 E. 2. *Quare Impedit* 178. And yet the King (before the Diſſolution) might have been Patron of a Vicarage, 11 *H.* 6. 18. *b.* and ſo may any other Lay-man be Patron of a Vicarage, 11 *H.* 6. 19. *contra.* 39 E. 3. 33. Yea, both Patron of the Parſonage, and alſo of the Vicarage, 11 *H.* 6. 19.

Though a Vicarage endowed, may not according to the Statute of 4 *H.* 4. *ch.* 12. be appropriated, yet it may be united to another Church, or to a Dean and Chapter, or College, but then it ought to be done with the Kings conſent, *Vide Temps R.* 2. *Grants.* 104. 6 *H.* 7. 13. 5 E. 3. 26. *Trin.* 37. *Eliz. Auſtin's* Caſe, 1 *Cro.* 500. See *Robinſon's* Caſe, v. *Bedle*, *Hill.* 44 *Eliz.* 1. *Croke*, 873. And yet it is ſaid by (*Mountague*) that a Vicarage endowed might be appropriated, but not to the Parſon, to which *Haughton* and *Doderidg* agreed, *Trin.* 16. *Jac. B. R. Popham.* 145.

Albeit theſe things be requiſite to the perfecting of an Appropriation, yet if a Church hath been anciently appropriated, although the ſame were not appropriated in due form of Law, or that the Patron was but Tenant in tail of the Patronage, *&c.* yet the Appropriation ſhall be taken to be good; for although, for ought any thing that can now be ſhewn to the contrary, the appropriation is defective, yet it ſhall be intended in reſpect of the Ancient, and continual poſſeſſion that the firſt Appropriator was Patron, and that all things requiſite to make the Appropriation good, were obſerved for Records, Letters Patents, and other Writings, either conſume, or are loſt, or imbezelled; and God forbid, ſaith *Coke*, that ancient Grants and Acts ſhould be drawn in Queſtion, although that all things cannot be ſhewed which at firſt were neceſſary to the perfecting of them, *Hill.* 4 *Jac. Bedle*, *Berd* and *Wingfield's* Caſe, 12 *Coke*, 5. Arch-biſhop of *Canterbury's* Caſe, 2 *Coke* 47. *Paſch.* 2 *Car. Cole* v. *Bedford*, *Palmer.* 426. And therefore, although in a *Quare Impedit*, the Plaintiff made Title by a gift in tail of the Advowſon of the Church appropriated, made to his Anceſtor in the 18 *R.* 2. And a Verdict for another Anceſtor of his was had, 12 *H.* 8. And his Grandfather had alſo preſented to the ſame Church, and his Clerk being Inſtituted and Inducted, had poſſeſſion certain Years, with ſeveral other matters to prove the Plaintiffs Title, yet the Appropriation was upon the reaſon of ancient poſſeſſion adjudged good, *Paſch.* 4 *Jac. Lord St. John*, and Dean and Chapter of *Gloceſter*, 12 *Coke*, 3. Or if the Original Inſtrument of appropriation be ſhewed with a Condition in it, that a Vicarage ſhould be competently endowed, and no Inſtrument or Proof can be made of ſuch Endowments, without which Endowment at firſt, the appropriation had been void, yet if the Rectory for long time, be ſuppoſed, reputed, and taken to be appropriated, and the Vicar all that time preſented, inſtituted and inducted, as a Vicar rightfully endowed, it ſhall be preſumed in reſpect of the continuance, that the Vicaridge was lawfully endowed, *Trin.* 37 *Eliz. Grimes* and others *v. Smith.* 12 *Coke*, 4. *Mich.* 8 *Jac. B. R. Hunſton* v. *Corkett.* 2 *Croke* 252.

After

After a Church is appropriated, and a Vicar out of the ſame endowed, the Parſonage and Vicarage are two diſtinct Eccleſiaſtical Benefices, and the Parſon and Vicar have both of them *Curam animarum*; the Parſon, habitually, the Vicar actually, by *Noy* in *Britton* and *Wade*'s Caſe, 2 *Cro.* 518. And ſo it was agreed by the Judges in the Caſe of *Clark* and *Heath*, *Mich.* 21 *Car.* 2. *Banco R.* 1 *Sid.* 426. 2 *Keb.* 484. 556. 1. *Mod. Rep.* 11. And it was alſo ſaid in this Caſe, that there are ſeveral Churches in *England*, where there are Vicars endowed with Cure, and yet the Parſon had a concurrent Cure, and both of them took the Oath of Canonical Obedience: And a Parſon appropriate doth differ from another Parſon only in this, that he ſhall be Parſon perpetual, and the other but for Life, *Rolls Abr.* 2. *p.* 341. See 31 *H.* 6. 14. 17 *E.* 3. 76. 5 *Ed.* 2. *Quare Impedit* 165. And therefore, it is provided that a Benefice appropriate ſhall not be taken to be a Benefice with Cure, in any Article of the Statute about Pluralities, *Stat.* 21 *H.* 8. *Chap.* 13. Elſe it had been ſo, as it yet is by the Canon Law in caſes out of the Statute, *Colt* and *Glover*'s Caſe, *Hobert* 157, 158.

After a Parſonage is appropriated, and a Vicarage endowed, if any Queſtion doth ariſe between the Parſon and the Vicar concerning the endowment, it ſhall be tryed in the Eccleſiaſtical Court, for that the Perſons, and the Cauſes alſo are Spiritual, and therefore where the Vicar ſued the Parſon for Tythes, and ſuggeſted the manner of Tything to have a Prohibition, the Prohibition being granted; yet after upon a ſolemn Argument, a Conſultation was obtain'd, in as much as the manner of Tything did not come in Queſtion, but the endowment of the Vicarage, as was cited by *Coke* to be adjudged, *Trin.* 11 *Jac. Buſh*'s Caſe, 2 *Brownlow* and *Gouldsborough* 36. See *Moor* 907. 2 *Bulſtr.* 157. 3 *Bulſtr.* 220. But where the Vicar ſued in the Spiritual Court for Tythes, and the Defendant ſuggeſted a *Modus* payable to the Parſon, a Prohibition was granted, notwithſtanding it was objected, that it was a matter proper for the Spiritual Court, being the Conteſt is between the Vicar and Parſon, who are both Spiritual Perſons, to which of them the Tythes belong; but it was Anſwered, that the Conteſts between the Parſon and Vicar, ſhall not draw the Pariſhioner who hath a *Modus*, *ad aliud Examen. Paſch.* 19. *Car.* 2. 1 *Siderfin* 332. 2 *Keble* 215.

After a Church is appropriated, and a Vicarage endowed, yet the Vicarage may be reſtored again to the Rectory; for if the Ordinary doth unite, annex, and conſolidate the Vicarage to the Rectory or Parſonage out of which it was endowed, to be holden by the Corporation Spiritual, and his or their Succeſſors, that were Parſon of the appropriated Church, together with that wherewith it was endowed to his or their proper uſe, ſo that the Appropriator ſhould have and take care of the Souls which the Vicar had, and the Patron who is the Appropriator doth concur thereto; this is ſaid to be a diſſolution and reſtitution of the Vicarage to the Parſonage, and good, and is not ſuch an Appropriation of the Vicarage as is made void by Statute of 4 *H.* 4. *Chap.* 12. As was admitted by the Juſtices, upon reference out of the Court of Wards, *Mich.* 7 *Jac. B. R. Stafford*'s Caſe, *Rolls Abr.* 2. *p.* 337. But then this reſtitution muſt be made upon the Reaſon that the Appropriator is become Poor and doth want ſuch reſtitution, 40 *E.* 3. 28. And ſuch diſſolution and reſtitution of the Vicarage may be as well made when ſuch Vicarage is full, if it be ſaid that it ſhall be after the death of the Incumbent, when it is void, and ſuch Vicarages as were held from the time that the reſtitution were to take effect by the reſpective Appropriators with the Parſonage, as one entire Church without any Vicar, until ſuch time as they came to the Crown by the diſſolution of Monaſteries, cannot now be preſentable, but the King or his

Paten-

Patentees ſhall enjoy them, as free as the Appropriators had, or held the ſame; and altho' that ſuch-like Reſtitutions, or Unions, had been any way defective at the time of the making the ſame, being good in Reputation, the Statute of Diſſolution of Monaſteries hath fully ſetled them in the Crown, *Mich.* 1609. *Stafford*'s Caſe, *Lee* 14.4 *E.* 3. 27. in *Britton* & *Wade*'s Caſe, 2 *Cro.* 517. *Hil.* 44 *Eliz. Robinſon* v. *Bedle*, 1 *Cro.* 873. *Mich.* 18 *Jac. Britton* & *Ward*'s Caſe, *Palmer* 113, & 219. However, there muſt be a real Reſtitution, altho' it be a defective one, to make the Vicarage not preſentable: For if a Vicarage be endowed, and it can be only ſhewed, that for many Years, *viz.* 160 Years, there hath not been any Vicar preſented; yet by this not preſenting a Vicar for ſo long time (which is through the default of the Parſon himſelf) it ought not to be adjudged to be a Diſſolution of the Vicaridge, but ſomething muſt be ſhewed of the re-uniting thereof to the Parſonage, *Hil.* 44 *Eliz. Robinſon* v. *Bedle*, 1 *Cro.* 873. So if upon Petition of a Prior, *&c.* being the Appropriator, ſhewing that the Priory was become poor, *&c.* the Pope hath granted by Bull, that the Prior ſhould appoint one of his Monks to ſerve the Cure, who ſhould be removable *ad nutum prioris*, &c. this makes no Diſſolution of the Vicarage, eſpecially being done ſince the Statute of 4 *H.* 4. for the Pope could not do any Act againſt a Statute in the affirmative, or diſpence therewith; and if the Ordinary may diſſolve a Vicaridge, it follows not that the Pope may: For it appears by divers Statutes, that the Pope had not any Right to meddle with Advowſons, Benefices, *&c.* and therefore may not diſſolve Vicarages. However, as the Caſe is put, the words are not ſufficient to make a Diſſolution, nor do not amount to ſuch; nor do they ſo much as give the the Prior power to take the Profits, *Mich.* 16 *Jac. Britton* v. *Wade*, 2 *Cro.* 516. But there was a difference taken (by *Mowbray*) when a Lay-man gives Land to one that is a Vicar, and when the Vicar is endowed by the Ordinary of the Parſon's Land, *&c.* For in the firſt Caſe the Ordinaty hath no power to diſſolve the Vicarage as to the Land, tho' he hath in the other, 4 *E.* 3. 27. *Vide* 20 *E.* 3. *Annuity* 32. 16 *E.* 3. *Annuity* 24. & 40 *E.* 3. 28. *b.* But altho' it is to be admitted, that the Ordinary had anciently power to make Reſtitution of Vicaridges to the Parſonages out of which they were endowed upon juſt cauſe, without limitation; yet ſince the Statute of 31 *H.* 8. which made Parſonages Lay-Fees, the Ordinary may not diſſolve a Vicaridge, when the Parſonage is in Lay-hands, for that would be to deſtroy the Cure utterly; in *Britton* & *Wade*'s Caſe, 2 *Cro.* 518. and *Parry* and *Banks*'s Caſe, vouched in the ſaid Caſe.

As the Endowment of a Vicaridge may be diſſolved, ſo may a Church appropriate become diſappropriate, and preſentable, as before the Appropriation was made, and that either by Preſentment, or Recovery, or Diſſolution; and firſt by Preſentment: For if a Parſon appropriate, that is Patron of the Vicarage of the ſame Church, by agreement betwixt him and the Ordinary, doth preſent the Vicar to the Parſonage, this doth unite the Vicarage and the Parſonage together, ſo that the Preſentee ſhall have all the Tythes, and other Profits of the Church, 44 *E.* 3. 33. *B. Admitted* 44 *Aſſ.* 37. And it is alſo ſaid generally, that if the Parſon of the Church appropriate, being Patron of the Vicaridge, doth preſent thereto by the Name of a Parſonage, and his Preſentee be Inſtituted, and Inducted, this is a Diſappropriation of the Church, altho' there was no precedent Agreement betwixt the Patron and the Ordinary to that purpoſe, and it ſhall be preſentable after, 44 *E.* 3. 33. *B.* & *Paſch.* 22 *Eliz. Savile p.* 20. *Caſe* 51. And the like is ſaid by *Manwood* Chief Baron, *Trin.* 26 *Eliz.* in the Queen, and Lord *Lumley*'s Caſe, 2 *Leonard* 80. who alſo ſaid, that a Church was diſappropriated by the Lord *Dyer* by Preſentment, which of late he made unto it. And by *Windham* Juſtice, all Appropriations are preter-

natural, and the Church during that time is as it were in Bondage, and therefore by Preſentation is made preſentative; in the Caſe of *Wilkinſon* v. *Richardſon*, 1 *Keble* 906. By which it appears, that a Lay-man having an Appropriation which is commonly called an Impropriation, may diſappropriate it by Preſentation, if he be Patron of the Vicaridge of the ſame Church, as well as an Eccleſiaſtical Parſon may, Inſtitution and Induction being had upon his Preſentment; yea, and 'tis ſaid, that ſuch Patron by his Act of Preſenting only to the Vicaridge, by the name of a Parſonage, doth diſappropriate the Church, and unite the Parſonage, and the Vicaridge into one, 11 *H.* 6. 18. *b.* 3. 38 *H.* 6. 20 *F. N. B.* 35. Therefore *Hobart* ſaith, that he is of Opinion, That if the Parſon appropriate, doth as aforeſaid preſent to his Vicarage, and his Clerk be refuſed for juſt Cauſe, of which Notice is given by the Ordinary, Lapſe ſhall incur: For that the Appropriation gives him a Choice to hold, or not to hold, *Colt* & *Glover's Caſe*, *Hobart* 152. But *Quære*, Whether a Diſappropriation be perfected by Preſentment before Inſtitution, and Induction, be had thereupon; however, if a Woman be endowed of an Advowſon that is appropriate, and doth preſent her Clerk, who is inſtituted and inducted, it is ſaid, that this ſhall make a Diſappropriation, and ſhall never be appropriate again after the Death of the Incumbent, for that the Incumbent that comes in by Preſentation, hath all the Eſtate in him, 2 *E.* 3.8. and cited, *Mich.* 28 *Eliz.* in the Earl of *Bedford*'s Caſe, 7 *Co.* 8. 1 *Inſt.* 46. *b.* But if the Wife in ſuch Caſe had died, before any was admitted, and inſtituted at her Preſentment, the Church had remained appropriate; and ſo the *Quære*, 6 *E.* 6. *Dyer* 71. is well reſolved, ſaith *Coke*, *Mich.* 28, 29 *Eliz.* *Earl* of *Bedford's Caſe*, 7 *Co.* 8. where the Caſe 2 *E.* 3. 3. oft miſtaken is well explained. But if Leſſee for Years of an Appropriation doth preſent thereto a Clerk; and who is inſtituted and inducted, this doth diſappropriate the Church during his Years, and not after, for this Diſappropriation doth not bind him in Reverſion, 44 *Aſſ.* 37. 44 *E.* 3. 33. 37. 20 *E.* 4. 6. *b.* 1 *Ro. Abr.* 240, 241. Yet this ſeems to be contrary to the Reaſon of the Caſe of Tenant in Dower next before; for in this Caſe the Preſentee of the Leſſee for Years, hath all the Eſtate in him as much as the Preſentee of the Wife-Tenant in Dower, and for that Reaſon ought as abſolutely to make a Diſappropriation: And *Paſch.* 33 *Eliz.* *Lancaſter* v. *Lucas*, 1 *Leon.* 235. by *Popham*, the Preſentation of the Wife in the firſt Caſe did only diſappropriate the Church during her Life, but afterwards it ſhall ſtand; and he refers to the ſame Caſe of 2 *E.* 3. 8. Therefore *Quære*.

If Leſſee for Years of an Appropriation, who for the Term is alſo Patron, doth by Preſentation, *&c.* unite the Parſonage, and Vicaridge, which continueth ſeven Years, a Spoliation doth not lie in the Eccleſiaſtical Court for the Appropriator, or Leſſor, and if a Spoliation be brought, an *Indicavit* may be had to ſtop them in the Spiritual Court; for Spoliation doth not lie, but where a ſecond Incumbent is preſented, *&c.* upon a former, by one and the ſame Patron; in which Caſe, the Right of the Patronage is not in queſtion: But if the ſecond Preſentment be made by another, the Matter is to be tried by Aſſiſe, or Treſpaſs at Common Law, 44 *E.* 3. 33. But if one doth preſent to a Church appropriated by Uſurpation, having no Title, this doth not make the Church to be diſappropriated, for that all is void, *Grendon*'s Caſe, *Plowden* 500. *b.* And yet it is ſaid, that if a Stranger doth preſent, and his Clerk be be inſtituted, and inducted, and continueth Incumbent for ſeven Years, this continuance for ſo long time hath diſappropriated the Church, until it be recover'd again by a Writ of Right, 44 *E.* 3. 34. 44 *Aſſ.* 37. But *Rolls* in his *Abridgment* 1. *p.* 240. ſaith, that this is not Law; for that there cannot be an Uſurpation upon an Appropriation, 5 *Co.* 101. and ſo is *Plowden* in the Caſe laſt cited:

cited: And if the Patron of a Vicaridge (another being Patron of the Parſonage) doth preſent thereto, by the Name of a Parſonage, and his Clerk be inducted, yet it doth continue a Vicaridge; the ſame Law is, if the King doth preſent by ſuch Name to ſuch Vicaridge, *Rolls Abr.* 2. *p.* 338. *Dubitatur* 11 *H.* 6. 106. *B.* 19. 32. *B.* But if there be a Vicaridge, and a Parſonage, in one Church preſentable, and both be void at one time, and one doth preſent his Clerk as Parſon, who is inducted, this ſhall unite the Parſonage and Vicaridge again, 11 *H.* 6. 33. *Quære.*

As by Preſentment, ſo by Recovery an Appropriation may be diſappropriated; for if a Parſon appropriate, and the Ordinary do create a Vicaridge, and afterwards the Advowſon of the Church be recovered by a Writ of Right, upon a Title prior to the making of the Vicaridge, the Vicarage is defeated thereby, and the Church diſappropriated; for that the Plaintiff doth recover by higher Title than the making of the Vicaridge or Appropriation; but otherwiſe it is, if he doth recover by a younger Right than the Creation of the Vicaridge, 17 *Ed* 3. 51. *B.* 76.

If a Church be appropriated to a Corporation that is diſſolved, the Church by the Diſſolution is diſappropriated, (as the Lord *Dyer* ſaid) and the Advowſon thereof doth fall to the Lord of whom it was held, ſo that he may preſent thereto, *Grendon*'s Caſe, *Plowden* 497 *a.* And by *Hobart*, in *Wright* v. *Gerrard* and *Heilderſham*, *Hobart* 307. *Trin.* 38 *El. B. R.* The Arch-biſhop of *Canterbury*'s Caſe, 2 *Coke.* 47. or to the firſt Patron that gave the Advowſon to the Corporation, *Mich.* 18 *Jac. Wright*, v. *Gerrard* and *Heilderſham*, *Jones* 2. And *Quære*, if a Dean and Chapter, or other Spiritual Corporation, be ſeiſed of a Mannor to which an Advowſon is Appendant, and the Church is appropriated to them, and after they make a Feoffment, or Leaſe of the Mannor *cum pertinentiis*, whether this doth diſappropriate the Church; for it ſeems to ſome (ſaith *Plowden*) that the Advowſon ſhall paſs as Appendant to the Mannor, by the Order of the Common-Law, but, now by the Statutes, which make the King and Lay-perſons capable of Parſonages appropriated, the Advowſons in ſuch Caſe be ſevered from the Mannors by the intent of the Statutes, and by the Grant of a Parſonage appropriate, which may now be granted, and transferred to common Perſons, the Advowſons do paſs, *Grendon*'s Caſe, *Plowden* 501 *a.* See *Stat.* 31 *H.* 8. *Ch.* 13.

It is ſaid, 19 *Ed.* 1. *Rot. Pat. Membrana* 25. In *Scledula annexa*, That the Arch-biſhop of *Canterbury*, with the conſent of the Dean and Chapter, did appropriate a Church of his Dioceſs, and of his Collation to an Hoſpital of Lepers, in compenſation of a Sum of Money due from the Arch-biſhop, and that the Succeſſor of the Arch-biſhop, with the conſent of the Pope, Dean and Chapter, and Maſter of the Hoſpital, did revoke the Appropriation, but I conceive that this Appropriation was never good; unleſs that the Patronage of the Church appropriated was firſt veſted in the Hoſpital, and afterwards appropriated as is before ſhewed, it ought to be. However, if there be a Parſon appropriated, and a Vicar endowed of the ſame Church, and after the Parſon and Ordinary do reunite the Vicaridge to the Parſonage, yet this doth not diſappropriate the Church appropriated, for that the Vicaridge was taken out of the Parſonage, and ſo is reſtored but to its firſt Eſtate, as was reſolved, 7 *Jac.* at *Serjeants-Inn*, by the Judges, upon a reference out of the Court of *Wards*, in one *Stafford*'s Caſe, *Rolls Abr.* 1. *p.* 240.

If the King, or any common Perſon be ſeiſed of the Rectory as Appropriator, and doth grant *Advocationem Eccleſiæ de D.* neither the Appropriation doth paſs thereby, nor the Advowſon of the Church; not the Advowſon, becauſe it is not a thing in *Eſſe*, by reaſon of the Appropriation, nor is the

Church diſappropriate thereby, becauſe it being appropriated by a Judicial Act, nothing but a Judicial Act, as Inſtitution and Induction upon the Proprietors Preſentment, and not any other private Act of his can make a Diſappropriation thereof, by *Manwood*, Chief Baron, *Trin.* 26 *Eliz. Queen* and my Lord *Lumley*'s Caſe, 2 *Leonard* 80 *Paſch.* 22 *Eliz. Savile* Caſe, 51. *p.* 20. *Boſtock* and *Monin*'s Caſe, *Rolls Abr.* 245. *b.* And indeed, Appropriations are not regularly grantable over, nor can be ſurrendered; therefore it hath been held, That the Grants and Surrenders of the poſſeſſions of Monaſteries, would not have carryed Appropriations without the aid of the Statute, 31 *H.*8. *Wright*'s Caſe, v. *Gerrard* and *Hilderſham*, *Hobart* 307.

Altho' the Rectory be not diſappropriated, and the Vicarage at the firſt was ſufficiently endowed, yet if after the Vicaridge be diminiſhed, it ſhall have more from the Parſonage if the remnant be not ſufficient; or if a charge be ariſing upon the Vicaridge, it ſhall be recompenced from the Parſonage. So if the Parſonage be impoveriſhed, or that neither the Parſonage by its ſelf, nor the Vicaridge be ſufficient to ſuſtain themſelves, the Vicaridge ſhall be determined, and reſtored to the Parſonage, 31 *H.* 6. 14. *a.* 40 *E.* 3. 28. But this is now to be underſtood of a Parſonage appropiate in an Eccleſiaſtical Perſon, which never came to the King by the Statute of Monaſteries; and in the aforeſaid Caſes, if the Parſon hath made a Leaſe for Lives, according to the Statute of 32 *H.* 8. the Vicar may well ſue in the Eccleſiaſtical Court againſt the Parſon, and his Leſſee that comes in by the Statute for addition of Maintenance, and the Ordinary may compell them to encreaſe his Maintenance, for upon all Appropriations, ſuch power of encreaſing of the Maintenance of the Vicar was reſerved to the Ordinary by the Common-Law, *March* 87, and the Leſſee comes in Subject to this Charge; and upon ſuch Suit in the Eccleſiaſtical Court, by the Vicar of the Pariſh-Church of *Preſhurſt* in the County of *Wilts*, againſt the Maſter of the Choiriſters in the Cathedral Church of *Sarum*, and his Leſſee the Maſter, and his Leſſee ſuing for a Prohibition, it was denyed, *Hil.* 9. *Car. B. R. Fitchcolt* v. *Thornborough* and *Hitchcolt*, *Rolls Abr.* 2. *p.* 337.

CHAP. XVIII.

Of Commendams.

THE Third and extraordinary Way or Means of taking a Title to a Benefice in the Church, is by obtaining (as the Term is) a *Commendam recipere* for that purpoſe, and this may be had not only by a Biſhop after he is advanced to a Biſhoprick, but alſo by every Clerk that may hold a Plurality; as to which it is to be known, that there are two Degrees of theſe *Commendams* only allowable by Law; the one Semeſtris, or for ſix Months, and is made to the Clerk during the Vacancy of the Church, and is but a Sequeſtration of the Cure and Fruits, until the Patron doth prefer his Clerk, or at the moſt, until ſuch time as the Church doth go in Laps to the Ordinary; or if it be granted becauſe the Church is litigious, until ſuch time as the Controverſie ſhall be determined: But ſuch *Commendam* neither is, nor doth it give any Title to the Church, altho' the *Commendatory* be by Commiſſion allowed to gather the Profits, or to ſupply, or cauſe the Cure to be ſupplyed;

plyed; and this *Commendam* is grantable by every Ordinary that may ſequeſter the Profits of the reſpective Church, 8 *H.* 6. 9. But I ſuppoſe that ſuch *Commendam* or Sequeſtration, doth not give the Perſon that ſhall obtain it a right to all the Profits, (eſpecially of a great Benefice) during the Vacation, by reaſon of the Statute of *H.* 8. Which Ordains, **That the Ordinary ſhall ſequeſter, and that the Profits of the Church ariſing during the Vacancy thereof, (the Supply of the Cure for that time being firſt paid,) ſhall go to the next Incumbent.**

The other Degree of *Commendam* is more perfect and full, and is for Life, and grantable at this Day by theKing or Arch-biſhop of *Canterbury* only, and there is no difference between a *Commendam* for Life and a Preſentment, but that the one preſents the Parſon to the Church, the other commits the Church to the Parſon; and as a Patron cannot preſent to a full Church, ſo neither can a *Commendam* be made to a Church certain that is then full. Alſo the Patron's Conſent muſt be had to the taking of a Benefice in *Commendam*, and this muſt be expreſſed in the Inſtruments of *Commendam*, *Mich.* 9 *Jac. King* v. *Horsfall* and *Wale*, *Davis* 74. *Hill.* 22 *Jac. Evans* and *Kiffin*, v. *Askwith*, *Palmer* 477. And if the Patronage be to Divers, and that one is to nominate to another who is to preſent over; the Conſent both of the Nominator and Preſenter muſt be had, and expreſſed as aforeſaid, but if a *Commendam* be made to the Patron himſelf, it may be well made by theſe Words; *Authoritate ſua propria capere & apprehendere abſque Inſtitutione, Collatione*, &c.

If the Arch-biſhop ſhould commend to a certain Church void, *licet Patronus non conſentiret*, the Inſtrument of *Commendam* is void, altho' the Patron would after conſent. Alſo if an Attorny made by a Patron to preſent to his Benefices ſhould conſent to a *Commendam*, it would be void, becauſe ſuch Adminiſtration for others are never extended beyond ordinary Caſes, and ſo if a Church doth come by Laps to the King or Ordinary, neither of them can conſent to have the Church taken by *Commendam*: But I ſee no reaſon why the Church that is in Laps may not be fill'd (he conſenting to whom it is Lapſed) by any Means by which a Church may lawfully be filled, and therefore by *Commendam*, for that can be but for one Turn, and the Inheritance is no ways prejudiced or touched thereby, the Church being thereby fill'd, and the Cure provided for, the Truſt that comes by Laps is by ſuch *Commendam* as well executed to all Intents, as if Preſentation had been made, and Inſtitution and Induction had thereupon enſued, and of this Opinion is *Dodderidge*, *Mich.* 10 *Jac.* in *Colt* and *Glover*'s Caſe, *Moor* 900. Eſpecially when the Church is by Laps come to the King, for then the right of preſenting for that Turn is veſted in the King, not as Ordinary, but as ſupream Patron, ſo that the Patron cannot preſent to that avoidance, *Quære.*

When a *Commendam* is made, if it be for longer time, than whilſt the Church ſhall remain void through the Patrons fault, it muſt be made for the Life of the *Commendatory*, and not for Years, or ſo long as he ſhall be Biſhop of ſuch a Dioceſs, or the like; neither can a Benefice be commended by parts, any more than it may be preſented unto by parts, as that one ſhall have the Cure without the Fruits, or the Fruits without the Cure; or that one ſhall have the Glebe, another the Tythes, and the like; neither can ſuch *Commendatory* have a *Juris utrum*; which is, *utrum ſit libera Eleemoſina pertinens Eccleſiæ ſuæ*, nor can he take to him, or his Succeſſors, nor can he ſue or be ſued in a Writ of Annuity, or the like. But a *Commenda perpetua* may be admitted, 11 *H.* 4. 76. By *Thirning* and *Hankford*; for it amounts to a Collation or Proviſion, and hath full words, that he may take or receive a Benefice void of the Gift or Preſentation of the Patron, and the *Commenda-*

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tory may entertain it without Inſtitution, *&c.* and take the Profits as Rector in *Commendam*, for term of his Life: And it is ſaid to be adjudged, and affirmed in Error, that a *Commendam* to take a Benefice upon the Preſentations of the Patron is good, *Jenkin*'s Caſe, 9 *Cent.* 6. But then the Benefice muſt be void when the *Commenda* is made for the holding of it, and words *de futuro* will not ſerve; but *Quære*. And though it bein a ſort repugnant, that a Man ſhould have an Intereſt irrevocable in a thing that he takes only to keep, (for ſo was the original of a *Commendam*,) yet where the words are ample to make a full Incumbent, the word *Commendam* ſhuffled in may be void, *Hobart* 153.

And though it may be ſaid that the nature of a *Commendam* is to be determinable, not perpetual; yet it muſt be agreed that a *Commendam* may be perpetual, and ſuch is the beſt, and perfecteſt kind of *Commendams*; and a *Commenda Temporalis* doth not ſtand with the common Law of *England*. When any Spiritual Perſon is made a Biſhop, he may by diſpenſation of retainer, hold with his Biſhoprick all ſuch Benefices of which he was lawfully poſſeſſed before he was Biſhop; and ſo if he was the King's Chaplain, and had three Benefices with Cure above the Yearly value of Eight Pounds, one of them at the leaſt being of the King's Gift, he may retain them all; but if he doth retain by Diſpenſation two Benefices, or ſo many as he might have before he was Biſhop by the Statute, 21 *H.* 8. *Ch.* 13. he cannot by *Commendam* take any more, becauſe the Words of the Statute are as well againſt having, as taking more Benefices, and upon other Terms than the Statute doth allow; and if he had no Benefice before, or did void them by being made a Biſhop, he can take but one Benefice *De Novo*, eſpecially if it be with Cure, and of the Yearly value of Eight Pounds; becauſe he that will have two ſuch Benefices, muſt have ſuch a Qualification and Diſpenſation as the Law requires; and a Biſhop by being Biſhop, ceaſeth to be a Chaplain, and ſo makes his Qualification void; but I conceive that he continues to be (but *Quære* whether he doth not continue to be qualified as a Doctor) but he muſt have a double Diſpenſation to licenſe him to take two ſuch Benefices, and hold them with a Biſhoprick, which is ſuppoſed not to be tollerable, *Hobart*, 157. But I ſee no reaſon in Law, why a Biſhop may not as well be diſpenſed with to hold a Benefice above the value of Eight Pounds *per Annum* with his Biſhoprick, and another Benefice within the Statute with that and his Biſhoprick, *viz.* by (*Commendam*, all *Commendams* being but Diſpenſations,) as was agreed *Hill.* 22 *Jac.* In *Evans* and *Kiffin*'s Caſe, *v. Aſcouth*, *Noy* 94. and *Palm.* 457. as well as he that hath any Inferiour Dignity may be diſpenſed with, to hold two ſuch Benefices together with his inferiour Dignity; for a Biſhoprick by *Hobart* is agreed to be no more a Benefice within this Statute than a Deanry, Arch-deanry, *&c.* are, which are expreſly excepted by it.

However, as *Hobart* ſays, *Hobart* 157. Whatever Benefices a Biſhop holds in *Commendam*, he is not a Biſhop as to ſuch Benefices, whether they be in his own or another Dioceſs, but a Parſon, Vicar, or the like, (as his Caſe is) to all purpoſes, and by that Name muſt Sue and be Sued, Preſcribe and Claim, and yet is ſaid, *Hill.* 22 *Jac.* in *Evans* and *Kiffin*'s Caſe, v *Aſcouth*, *Noy* 94. The ſame Caſe is alſo reported, *Palm.* 345, 457. *Latch*, 31. 233. That a *Commendatory* muſt Sue by that Name; all which particulars concerning *Commendams* are mention'd by *Hobart*, unleſs ſuch of them for which other Authors are cited, In *Colt* and *Glover*'s Caſe, *v.* The Biſhop of *Coventry* and *Litchfield*, *Mich.* 10 *Jac.* *Hobart* 154, *&c.* Which Caſe alſo ſee in *Moor*'s Reports, *p.* 896. And in *Rolls* 1 *Rep.* 451. Where the principal Caſe is, that a Church being come to the King by Laps, and after a Biſhop (that did hold with his Biſhoprick a Benefice with Cure, being elected to be Biſhop of ano-

another Dioceſs) doth upon his Petition obtain a Grant or Diſpenſation from the Arch-biſhop, that he ſhould hold the Benefice he held with his firſt Biſhoprick, *Nec non, ut unum aliud vel plura Curata vel non Curata Beneficia Eccleſiæ, infra Regnum Angliæ, cujus cunq; nominis, qualitatis aut Dignitatis in Commendam ibidem obtinere, acceptare & recipere, ac propria ſua authoritate capere, & apprehendere, ac Realem, Corporalem, & actualem Poſſeſſionem ejuſdem abſque Inſtitutione, Collatione, Inductione, & alia quacunq; juris Solemnitate intrare*, &c. And then being confirmed Biſhop of the Second Dioceſs, the King *ratione Prærogativæ*, &c. doth grant him the Benefice that was come to him by Laps, upon which the Biſhop doth accept of the ſaid Benefice, and did enter upon it, and held it in *Commendam*, in which Caſe of Twelve Judges, three only did hold that the ſaid *Commendam* was good in Law, at leaſt made good by the Words of the King's ſecond Grant; the other Nine held that it was void, of which Nine, two were to have Judgment to be given for the King, the other Seven, that Judgment ought to be given for the Plaintiff, and for him it was given accordingly, *Quod habeat breve Epiſcopo*; but Order given that no Writ ſhould go forth, neither to the Biſhop nor the Sheriff to enquire of the Points of the Writ, till the Court give further Order, becauſe that the King's Title by Laps was in ſome ſort admitted, or not denyed, and to the end, that (as *Coke* adviſed who was one of the Seven) that Knowledge might be taken of the King's Title before Execution. And this is the firſt Judgment that is found to be given concerning this ſort of *Commendams*, altho' Queen *Elizabeth* brought a *Quare Impedit* before in a Caſe not much unlike it, which was, That on the Twenty ſecond of *November*, 1582. A. Biſhop of *Coventry* purchaſed a Diſpenſation of the Arch-biſhop of *Canterbury*, after Confirmed by the King, whereby it was diſpenced with the ſaid Biſhop, that he might during the time that he ſhould be Biſhop of the ſame See, *duo Beneficia Eccleſiaſtica infra Dioceſin ſuam*, &c. *In Commendam recipere*, &c. *Et authoritate ſua propria retinere quam diu prædicto Epiſcopatui præeſſe contigerit quantum in eodem Archiepiſcopo fuit & jura Regni patiebantur.* After which, *viz.* 14 *April*, 1597. A Church within his Dioceſs falling void on the Tenth of *May* following, the rightful Patron, *Nominavit, Deſignavit & Aſſignavit*, the ſaid Biſhop to be Rector of the void Church, and that he might take it, and hold it according to his Diſpenſation, by pretence of which Diſpenſation and Preſentation, the Biſhop on the 24*th* of *October* in the ſame Year, took by his own Authority corporal poſſeſſion of the ſame Church; as to which Diſpenſation of *Commendam*, three of the Juſtices held that both it and the Confirmation were void. The Fourth, *viz. Walmſly*, that it was good, but the Queen put an end to the Suit, by Certifying by her Attorney, that her Pleaſure was not to proſecute it further, *Paſch.* 43 *Eliz.* Argued, *Mich.* 44, and 45 *Eliz.* Queen *v.* Biſhop of *Coventry* and *Compton*, 2 *Anderſon* 181. Alſo the Biſhop of *Oſſery* having obtained the like Diſpenſation, and upon pretence thereof, enjoyed during his Life the Profits of a Vicaridge that came to him by Laps, and was full of an Incumbent when his Diſpenſation was granted; the King brought after his Death a *Quare Impedit* againſt the Patron, and his Clerk upon the Title of Laps, preſuming that as the Church came by Laps to the Biſhop, ſo not being fill'd by his taking Poſſeſſion by vertue of his Diſpenſation, that it came to him, and was in him by Laps, but what Judgment was given is not declared; however, the Arguments Pro and Con are ſet down, *Paſch.* 9 *Jac. King* v. *Horſfal* and *Wale*, *Davis*, *fo.* 68. It hath alſo ſometimes been made a doubt, whether a Biſhop might hold any Benefice by *Commendam* within his own Dioceſs or not, *Moor* 899. 1 *Siderfin* 305. *Rolls* 1 *Rep.* 454. 469. *Davies* 69. 8.

CHAP.

CHAP. XIX.

Of Curates and Lecturers.

THus having ſpoken of the general Ways or Means, both ordinary and extraordinary, by which a Title to an Eccleſiaſtical Benefice may be taken; I may here alſo not improperly add that the power of executing the Office of a Miniſter may be had by thoſe that have not any Title to an Eccleſiaſtical Benefice, and that is, either as a Curate to ſome Beneficed Perſon, or as a Lecturer without Title; but no Parſon whether Prieſt or Deacon (for Deacons are capable of being Curates and Lecturers as aforeſaid) may ſerve another as his Curate, or preach as a Lecturer in any place of publick Worſhip, by the conſent only of thoſe that imploy them, but ought to be admitted by their Reſpective Arch-biſhop, Biſhop, or Ordinary, and at their Admiſſion to ſubſcribe before ſuch their Arch-biſhop or Ordinary, the Declaration or Acknowledgment, the form of which is ſet down before, *Chap.* 15. And if they do not ſubſcribe as aforeſaid, they loſe and forfeit ſuch Curate's place and Lecture; and after Subſcription made, ſuch Curate and Lecturer are to procure a Certificate under the Hand and Seal of their Arch-biſhop, Biſhop or Ordinary, before whom they ſubſcribed, who upon demand are bound to make and deliver the ſame, and publickly to read the ſame Certificate, together with the Declaration aforeſaid, upon ſome Lord's day within three Months next following, in the Pariſh-Church where he is to officiate, in the Preſence of the Congregation there aſſembled in the time of Divine-Service, upon the Pain aforeſaid.

And it is alſo Enacted, That no Perſon ſhall be, or be received as a Lecturer, or permitted, ſuffered, or allowed to preach as a Lecturer, or to preach or read any Sermon or Lecture in any Church, Chapel, or other place of publick Worſhip, within this Realm of England, or the Dominion of Wales, and Town of Berwick upon Tweed, unleſs he be firſt approved, and thereunto licenſed by the Arch biſhop of the Province, or Biſhop of the Dioceſs, or (in Caſe the See be void) by the Guardian of the Spiritualities under the Seal, and ſhall in the Preſence of the ſame Arch biſhop, or Biſhop or Guardian, read the Nine and Thirty Articles of Religion, mentioned in the Statute of the Thirteenth Year of the Late Queen Elizabeth, with Declaration of his unfeigned Aſſent to the ſame. And that every Perſon and Perſons who now is, or hereafter ſhall be Licenſed, Aſſigned and Appointed, or received as a Lecturer to preach upon any day of the Week, in any Church, Chapel, or place of publick Worſhip within this Realm of England, or places aforeſaid: The firſt time he Preacheth, before his Sermon ſhall openly, publickly and ſolemnly read the Common-Prayers and Service in, and by the ſaid Book appointed to be read for that time of the day, and then and there publickly and openly declare his Aſſent unto and Approbation of the ſaid Book, and to the uſe of all the Prayers, Rites and Ceremonies, Forms and Orders therein contained and preſcribed, according to the Form before appointed in this Act: And alſo ſhall upon the firſt Lecture day of every Month afterwards, ſo long as he continues Lecturer or Preacher there, at the place appointed for his ſaid Lecture or Sermon, before his ſaid Lecture or Sermon openly, publickly and ſolemnly read the Common-Prayers and Service, in and by the ſaid Book appointed to be read for that time of the day, at which the

the ſaid Lecture or Sermon is to be Preached; and after ſuch reading thereof, ſhall openly and publickly before the Congregation there Aſſembled, declare his unfeigned Aſſent and Conſent unto, and Approbation of the ſaid Book, and to the Uſe of all the Prayers, Rites and Ceremonies, Forms and Orders therein contained and preſcribed according to the Form aforeſaid; And that all and every ſuch Perſon and Perſons who ſhall neglect or refuſe to do the ſame, ſhall from thenceforth be diſabled to Preach the ſaid, or any other Lecture or Sermon in the ſaid or any other Church, Chapel, or place of publick Worſhip, until ſuch time as he and they ſha'l openly, publickly and ſolemnly read the Common Prayers and Service appointed by the ſaid Book, and conform in all Points to the Things therein appointed and preſcribed according to the purport, true intent, and meaning of this Act.

Provided always, That if the ſaid Sermon or Lecture be to be Preached or Read in any Cathedral or Collegiate Church or Chappel, it ſhall be ſufficient for the ſaid Lecturer openly at the time aforeſaid to declare his Aſſent and Conſent to all things contained in the ſaid Book according to the Form aforeſaid.

And be it further Enacted, That if any Perſon who is by this Act diſabled to Preach any Lecture or Sermon, ſhall during the time that he ſhall continue and remain ſo diſabled, Preach any Sermon or Lecture, that then for every ſuch Offence, the Perſon and Perſons ſo offending ſhall ſuffer Three Months Impriſonment in the Common Goal, without Bail or Mainprize; And that any two Juſtices of the Peace of any County of this Kingdom and places aforeſaid, and the Mayor or other Chief Magiſtrate of any City, Town Corporate within the ſame, upon Certificate from the Ordinary of the Place, made to him or them of the Offence committed, ſhall and are hereby required to commit the Perſon or Perſons ſo offending to the Goal of the ſame County, City or Town Corporate accordingly.

Provided always, And be it further Enacted, That at all and every Time and Times when any Sermon or Lecture is to be Preached, the Common-Prayers and Service in and by the ſaid Book appointed to be read for that time of the Day, ſhall be openly, publickly and ſolemnly read by ſome Prieſt or Deacon, in the Church, Chapel or place of publick Worſhip, where the ſaid Sermon or Lecture is to be Preached, before ſuch Sermon or Lecture be Preached, and that the Lecturer then to Preach, ſhall be preſent at the reading thereof.

Provided nevertheleſs, That this Act ſhall not extend to the Univerſity Churches, in the Univerſities of this Realm, or either of them, when or at ſuch times as any Sermon or Lecture is Preached or Read in the ſaid Churches or any of them, for or as the publick Univerſity Sermon or Lecture, but that the ſame Sermons and Lectures may be Preached or Read in ſuch ſort and manner, as the ſame have been heretofore Preached or Read; this Act or any thing herein contained to the contrary thereof in any wiſe notwithſtanding, *Stat.* 13 & 14 *Car.* 2. *Chap.* 4.

And it hath been further Enacted, That whereas ſome doubt hath ariſen, whether Parſons prohibited to Preach by (14 *Car.*2. *Chap.* 4.) are in the ſame plight as to Puniſhment with Perſons diſabled by the ſaid Statute to Preach. Be it declared and Enacted that the Penalties by the ſaid Act to be inflicted upon any Perſon diſabled by the ſaid Act to Preach for any Offence againſt the ſaid Act ſhall in like manner be inflicted upon every Perſon ſo offending that is prohibited by the ſaid Act to Preach any thing Doubt or Ambiguity in the ſaid Act to the contrary notwithſtanding, Stat. 15. Car. 2. Ch. 6.

CHAP. XX.

Of Preſentations and Admiſſion of Clerks preſented; what Preſentations are good; and what are Cauſes ſufficient for the Biſhop to refuſe to Admit; Of Jure Patronatus *and* Caveats.

HAving ſhewed both what are the Ordinary and Extraordinary Means, by which a Clerk muſt take a legal Title to an Eccleſiaſtical Benefice, it remains to be ſhewed what Remedies the Law doth afford the Clerk in caſe he be hindred in his deſign of taking a Title by any of the aforeſaid Ordinary or Extraordinary Ways. If the Church be preſentable (a Preſentation being had) the Impediments to be removed in ſuch Caſes, are to be met with either when the Clerk doth go to the Biſhop for Admiſſion and Inſtitution, or to the Arch-deacon for Induction. As to the Biſhop it muſt be remembred, that he in Admitting and Inſtituting, is not to be lookt upon as a meer Miniſter or Inſtrument, but as a Judge, 15 *H.* 7. 8. *a.* And therefore in many Caſes, he may refuſe to admit the Clerk that is preſented to him, and juſtifie his refuſal; wherefore it is meet before I ſpecifie the Remedies the Law hath provided, in Caſe a Clerk be unjuſtly refuſed, that I firſt declare what are, and what are not the juſtifiable Cauſes of a refuſal. The Cauſes of a refuſal may ariſe either from the Perſon of the Clerk, the Preſentment he brings, or from the Condition of the Church to which he is preſented, *&c.*

Firſt, they may ariſe from his Perſon, for every one that is preſented to a Church, ought to be duly qualified to perform the Duties of the Incumbent thereof, and this the Law of Reaſon doth render ſufficiently evident, therefore he ought to be Ordained, or made a Miniſter, according to the direction of the Laws, *Mich.* 12 & 13 *Eliz. Dyer* 292. For whatever the Law hath been as to Lay-men, in reſpect of Deanries, Prebends, and other Benefices without Cure, and as to Deacons in reſpect of Benefices with Cure; yet as the Law now ſtands, neither Lay-men nor Deacon, but only a Prieſt according to the Form and Manner by the Book of Common-Prayer preſcribed. or formerly by Epiſcopal Ordination, are capable to be admitted to any Parſonage, Vicarage, Benefice, or other Eccleſiaſtical Promotion or Dignity whatſoever, upon Pain to forfeit for every Offence, One hundred pounds, except only the King's Profeſſor of the Law within the Univerſity of *Oxford*, who may hold the Prebend of *Clipton* in the Cathedral Church of *Salisbury*, altho' he be but a Lay-man, *Stat.* 14 *Car.* 2. *c.* 4. But altho' no other than a Prieſt duly Ordained, is capable of being admitted to an Eccleſiaſtical Preferment, yet if a Clerk doth go to the Biſhop with a Preſentation for Admiſſion and Inſtitution, not having with him Letters of Orders to teſtifie that he is a Prieſt duly ordered, nor making any Proof thereof; and the Biſhop at the Clerks requeſt doth give him a Weeks time to bring them, and the Clerk doth not return before their Patrons ſix Months paſs; yet it was held by *Periam* and *Anderſon*, that the cauſe of the Biſhops refuſal to admit was not ſufficient, and that he ſhould not have the turn by Laps, for that the Clerk is not bound to ſhew his Letters of Orders; but if it was urged that the Clerk that is preſented ought to make proof to the Biſhop that he is Deacon, and that he hath Orders, otherwiſe by the Statute 13 *Eliz.* the Biſhop is not bound to admit him: (for as that Law was then, a Deacon was admittable) to which it was ſaid, that the Statute doth not compell the Clerk to ſhew his Orders; for perhaps he

he hath loſt them; but then it was a Queſtion how the Clerk ſhould make proof that he was in Orders, for that he ought to do that ſeems to be granted; to which *Anderſon* ſaid, that the Biſhop may examine him upon Oath if he hath Orders or not: However Judgment was given againſt the Biſhop, *Paſch.* 33 *Eliz. C. B. Palmes and Biſhop of Peterborough's Caſe*, 1 *Leonard*, 230. ſame Caſe, 3 *Cro.* 241. which ſeems to be a hard Caſe, unleſs the Biſhop hath not only Authority to examine him, as *Anderſon* ſays upon Oath, but be alſo bound to do it of Office upon the Clerk's refuſal to ſhew his Orders. And in this Caſe it was alſo ſaid, that altho' a Clerk doth not exhibit to the Biſhop Letters Miſſive or Teſtimonial, teſtifying his Ability and good Behaviour, yet the Biſhop ought not to refuſe the Clerk, or to defer the Admiſſion of him, upon the account of giving the Clerk a day to bring the ſame, becauſe the Biſhop is by Examination to try the Ability of the Clerk, and may alſo make Enquiry concerning his Behaviour, for that the Law allows him time convenient; yet altho' a Clerk doth bring to the Biſhop Letters Teſtimonial, which do report him to be ſufficient to ſerve the Cure, and to be of honeſt Behaviour; yet the Biſhop may proceed to the examining of him, as to his Ability, and may take time to enquire of him, as to his Behaviour; and it is ſaid that Twenty Eight Days are allowed by the Law for that purpoſe, 1 *Rolls Abr p.* 354, and 355. And ſhould the Biſhop be ſatisfied both as to the Clerk's Ability and Honeſty, yet he is not bound inſtantly to admit him; and if a Clerk coming to the Biſhop for Admiſſion, be commanded by him to come to him again afterwards to be examined, for that he hath other Buſineſs, this is no refuſal of the Clerk; ſo that if the Clerk return not again for the Admiſſion, and the ſix Months paſs, and the Biſhop collate by Laps, this will be a good Plea for the Biſhop, if he be ſued for collating, 14 *H.* 7. 21 and 15 *H.* 7. 21. Quoted by *Dyer*, *Mich.* 15 *Eliz.* 3. *Leonard* 46.

If the Biſhop upon Examination doth find the Clerk preſented inſufficient to ſerve the Cure that is to be committed to him, he may refuſe to admit him, *Stat. de Art. Cleri. Chap.* 13. *Dr. and Stud. Lib.* 2. *Chap.* 26. And tho' the Clerk be otherwiſe Learned, yet if he be preſented to a Church in *Wales*, where the Pariſhioners are to have Divine Service in the *Welſh* Tongue, for that they underſtand not *Engliſh*, and the Clerk is not able to ſpeak *Welſh*, the Ordinary may refuſe him as uncapable of the Cure, *Mich.* 30 & 31 *Eliz. Albany*, v. *Biſhop of Saint Aſaph*, 3 *Cro.* 119. And the reaſon why the want of *Welſh* in ſuch Caſe is at this day a juſtifiable Cauſe of refuſal, is becauſe of a private Act made the 5 *Eliz.* Entitled, **An Act made for the tranſlating of the Bible, and of the Divine Service into the Welſh Tongue.** And now it may be further ſaid, I conceive by reaſon of a Clauſe in the Statute of 14 *Car.* 2. by which it is Enacted, That the now Common-Prayers ſhall be tranſlated into the *Welſh* Tongue, and being ſo tranſlated, ſhall be uſed by all Miniſters and Curates in *Wales*; for at the Common-Law before it was thus Enacted, ignorance of the *Welſh* Tongue in a Perſon preſented to a Church in *Wales*, was not a cauſe of refuſal of any Perſon preſented to ſuch Church, and becauſe the Act of 5 *Eliz.* making this Alteration in the Common-Law was but a private Act; it was ſaid by *Anderſon*, the ſaid Act not being pleaded by the Biſhop that they could not take notice of it, but would adjudge according to the Common-Law, and therefore it concerns the Biſhop in the like caſe to plead it ſpecially, *Trin.* 27 *Eliz. Albany and the Biſhop of St. Aſaph's Caſe*, 1 *Leonard* 31. ſame Caſe, 3 *Cro.* 119. Or if a Perſon that doth not underſtand the *Engliſh* Tongue be preſented to a Cure in *England*, the Biſhop may refuſe him for ſuch Incapacity, *Colt* and *Glover*'s Caſe, *Hobart* 147. But if he doth underſtand our Language, altho' he be an Alien born, he is not to

be refuſed, *Mich.* 8 *Jac. C. B. Dr. Senton's Caſe in Parſon's Law, Chap.* 10. See *Stat.* 7 *H.* 4. *Chap.* 12. & 14 *H.* 6 *Chap.* 6. Altho' by the Statute of 13 *R.* 2. & 1 *H.* 5. *Chap.* 7. *French-Men* be diſabled to have Benefices in *England*; for it is thought that theſe Statutes are not in force at this day, *Rolls Abr.* 2 *p.* 348. Yet *Coke* ſaid, That if the King will preſent a *French-man* or *Spaniard*, they ſhall not hold the Benefice within this Realm, *Mich.* 8. *Jac. C. B. Waulter's Caſe*, *Godbolt.* And *Coke* ſaith alſo generally, That if any Alien or Stranger be preſented to a Benefice, the Biſhop ought not to admit him, but may lawfully refuſe him, 4 *Inſt. fo.* 338. And this Opinion of *Coke's* is given on Conſideration had of all theſe Statutes.

When a Biſhop doth refuſe a Clerk becauſe he is inſufficient, whereupon the Patron doth preſent another; if the Biſhop doth admit the Clerk that was firſt preſented, and within the ſix Months, the Biſhop is thereby a Diſturber, for that having once refuſed him for inſufficiency, he cannot afterwards accept him, *Paſch.* 26 *Eliz. C. B. Biſhop of Hereford's Caſe*, 3 *Cro.* 27.

So a Clerk preſented may be refuſed if he be perjured, before a Lawful Judge, 38 *E.* 3. *fo.* 2. *Quare Impedit* 134. And if by his own Confeſſion he be perjured he may be refuſed, altho' no Conviction be thereof, 13 *Eliz. Dyer* 293 *b.* 38 *Ed.* 3. 2. *b.* Or if he be an Heretick or Schiſmatick, 5 *H.* 7. 20. irreligious, 5 *R.* 2. Trial 54. Baſtard and not diſpenced with, *Mich.* 7 *H.* 6. *Rat.* 523. *Villain*, 14 *H.* 7. 28. *b.* within age, or if he or his Patron be Excommunicated, if by the ſpace of Forty Days, 15 *H.* 7. 7. *b.* contrary 1 *E.* 2. vouched by *Frowick*, *Mich.* 21 *H.* 7. *Keb.* 71. *b.* Or if he be Out-lawed, guilty of Forgery, or hath committed Simony in the procuring of the Preſentment he brings, or of another Preſentment to a former Benefice, *Trin.* 16 *Jac. Boughton and the Biſhop of Rocheſter's Caſe*, *Rolls Abr.* 2. *p.* 356. or hath committed Man-ſlaughter, 38 *Ed.* 3. 2. that is, if he be attainted thereof, and not pardoned, *Serll's Caſe*, *Hobart* 293. ſame Caſe, 2 *Cro.* 430. And it is ſaid, That the Ordinary may refuſe a Clerk upon his Knowledge for an Offence committed by him, which is a good Cauſe of a refuſal, although that he be not convicted thereof by the Law, and this ſhall be tryed by Iſſue, whether it be true or not, 38 *E.* 3. 2. *b.* and generally, all ſuch as are ſufficient cauſes of Deprivation, are alſo ſufficient cauſes of refuſal, *Hill.* 32 *Eliz. in Specott's Caſe*, 5 *Coke* 58. the ſame Caſe, *Goldsborough* 35. *Jenkins p.* 258. and in 3 *Leon.* 199. 1 *Anderſon* 190. But tho' a Clerk be a haunter of Taverns, and a player at unlawful Games, yet the Biſhop may not refuſe him, becauſe theſe Faults are not Evil in their own Nature, but only by prohibition of Law, 8 & 9 *Eliz. Dyer fo.* 154. *b.* But this Caſe was denyed to be Law by Juſtice *Barkly*, and ſo agreed by *Jones*, *Paſch.* 15 *Car. March's* Caſe 11. Nor is it ſafe for the Ordinary to refuſe a Clerk, becauſe he is the Son of the laſt Incumbent of the Church, altho' he ſhould not bring any Diſpenſation upon the account of the Common-Law; which ſaith *Filius patri non poteſt ſuccedere in Eccleſia*; becauſe, as was held, the Common-Law in this Caſe doth not take place in the Church of *England*, (but *Quære*) for that the Archbiſhop of *Canterbury* doth uſually grant Diſpenſations at the requeſt of ſuch Clerks; but if the Ordinary doth refuſe for ſuch Cauſe, and the Patron doth preſent another, who is Inſtituted and Inducted, the firſt Clerk is without Remedy, and if he doth Sue the ſecond Clerk in the Spiritual Court, he may be ſtopped by a Prohibition to proceed in ſuch Suit, *Mich.* 2 *Car. B. R. Stoke* v. *Sikes*, *Noy* 91. ſame Caſe, *Latch* 191, 253. Neither may a Biſhop refuſe a Clerk, upon the reaſon that he hath another Benefice at the time he brings his Preſentation, altho' it be under the yearly value of Eight Pounds, and will not be voided by the taking of the ſecond Benefice as to the Patron,

ſo

ſo that he be bound to preſent, nor perhaps as to the Clerk and Pariſhioners, ſo that he may not recover and renew the Profits of the firſt Benefice, until ſuch time as he be actually deprived (for this is at the Peril of the Clerk, for that if he be therein two Months) both ſhall be void by the Common-Law, 14 *H.* 7. 28. *b.*

When a Biſhop doth refuſe a Clerk, he is generally ſpeaking to give Notice to the Patron of ſuch refuſal, and to ſignifie to him the cauſe thereof; that is, unleſs he refuſe Spiritual Perſons Clerk, for of ſuch refuſal he is not bound to give Notice, unleſs he refuſe him for that he is a Villain, *&c.* 14 *H.* 7. 28. 18 *H.* 7. *Keb.* 49. *b.* 24 *H.* 7. 21. Accordingly, if a Biſhop doth refuſe the Clerk of a Lay-Patron, for that he is not a Prieſt by Epiſcopal Ordination, he ought to give Notice to the Patron of ſuch uncapacity, *Mich.* 12 & 13 *Eliz. C. B. Dyer* 292. ſo if he refuſe him becauſe illiterate, 18 *H.* 7. *Kell.* 49. *b.* 15 *Eliz. C. B. Dyer* 327. or becauſe he doth not underſtand the Language ſpoken by thoſe of whom he ſhould have the Cure, *Trin.* 27 *Eliz. C. B. Albany* v. *Biſhop of St. Aſaph*, 1 *Leonard* 31. ſame Caſe, 3 *Cro.* 119. or if he refuſe him for any Crime, as Simony or Adultery, *&c.* Yet *Frowick* ſaith, That if the Ordinary doth refuſe a Clerk for any notorious Crime, as becauſe he is a common Whoremonger, or be commonly known to be guilty of Murther, the Patron is bound to take Notice of ſuch refuſal at his Peril, *Trin.* 18 *H.* 7. *Keib. p.* 50. but others hold the contrary, 7 *Ed.* 4. 20. *Rolls Abr.* 2. *p.* 364. And it is ſaid generally, That if the Preſentee be Criminous, the Ordinary ought to give the Patron Notice of his refuſal if he be Lay, but Spiritual Patrons are to take Notice at their Peril, that their Clerks be rightly qualified, 24 H. 7. 21. 14 *H.* 7. 21. *Bro. Notice* 6.

In caſes when the Biſhop is to give Notice of the refuſal, he is not only to ſignifie his refuſal of the Preſentee, but alſo the Cauſe or Cauſes thereof, 29 *Eliz. Specot*, v. *Biſhop of Exeter, Gouldsborough* 35. And ſuch ſignification ought to be made with as much ſpeed as conveniently it may; and therefore where the Ordinary delayed to give Notice to the Patron for the ſpace of 22 Days, it was held that the Notice was inſufficient, and that therefore the Biſhop ſhould have no advantage by Laps, *Trin.* 27 *Eliz. C. B. Albany* v. *Biſhop of St. Aſaph*, 1 *Leonard* 32. ſame Caſe, 3 *Cro.* 119. and Notice is to be given in ſuch Caſes to the Perſon of the Patron, 15 *Eliz. C. B.* 3 *Leonard* 47. that is, if he be within the County where the Church is at the time of the giving thereof; otherwiſe it is to be given to him by an Inſtrument in Writing, affixed to the Door of the Church to which the Clerk was preſented, but if Notice be given by ſuch Inſtrument as aforeſaid before the Patron be enquired after, and a return is made that he is not to be found within the County, ſuch Notice is not good, *Trin.* 10 *Eliz. Dyer* 327. *b. Mich.* 30 & 31 *Eliz. B. R. Albany* v. *the Biſhop of St. Aſaph*, 3 *Cro.* 119. ſame Caſe, 1 *Leonard* 33.

When the Biſhop hath given notice of his refuſal to a Clerk, this doth not give the Patron a longer time to preſent in than he had before, by *Manwood, Juſtice Mich.* 15 *Eliz. C. B.* 3 *Leonard* 46. For if the Church be ſo void, that the Biſhop is not bound to give the Patron notice of the Avoidance, the Patron muſt preſent his ſecond Clerk (if he think his firſt Preſentee to be juſtly refuſed) within the ſix Months, accounting from the time avoidance happened. But if the Church be void, by ſuch Means as that the ſix Months do not run without due Notice to the Patron of the Avoidance, and the Patron doth preſent his Clerk before the Ordinary hath given him any Notice thereof; if the Ordinary doth refuſe his Clerk, and give Notice of his refuſal, yet the Patron (I conceive) hath ſix Months, accounting from the Notice of the Biſhops refuſal, to make his ſecond Preſentment in before Laps can incur, and ſo it ſeems to be held, *Mich.* 15 & 16 *Eliz. C. B. Dyer* 327. But if the Biſhop

ſhop had given Notice of the Avoidance before the Patron preſented, tho' he refuſe, and doth give Notice thereof, the Patrons ſix Months are to be accounted from the firſt Notice.

Though the Perſon of a Preſentee be altogether without exception, yet the Biſhop may juſtly refuſe to admit and inſtitute him upon the account of his Preſentment; that is, in caſe he doth find his Preſentment to be void, *Grendon*'s Caſe, *Plowden* 502. for a void Preſentment is as no Preſentment, and the Clerk in ſuch Caſe is without Remedy; and if the Biſhop ſhould admit and inſtitute upon ſuch Preſentment, he is a diſturber, and not the Perſon that preſented, *Mich.* 8 *Jac. Doctor Ayry* v. *Sir Richard Lovelace*, 1 *Buſtrode* 91. That is, where the void Preſentment is made to a Church of another's Right; and yet by *Croke* 'tis ſaid, that the Uſurpation is only in the Incumbent procuring himſelf to be inſtituted, and that he is the wrong doer, eſpecially in the caſe of the King, who can do no wrong, in ſuch Caſes is ſuppoſed to be deceived, *Mich.* 16 *Car. B. R. Yates* v. *Sir John Dryden*, 1 *Croke* 592.

A Preſentment may be ſaid to be void in ſeveral reſpects, altho' it be good as to the Form, and duly tendered to the Biſhop,; for firſt, a Preſentment is void, if it be made to a Church when it is full of an Incumbent, for at ſuch time the Patron hath no Title to preſent, 17 *Ed.* 3. 59. *Small's Caſe*, *Stat.* 13 *Rich.* 2. *Chap.* 1. and *Rud* v. *Biſhop of Lincoln*, *Hutton* 66. and in *Grendon*'s Caſe, *Plowden* 500. *b.* And ſo if the Incumbent be inſtituted only, for thereby the Church is full againſt all but the King, *Mich.* 15 *Jac. Rone*'s Caſe, *Popham* 133. and againſt the King too, ſo that he cannot revoke his own Preſentment and preſent another. Yet note, That altho' a Church generally ſpeaking be fill'd by Inſtitution alone, and in the King's Caſe, however by induction, ſo that a Preſentation made to ſuch Church is void, yet this Rule fails in ſome Caſes, for if the Church be fill'd by the Preſentation of a ſtranger by Uſurpation, that is, if the Clerk of the Uſurper be but inſtituted to a common Perſons Church, or be inducted to a Church of the King's, the Church is thereby ſo full of the Uſurpers Clerk, that if the Biſhop inſtitute the Clerk of the true Patron, before the Uſurper's Title be avoided by recovery or otherwiſe, and his Clerk removed, it will be a Super-inſtitution and void, *Mich.* 15 *Jac. B. R. King* & *Saker*'s Caſe, *Rolls Abr.* 2. *p.* 349. ſame Caſe, 3 *Bulſtrode* 89. and *Rolls* 1 *Rep.* 235. *Co.* 6. 309. *b. Fitz. Nat. brev.* 36. *K.* 1 *H.* 7. 19. Yet if the true Patron before the Church hath been fill'd of the Uſurpers Clerk by ſix Months, doth make Letters of Preſentation altho' the Biſhop may, and ought to refuſe his Clerk if preſented, until ſuch time as he hath recovered, yet the Preſentment then made is good, be it exhibited to the Biſhop or not, for if the true Patron do recover upon his Writ brought, and then his Clerk doth exhibit the ſame Preſentment, 'tis good, and the Inſtitution thereupon valid, *Grendon*'s Caſe, *Plowden* 500. yea, altho' it be exhibited, and the Clerk inſtituted before any Writ is awarded to the Biſhop to remove the Uſurper's Clerk, and to admit him, by *Coke*, *Mich.* 12 *Jac. Whiſtler* and *Singleton*'s Caſe, *Rolls Abr.* 2. *p.* 350. *Trin.* 13 *Jac. Harris* v. *Auſtin* 3 *Bulſtrode* 41. *Rudd* v. the Biſhop of *Lincoln*, *Hutton*, 66. *Grendon*'s Caſe *Plowden* 500. But I conceive that the Biſhop is not bound to admit (tho' he may if he will) before the ſaid Writ is awarded. However the Uſurper's Clerk doth continue Incumbent until the recoverers Clerk is Inſtituted, and till then the Church is ſo full of him, that tho' as is ſaid after the Recovery, he that recovered may preſent, and his Clerk be Inſtituted, *&c.* yet if Stranger to the Recovery (tho' his Title be beſt) ſhould preſent to the Church, his Preſentation would be void, as being made to a Church that is full, *Mich.* 13 *Jac. B. R. Fairbank* and *Durham*'s Caſe, *Rolls Abr.* 2. *p.* 350.

But

But if *A.* and *B.* be Tenants in Common of an Advowſon, and the Church being void, a Stranger's Clerk is inducted, upon which *A.* and *B.* bringing their *Quare Impedit*, *B.* is ſummoned and ſevered, and after *A.* recovers, *B.* may not preſent before other removal of the Uſurper's Clerk, becauſe a ſtranger to the Recovery, nor may he preſent the Uſurper's Clerk, becauſe the Clerk's acceptance of his Preſentment doth not make the Church void to him, *Dubitatur*, *Mich.* 13 *Jac. B. R. Fairbank* and *Durham*'s Caſe, *Rolls Abr.* 2. *p.* 350.

Alſo the aforeſaid Rule, That Inſtitution and Induction fills the Church, ſo that a Preſentation made to ſuch Church is void, fails if the Inſtitution and Induction be made upon a void Preſentment; therefore if when a Church is void a ſtranger doth preſent thereto by Simony, tho' Inſtitution and Induction be had thereupon, yet the Church remains void to the Rightful Patron, and if he preſent, his Preſentation is good, and the reaſon is, becauſe the Preſentation, Inſtitution and Induction of him that came in by Simony are meerly void, *Stat.* 31 *Eliz.* 6. *Co. Litt.* 120. So if the true Patron doth preſent by Simony, and his Clerk is Inſtituted and Inducted, yet the Church remains open to the Preſentment of the King to whom the Turn is forfeited, and to the Pariſhioners who may therefore detain their Tythes, but not to the Preſentment of a Stranger, for if he that hath no Right doth preſent thereto, his Preſentment is void, *Hobart* 227. *Winchcomb*'s Caſe And ſo I conceive that the Preſentment of another Stranger will be void, if made to a Church filled by the Simony of a Stranger, as in the other Caſe.

The aforeſaid Rule fails if the Church be fill'd only by a wrongful Collation; that is, if the Ordinary doth collate upon the King's Laps, or without Title of Laps to a Church, the Right of preſenting to which is in a common Perſon, *Trin.* 44 *Eliz. Green*'s Caſe, 6 *Coke* 29. *b.* but if a Church be by Laps come to the Metropolitan, and after the Ordinary that had paſſed his time doth collate his Clerk within the ſix Months of the Metropolitan, the Church is thereby ſo filled, that if the Metropolitan ſhould collate his Clerk, it would be void, by *Finch* in Sir *Francis Popham* and the Biſhop of *Bath and Well*'s Caſe, *Rolls Abr.* 2. *p.* 350. It is alſo there ſaid, that the Church is thereby full againſt the Preſentation of the Patron, but that ſeems to be contrary to *Boſwell*'s Caſe, *Mich.* 3 *Jac.* 6 *Coke* 50. *Jenkins Cent.* 7. Caſe 62. Becauſe the Biſhop's Uſurpation is only upon the Arch-biſhop, and not the Patron. And in all Caſes, when the Church is not otherwiſe filled than by Inſtitution and Induction upon a void Preſentment, or by wrongful Collation (except the Collation be made upon him that hath Right to Collate) altho' the Clerk by whom the Church is filled, hath remained as Incumbent ſome Years, yet if after the Patron doth preſent his Clerk to the Biſhop, his Preſentment is not void, but the Biſhop may, and ought to Inſtitute him thereupon, and the Inſtitution ſhall be good to the outing of the other Incumbent, and if the Biſhop refuſe, the Patron may by Suit recover his Preſentment, *Green*'s Caſe, 6 *Coke* 29. and *Boſwell*'s Caſe, 6 *Coke* 50. *Co. Litt.* 344. But if a Church be once duly fill'd of a Clerk, altho' the Clerk be after deprivable, yet until ſuch time as he is actually deprived, the Patron may not preſent; ſo if a Viſitor by commiſſion from the King doth return into the Chancery good matter of deprivation of the Clerk of the King; yet if the King doth preſent before the Clerk is actually deprived, his Preſentation is void, and the Biſhop may refuſe in both Caſes, *Rolls Abr.* 2. *p.* 349. *Contra* 17 *Ed.* 3. 59. *b.* but otherwiſe it is where the Church is for ſome fault or defect in the Clerk declared by the Law to be actually void.

And here we may take Notice that it hath been Enacted that, Whereas before this time our Lord the King hath taken Title to present to Benefices at the suggestion of many Clerks, where the Title hath not been true, and by such Presentments and Judgments thereupon given, the Clerks have been received by the Ordinaries of the Place, against God and good Faith, and in depression of them which had good and true Title to the said Benefices; now the King Will and Granteth, That at what time he shall make Collation or Presentment from henceforth to any Benefice in anothers Right, that the Title whereupon he groundeth himself shall be well examined that it be true: And at what time before Judgment the Title be found by good Information untrue or unjust, the Collation or Presentment thereof made shall be repealed. And the Patron or the Possessor which shall shew and prove the false Title, shall have thereupon Writs out of the Chancery, as many as to him shall be needful, Statute for the Clergy 25 *Ed.* 3. 3.

And afterwards it was Enacted, Whereas it is Ordained by a Statute, made the Twenty Fifth Year of the Reign of King Edward, the Grandfather of our Lord the King that now is, that at what time that the King shall make Collation or Presentment to any Benefice in anothers Right, that the Title upon which he groundeth himself shall be well examined that it be true, and at what time before Judgment given, the Title be found by good Information Untrue and not Just, the Collation or Presentment thereupon made shall be repealed; and notwithstanding the same Statute some of the King's Presentees by favour of the Ordinaries be Instituted and Inducted in Benefices of Holy Church without due Process, the Parties not warned nor called: and sometimes taken by false Enquests favourably, and the Incumbent in such manner put out. It is Ordained and Assented, That the said Statute be firmly holden and kept: And moreover our Lord the King, for the Reverence of God and Holy Church, doth Will and Grant, That if he present to any Benefice that is full of any Incumbent, that the Presentee of the King shall not be received by the Ordinary to the Benefice, till the King hath recovered his Presentment by process of the Law in his own Court, and if any Presentee of the King be otherwise received, and the Incumbent put out without due process, as afore is said, the said Incumbent shall begin his Suit within a Year after the Induction of the King's Presentee at the least, Stat. 13 R. 2. Ch. 1.

And lastly with respect to the former Statutes, It was Enacted, Whereas it is Ordained by the Statute made the Twenty Fifth Year of King Edward, Grandfather to our Lord the King, that if the King make Collation or Presentment to any Benefice in anothers Right, that the Title whereupon he groundeth him should be well examined that it be true, and at what time before Judgment given, the Title be found by good Information Untrue and Unjust, the Collation or Presentment thereof made, shall be repealed and annulled. And moreover, in a Statute made after, in the time of King Richard, it was Ordained and Established, that if the King Present to any Benefice that is full of any Incumbent, that the King's Presentee shall not be received by the Ordinary till the King hath recovered his Presentment by process of the Law in his own Court; and if any Presentee of the King be otherwise received, and the Incumbent put out without due process as afore is said, the same Incumbent shall commence his Suit within a Year after the Induction of the Presentee. Our Lord the King considering the great Mischief of the Incumbent in this behalf, hath Ordained and Established by the Assent aforesaid, that if any such Incumbent be put out of his Benefice without due process in the manner aforesaid, that the said Incumbent so

ſo put out without Proceſs may be at large and ſue for his Remedy by the ſaid Statute, and begin his Suit in this Caſe at what time ſhall pleaſe him within the year, or after at his Will, and that as well for the time paſt as for the time to come, notwithſtanding the Term ſo limited by the ſaid Statute. 4 H. 4. 22.

If the Church be open to the Patron's Preſentation, yet in ſome Caſes the Preſentation by ſuppoſing a Right where there is none, will be void, as in the Caſe of the King. If the King doth preſent *ratione Lapſus*, or in theſe Words, *Ad noſtram Præſentationem ſive ex pleno Jure, ſive per Lapſum temporis, ſive alio quocunque modo ſpectant'*, and hath no colour of Right, the Preſentment is void, *Trin.* 44 *Eliz. Greendit* v. *Baker*, *Yelverton* 7. *Jenkins Cent.* 6. *Caſe* 28. *Mich.* 16 *Car. B. R. Yates* v. Sir *John Dryden*, 3 *Cro.* 592. *Trin.* 44 *Eliz. B. R. Green's* Caſe, 6 *Co.* 29 *b.* and will not make any Uſurpation; for where the King's Preſentation without Right amounts to make an Uſurpation, it is not to report or expreſs any Right in the King, becauſe the King hath no Right, but to be made to the Church generally: But if the King in ſuch caſe hath Title to preſent upon any account, whatſoever, the Preſentment is good, but it is a ſafe way to make the King's Preſentation general, *Hill.* 17 *Jac. Gawdy* v. *the Biſhop of Canterbury*, &c. *Hobart* 302. The Caſe of Sir *John Tuſton* and Sir *Richard Temple* and others, *Hill.* 17 & 18 *Car.* 2. *C. B. Vaughan* 14. *The King* v. *Thorneborough* and *Studley*, *Trin.* 29 *Car.* 2. *C. B. Mod. Rep.* 254. However Inſtitution being granted upon ſuch void Preſentment, the Inſtitution is not alſo void, but is ſaid to be as a Collation of the Biſhops, and the Clerk is Incumbent as to all Eccleſiaſtical Matters, to have Offering, Tythes, *&c.* againſt all but the Patron, who may preſent at any time, or he may bring his Writ of *Quare Impedit* when he pleaſeth, and remove the Incumbent, if named in the Writ, otherwiſe not, as the Chief Juſtice *Hobart* ſaid or may grant the Advowſon before he hath done either, as not being put out of poſſeſſion, by Inſtitution, and Induction upon ſuch void Preſentment, *Hill.* 17 *Jac. Gawdy* v. *the Biſhop of Canterbury*, &c. *Hobart* 302. *Rudd* v. *the Biſhop of Lincoln*, *Hutton* 66.

So if a Clerk be preſented by the King to a Church, the Right of preſenting to which doth belong to him, and the Preſentment doth miſreport the King's Right, as for the purpoſe doth mention it to be *ratione Lapſus*, when in truth it is *Jure Coronæ*, *&c.* the King is deceived and the Preſentment is void, and ſo are the Admiſſion, Inſtitution and Induction thereupon they being made without any Preſentment, *Mich.* 8 *Jac. Humſton* v. *Cockitt in B. R.* 2 *Cro.* 252. *Trin.* 44 *Eliz. Green's* Caſe, 6 *Co.* 29. that is void only *eis quorum intereſt.* See the Opinion of *Allen* in his Argument of *Knight* v. *Dauncer*, *Trin.* 14 *Car.* 2. 1 *Keble* 312. and *Paſch.* 15 *Car.* 2. *Brown* v. *Spence*, 1 *Keble* 503.

If one doth preſent Simoniacally to a Church, of the which the Advowſon is in the King, and the King doth after preſent thereto, upon a Title of Simony, the King hath hereby miſtaken his Title, and his Preſentment is void, becauſe in ſuch caſe he ought to preſent *Jure Patronatus*, as having a ſuperior Title; and the Simony gives him no new Right, for it gives him but the turn which was before in him with the Inheritance, *Green's* Caſe vouched in *the King* and *Zaker's* Caſe, *Mich.* 13 *Jac. B.* 3 *Bulſtr.* 89. But if the King having Right to preſent to a Church, being ſeiſed of the Advowſon thereof in Right of his Dutchy of *Lancaſter* doth preſent *pleno jure* under the Broad Seal, and not by the Seal of the Dutchy; or if the Lord Chancellor, or Lord Keeper had preſented to any Church belonging to a Ward, the ſame being under value, the Title is not miſtaken, but the Preſentment is good; becauſe a Preſentment may be made by Word only, as being but a Commendation of a fit Clerk to the Ordinary, and a Preſenta-

tion belonging to the King upon the account of his Dutchy, *&c.* is his *plena jure*, as well as thoſe that do belong to him in the Right of his Crown, *Mich.* 11 *Jac. The King* v. *the Biſhop of Lincoln & King*, *Moor* 874. 2 *Cro.* 248.

If the King himſelf ſhould preſent any one upon an Avoidance contrary to an expreſs Act of Parliament, his Preſentation is meerly void, *Mich.* 8 *Jac C. B. Waller*'s Caſe, *Parſon's Law cap.* 10. As if the King ſhould preſent upon a Title accrued to him by Simony, the Clerk that was guilty of the Simoniacal Contract, as being party or privy thereunto, ſuch Preſentation would be void, that Clerk being for ever diſabled to hold the ſame Benefice by Act of Parliament, *viz. Stat.* 31 *Eliz. c.* 6. 3 *Inſt.* 154. *Hob.* 75. And ſuch Preſentation would not ſerve for the King's Turn.

When the King miſtakes his Title, his Preſentment, as hath been ſhewed, is void; ſo if the Lord Chancellor of *England*, or the Lord Keeper of the Broad Seal (who by vertue of their Office) preſent to Benefices of the King's Gifts that are under the value of Twenty Pounds in the King's Books of First-Fruits, do preſent to any of the King's Benefices which are above the ſaid Value under the Broad Seal, and in the Preſentment it ſelf it be recited that the Benefice, to which the Preſentment is made, is under the Value of Twenty Pounds, the Preſentment is void; becauſe the Deceit doth appear upon Record: But if the Chancellor or Keeper do in fact make a Preſentation generally under the Broad Seal without ſuch Recital unto a Benefice of the King's Gift, valued at Twenty Pounds or above in the King's Books of First-Fruits, ſuch Preſentation is good, and the Clerk ſhall enjoy the Benefice without remedy; becauſe Preſentations made by the Chancellors or Keepers are ſuppoſed in Law to be made by the King, they being in his Name; and there is no difference in the Form when it is made by the King, and when by the Lord Chancellor, ſaving that for the moſt part the one is *Mandantes*, the other *Rogantes*, *Lord Chancellor's Caſe*, *Hobart* 214. But where 'tis ſaid, that the Chancellors or Keepers Clerk, ſhall enjoy ſuch Benefice without Remedy, it is to be ſuppoſed that the Clerk is as well inducted as inſtituted, for otherwiſe the King may revoke his Preſentment, and preſent another, for ſo it is ſaidin that Caſe, See 38 E. 3. 4.

If a Corporation in preſenting doth miſtake the Name of their Foundation, the Preſentation is void; therefore when a Provoſt did preſent by the Name of the Provoſt of the College of the Queen in *Oxon*, whereas it ſhould have been *Aulæ Scholarium Reginæ de Oxon*, according to the Foundation, it was adjudged, that by reaſon of the omiſſion of the Word *Scholarium*, ſeveral Preſentations did not make an Uſurpation, becauſe the Preſentments were void, *Mich.* 8 *Jac.* Doctor *Ayry* v. Sir *Richard Lovelace*, 1 *Bulſtr.* 91. And yet it is ſaid, *Trin.* 8 *Jac. C. B. King* v. ---- 2 *Cro.* 248. to be ruled in the Caſe of the Dean of *Norwich* (where the Preſentation was by the wrong Name of a Corporation) yet that the Preſentment was good, *Quære.* If a Corporation do preſent their Head, as if the Dean and Chapter do preſent their Dean; or if a Maſter of an Hoſpital doth preſent himſelf to a Church, the Advowſon of which doth belong to the ſaid Hoſpital, although the Preſentation be by the perſonal Name of the Dean and Maſter, and not by the Name of Dean or Maſter, and Inſtitution and Induction be made thereupon, yet the Preſentation is meerly void, and no Plenarty gained thereby; nor is ſuch Clerk enabled by the Statute of 25 E. 3. to plead in Barr, 12 *H.* 8. 12. *Br. tit. Abby & Prior*, *nu.* 23. 14 *H.* 8. 2. *Quare Impedit*, See *Jenk. Cent.* 5. *Caſe* 18. *Davis* 76. And ſo it is, if any private perſon doth preſent himſelf, but *Quære* whether the Inſtitution and Induction in ſuch Caſes be meerly void, ſo that Laps may run from the time, that the Church became firſt void, but I conceive they are not ſo. But the Dean and Chapter may

may well preſent one of their Chapter, or any Corporation one of their Members, in *Harris*'s Caſe v. *Auſtin*, *Trin.* 13 *Jac.* 3 *Bulſtr.* 43. Or if there be two Jointenants of the next Avoidance, the one may preſent the other, *Trin.* 31 *H.* 8. Sir *Godfrey Fuliamb*'s Caſe, *Moor* 4, 5. *Dyer* 305. Or they may preſent their Grantor, *Palm.* 309.

Laſtly, if a Stranger doth preſent upon a true Patron in time of War, though his Clerk be inſtituted in time of Peace, yet the Preſentment is void, and all that followed thereupon, ſo that the Biſhop may admit the rightful Patrons Clerk, 6 E. 3. 41. *Co.* 6. 30. *Green's* Caſe, 30 *Trin.* 33 *Eliz. Bingham*'s Caſe, 2 *Co.* 93.

A Preſentation every way good may become void by Revocation, *Mich.* 15 & 16 *Eliz.* 1 *Anderſ. Caſe* 99. and then the Biſhop may not only refuſe, but is bound not to admit; for if the Biſhop doth inſtitute the Clerk firſt preſented after his Preſentation is revoked a *Quare Impedit* lies againſt him, as a Diſturber, by *Dodderidge* in *Evans* and *Aſcouth*'s Caſe, *Latch.* 248. And ſuch is the King's Prerogative, that he may revoke or repeal a Preſentation made by him at any time before Inſtitution, 14 E. 3. *Quare Impedit* 5. 28 E. 1. *Rot. Patentium Membrana* 24. 2 E. 2. *Rot. Patentium Membrana* 3. *Fitz. Nat.* 34. *Cap.* 27. *d. Trin.* 12 *Eliz. Dyer* 292. 70. 7 *H.* 4. 32. *Trin.* 45 *Eliz. Green*'s Caſe, 6 *Co.* 29. *b.* He may revoke after Letters obtained for Admiſſion, Inſtitution and Induction, before the ſame be executed, 14 E. 3. *Quare Impedit* 5. But if the Preſentee of the King be inſtituted, the King cannot after that revoke his Preſentation according to 2 *Rolls Abr. p.* 353. *Dubitatur.* 18 *Eliz. Dyer* 348. 25 E. 3. 47. And in *Dyer* 360. *b.* there it ſeems to be admitted that the King may revoke before Induction, ſo alſo it is ſaid in the Caſe of *Kitchin & Calvert*, *Lane* 104. And 'tis commonly held that a Church is not full againſt the King, but by Induction; ſo that if the Preſentee of the King doth die after Inſtitution, and before Induction, this is a Revocation in Law, and the King ſhall preſent again, tho' it be in the Caſe where he hath but one Turn, becauſe the King had not the Effect of his Preſentment, 20 *Eliz. Dyer* 360. but about this point the Court was divided, 18 *Eliz. Dyer* 348. 12 *Co.* 9. *Hobart* 339. So if the King dies before his Clerk be inſtituted and inducted, his Death is as a Revocation in Law of the Preſentment made by him, and it is ſaid by ſome to be an expreſs Revocation, *Mich.* 8 *Jac. Scaccario*, and *Hill.* 8 *Jac. Scaccario*, *Calvert & Kitchin*'s Caſe, 2 *Rolls Abr. p.* 354. *ſame Caſe*, *Lane* 71, 102. So if the King hath preſented his Clerk, and the Clerk hath gained Inſtitution, and then the Kings dies (although the Death of the King had been a Repeal of the Preſentment) ſo that his Succeſſor needed not have made any expreſs Repeal of it, if no Inſtitution had been: Yet, *Tanfield* Baron ſaid, that peradventure in ſuch caſe there ought to be an expreſs Repeal, becauſe here is not only the King's Act, but the Act of the Ordinary alſo hath interpoſed, *viz.* his Inſtitution, which is a judicial Act *Kitchin & Calvert*'s Caſe, *Lane* 104. In which Caſe it was alſo held that as to the Statute of 6 *H.* 8. *c.* 15. that a Preſentation is not comprehended therein, and ſo the King not obliged thereby to a Recital of his firſt Preſentment, if he make a ſecond, or to an expreſs Repeal of the ſame, and that in an Action of Treſpaſs brought by the later Preſentee it being an Action poſſeſſory for the Profits, it is not examinable whether in the ſecond Preſentment there ought to be a Repeal of the firſt, but that it may be examinable in a *Quare Impedit*.

If the Lord Chancellor, or Keeper of the Broad Seal, do preſent to a Benefice of the King's, under the Broad Seal, ſuppoſing it to be under the Value of Twenty Marks in the King's Books of Firſt-Fruits, when in truth it is above that value, and the Clerk is admitted and inſtituted; yet before

Induction the King may repeal ſuch Preſentation and preſent in his own Name, becauſe the King had a Right precedent, 38 E. 3. 3. *b.* 9. This Caſe is I conceive to be underſtood, that the Living is not recited in the Preſentation to be under value, elſe according to the *Lord Chancellor*'s Caſe in *Hobart* 214. before mentioned the Preſentation will be void, and if ſo, it can be no Queſtion in the King's Caſe, at what time it may be revoked. If the Ordinary in this Caſe hath admitted and inſtituted the Preſentee of the Chancellor, but before he hath made a Warrant to the Archdeacon for Induction, the King doth ſend to him an Inhibition, reciting that the Church is of the Value of Twenty Marks *per annum*, or above, and ſo doth not appertain to the Chancellor to preſent, commanding the Ordinary to receive another Clerk; if after ſuch Inhibition the Ordinary doth make a Warrant to the Arch-Deacon to give Induction, and the Arch-Deacon doth thereupon induct, the Ordinary ſhall be a Diſturber, but the Induction is good till it be avoided by *Coke* in *Hitching* and *Glover*'s Caſe, *Rolls* 1. *Rep.* 191. But if the Ordinary had ſent his Warrant to the Arch-deacon to give Induction before the King's Inhibition came to him, altho' the Ordinary after the Inhibition did not ſend to the Arch-deacon to ſtop making of the Induction, (as he may if he pleaſe repeal his Mandat at any time before the Execution of it, the Arch-deacon being but his Miniſter,) but ſuffered the Induction to be given a Month after he ſhall not be adjudged a Diſturber, for that there was no Default in him, 38 *Ed.* 3. 3. 4. 9, 10. but *Quære* if the Ordinary be not in this Caſe bound to ſend to the Arch-deacon to countermand his making the Induction, for to that purpoſe is this Caſe cited in *Hale* and *Buckley*'s Caſe, *Plowden* 528. *b.*

After the King hath repealed his Preſentation, if the Clerk preſented doth get to be Inſtituted and Inducted, altho no Notice of the Repeal was given to the Ordinary, the King may preſent another Clerk, and the Ordinary cannot refuſe him without being a Diſturber; for by the revocation of the firſt Clerks Preſentment without Notice, the Preſentment is ſo abſolutely void, that if after he had got Inſtitution and Induction thereupon, the King would confirm his Title, his Confirmation would be alſo void, and the Church ſtill remain open to his Preſentment, 12 Eliz. *Dyer* 292. 25 Ed. 3. 47 *Co* 6. *Green*'s Caſe 29 *b.* *Dubitatur*, 16 Eliz. *Dyer* 328. *b.* for the Repeal is effectual before Notice, and the giving Notice to the Ordinary thereof is only to make the Ordinary Chargeable as a Diſturber, if he proceed afterwards, *Rolls Abr. p.* 2. *p.* 351. But if the firſt Preſentee doth inſiſt upon his Title, and an Action is brought againſt him, the Repeal muſt be made to the Court where 'tis pleaded, elſe the pleading of it only without being produced will avail nothing, 14 E. 3. *Quare Impedit*, *Fitz. Tit. Quare Impedit.* 5. 7 *H.* 4. 13. but if the King before the due Execution of the firſt Preſentation doth preſent another by a ſecond Preſentation, tho' it be without any mention of the firſt Preſentment or other Revocation, the ſecond Preſentation is good, *Mich.* 15 & 16 Eliz. *Anderſon* 1. *Caſe* 99. *Mich.* 4 *Jac.* *Biſhop of Bangor and William's Caſe*, *Parſon's Law. Chap.* 12. and vouched by *Bromly*, *Hill.* 8 *Jac.* *Kitchen and Calveri*'s Caſe, *Lane* 103. 38 Ed. 3. 3. 4. 7 *H.* 4. 32. that is, unleſs the ſecond Preſentment was obtain'd by Fraud, and in deceit of the the King, *Hill.* 17 Eliz. *Dyer* 339. *Rolls* 206. 190. For if the King doth preſent *A.* who being refus'd by the Ordinary brings *Quare Impedit*, and *Pendant* the ſame; *B.* doth get another Preſentation by Fraud in deceit of the King without any mention therein of the King's Pleaſure to revoke, or repeal the firſt, altho' the Ordinary doth inſtitute *B.* and cauſe him to be Inducted, the Preſentment of *A.* ſhall not be void, nor the Church ſo full of the Perſon of *B.* but that *A.* may be admitted; for if the ſecond Preſentation ſhould in this Caſe be good, it ſhould enure to a double

ble intent, *viz.* to take away the Action attach'd, and alſo as a Preſentation, which the Law will not tollerate without expreſs Words purporting ſo much; but eſpecially, the King being deceived and certifying ſo much to the Judges before whom the Suit is depending, betwixt the Preſentees that he was deceived, as was done in this Caſe, *Hill.* 17 Eliz. *Dyer* 339. *b. Trin.* 44 Eliz. *Green*'s Caſe 6. *Co.* 29. *b*, But if there be an expreſs Revocation in the ſecond Preſentment, it is otherwiſe, *Hill.* 8. *Jac. in Kitchin and Calvert*'s Caſe, *Lane* 103.

Though the King may revoke his Preſentment, yet it is a Queſtion whether a Common Lay-Patron hath that Liberty by Law, for the *Civilians* are ſaid by *Dodderidge* to affirm, that he cannot revoke, but only vary, *cumulando*, *Hill.* 2 *Car. Stoke* v. *Sykes Latch.* 254. and ſo *Rolls*, in his *Abr. Part* 2. *p.* 354. ſaith, That by the Common-Law, a common Lay-Patron cannot revoke his Preſentation, quoting only *Dyer*, 18 Eliz. *fo.* 348. where it is ſaid, That the Preſentment of the Queen before Induction is revocable by her Prerogative, which is not ſo of a Preſentation made by a Subject; but this may be ſaid only, becauſe 'tis paſt doubt that a Subject cannot revoke after Inſtitution, as the King may: However, *Dyer fo.* 392 'tis ſaid, that a Lay-Patron can no more change his Preſentation, than a Spiritual Patron may, *Vide Quare Impedit. Fitz. Tit.* 31 Ed. 1. 185. 38 Ed. 3. 35. And it is declared in *Anderſon*'s Caſe, That if a Rightful Patron doth preſent after an Uſurper hath fill'd the Church, and his Clerk be refuſed as he ought to be after he hath recovered, he that had this Preſentment may exhibit it to the Biſhop, and the Patron cannot revoke or give him a new Preſentment. But on the other ſide, *Dodderidg* ſaid, that by the Common-Law without Queſtion, a Patron before Inſtitution may revoke his Preſentment, *Hill.* 2 *Car. Stoke* v. *Sykes Latch.* 254. 192. and by *Dodderidg* in *Evan*'s and *Aſcouth*'s Caſe, *Hill.* 22 *Jac. Latch.* 248. However, a common Perſon cannot change his Preſentment after his Admiſſion, by *Gawdy*, in *Robbins* and *Prince*'s Caſe, *Hill.* 43 Eliz. *Gouldsborough* 163. but the aforeſaid Authorities are more to be regarded, and this is to be noted, that a common Lay-Patron, if he any way revoke his Preſentation (as I think he may) not but only vary, yet he cannot revoke it, after his Clerk is Inſtituted thereupon, becauſe Inſtitution doth fill the Church againſt the Common Patron; in all which Caſes aforeſaid where a Preſentation is ſaid to be void, the Biſhop may refuſe to admit the Clerk preſented, and not be charged in any ſort as a Diſturber.

Altho' a good Preſentation be made by the true Patron to his void Church, yet the Biſhop may either admit or refuſe his Clerk, and be no Diſturber, for after the Patron hath preſented one Clerk to a void Church, if he be a Layman he may (as hath been ſaid) vary, that is, preſent another Clerk before the Biſhop hath received his firſt, 38 Ed. 3. 36. *b. Skene Regiæ Majeſtatem* 10. *b.* v. 3. 31 Ed. 1. *Quare Impedit.* 185. 38 Ed. 3. 36. *b.* 14 Ed. 3. 2. *b.* and then the Ordinary may admit or refuſe which of the Clerks he pleaſeth, *Rolls Abr.* 2. *p.* 353. 354. *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch.* 191. 154. And if a Church being void, the Patron doth preſent, and then doth Die before his Clerk is admitted, this is no Revocation in Law of the Preſentment, 24 Ed. 3. 30. for if his Executor doth preſent another Clerk, this ſecond Preſentment is alſo good, and the Biſhop is at his Liberty which Clerk to receive, *Trin.* 31 Eliz. *Smallwood, &c.* v. *Biſhop of Litchfield, &c.* 1 *Leonard* 205. But otherwiſe it is in the Caſe of the King, for his Death revokes and voids his Preſentment, *Mich.* & *Hill.* 8 *Jac.* in *Calverts* and *Kitchin*'s Caſe, *per Cur. Lane* 103. The Lay-Patrons priviledge of varying is to be extended ſo far, as that if a Patron hath made Letters of Preſentation to one Clerk, who exhibiting

ting them to the Biſhop, is by him unjuſtly refuſed, and during the Clerk's endeavour at Law to get Inſtitution, his Patron doth preſent another, who is Inſtituted and Inducted; the firſt Clerk is without Remedy, and if the firſt Preſentee doth Sue the ſecond, and the Ordinary in the Spiritual Court, he may be ſtopped by a Prohibition, *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch.* 191. 254. and ſame Caſe, *Noy* 91.

In the Caſe of the King, the King only (as hath been ſaid before) by making a ſecond Preſentation before his firſt Preſentee be Inducted, or at leaſt Inſtituted, and without any expreſs Revocation of the firſt, or any mention thereof, doth repeal, and abſolutely make void his former Preſentation, *Mich.* 8 *Jac. Scaccario*, *Hill.* 8 *Jac. Scaccario*, *Calvert* & *Kitchen*'s Caſe, *Rolls Abr.* 2 *p.* 354. *Lane* 103. Yea, and tho' the firſt Preſentee bring a *Quare Impedit* for being refuſed by the Biſhop, or be admitted and inſtituted after the ſecond Preſentment is made, and before any Admiſſion thereupon is had, and tho' he doth recover in the *Quare Impedit*, and hath Induction, yet all this will not mend his Title and make his Preſentation good, *Mich* 15 & 16 *Eliz. Anderſon*'s 1 Caſe 99. *Lane* 104. from which it follows, that the Biſhop hath not the Liberty of excepting which Clerk he pleaſeth in the Caſe of the King, as he hath in the Caſe of a common Perſon. And it was alſo agreed by *Coke*, *Warburton* and *Foſter*, that the King may vary in his Preſentation, without reciting the former, notwithſtanding the Statute of 6 *H.* 8. 15. *Trin.* 8. *Jac. King*, v.---2 *Cro.* 248. See *Calvert* & *Kitchin*'s Caſe, *Lane* 104. And I ſuppoſe what hath been ſaid of Preſentations made by the King, will hold alſo as to Preſentations made by the Lord Chancellor, or Lord Keeper; that is, that the Lord Chancellor or Lord Keeper may revoke their Preſentations to Livings under value at any time before Induction, at leaſt before Inſtitution, for that ſuch Preſentations are in the King's Name, and by Law made by the King himſelf. See *Hobart* 214.

Tho' the King may revoke, and void his Preſentment, and any common Lay-Perſon may vary, yet a Biſhop or other Eccleſiaſtical Perſon can neither revoke his Preſentment, nor vary in Preſenting, *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch.* 191. 254. and if ſuch Eccleſiaſtical Patron doth preſent one that is not ſufficiently Learned, he cannot preſent another; if he do, the Biſhop may refuſe or admit him at his Pleaſure, *Mich.* 1 *H.* 8 *Keilwey* 154. and the reaſon is, becauſe every Spiritual Perſon, is in Law ſuppoſed to be able to judge of the Sufficiency of his Clerk, and becauſe a Preſentation made by a Spiritual Patron hath the force of an Election, and he that Elects an unfit Perſon, is *ipſo jure*, deprived of his power of Electing, *Skean Majeſtatem* 10. *b.* v. 3. 31 *Ed.* 1 *Quare Impedit* 185. Yet it is ſaid, That if a Man preſents his Clerk to the Biſhop, who dies before that he is received, he may preſent another, 38 *Ed.* 3. 36. *b.* (and this holds good I ſuppoſe) in the Caſe of an Eccleſiaſtical Patron.

As when a common Lay-Patron doth vary, the Biſhop is at his Liberty which Clerk to receive, and if a Spiritual Patron doth preſent an unſufficient Clerk, the Biſhop alſo may chuſe whether he will receive another better qualified; ſo tho' the true Patron doth preſent but one Clerk to his void Church, the Biſhop may ſafely in ſome Caſes refuſe to admit him, tho' he be ſufficient; for if three Joynt-Tenants be of an Advowſon, or next Avoidance, and one or two of them do preſent alone, the Biſhop is not any Diſturber if he refuſe ſuch Clerk, tho' he may admit if he pleaſe, and good, 1 *Inſt.* 186. *b.* for he is not bound to admit the Clerk, if all the Joint-Tenants do not join in a Preſentment, 6 *Ed.* 4. 10. 14 *Eliz. Dyer* 304. 54. or if two Join-Tenants be ſeiſed of an Avowſon, and the one doth preſent alone, the Ordinary may refuſe his

his Clerk, becauſe of their Joint Title, 1 *Inſt* 186. *b.* So it is if a Tenant in Common doth preſent alone; for that one Tenant in Common or Joint-Te-Tenant cannot put the other out of poſſeſſion, *Quare Impedit* 12. *Dr. and Student, Chap.* 30. *L.* 2. 1 *Inſt.* 186. *b. Paſch.* 17 *Jac. Rite* and the Biſhop of *Briſtol*'s Caſe, *Rolls Abr. part* 2. *p.* 372. and they are ſaid to be but as one Patron, 5 *H.* 7. 8. 6 *Ed.* 4. and ought to agree in a Preſentment, 13 *Eliz. Dyer* 304. So if four Co-partners be of an Advowſon, and the two Eldeſt, or the Eldeſt, and the third preſent one, and the other do preſent another, and not altogether, for that the Eldeſt, or ſhe whoſe turn it was to preſent, did not preſent alone, the Ordinary may refuſe all their Clerks, the Eldeſt Siſter having no Privilege, but where ſhe preſents alone, *Co. Litt.* 186. *b. Dr. and Student, L.* 2. *Chap.* 30. *Parſon's Counſellor* 21. But if a Grant of a next Avoidance be made to three, and after the Church doth void, and two of the three do preſent, the third Grantee being a Clerk, this is a good Preſentment, and the Biſhop cannot refuſe him, altho' all three were Joint-Tenants thereof by the Grant, and only two of them joined in the Preſentment, becauſe the third Perſon could not preſent himſelf, and he may relinquiſh his Title, and accept of a Preſentment from the others, *Dyer* 13 & 14 *Eliz.* 304. So if one that is ſeiſed of an Advowſon, doth grant to three or more Perſons, *& eorum cuilibet conjunctim & diviſim Hæredibus, Executoribus, & Aſſignatis ſuis primam & proximam advocationem*, and one of the ſaid Grantees without the reſt doth preſent another of them to the avoidance granted; this is a good Preſentment, *Trin.* 31 *H.* 8. Sir *Godfrey Fuliamb*'s Caſe, *Moores* 4. *Bendloe p.* 34. and 1 *Anderſon* 2. 21 *Ed.* 4. *fo.* 66. 13 *H.* 8. *fo.* 12. 35 *H.* 6. *fo.* 62. But if the Grant had been to three or more, *Habendum eis conjunctim & deviſim*, and if one of the Grantees being preſented by another of them alone without the reſt, and the Biſhop had refuſed, peradventure ſaith *Dyer*, a *Quare Impedit* by him would have failed; for the ſeverance in the *Habendum* in this Caſe ſeems void in Law, *Mich.* 13 & 14 *Eliz. Dyer* 304. See 21 *Ed.* 4. 66. And in all theſe Caſes of divers that have Right jointly preſenting ſeverally, in which Caſes the Ordinary is not bound to admit, no more is he bound to award a *Jure Patronatus*, but may ſuffer Laps to incur; yet the Ordinary cannot collate until the Six Months be paſſed, for if he do they may after agree, and bring a *Quare Impedit* againſt him, and remove his Clerk, *Dr. and Student, L.* 2. *Chap.* 30. In like manner if one being ſeiſed of an Advowſon doth make his Will, and therein doth conſtitute three Executors, and appoints that they or any of them ſhall preſent *A.* one of the Executors, or any other of them upon the next Avoidance, tho' the Perſon appointed to be preſented doth not refuſe the Executorſhip and could not have preſented himſelf, and tho' the Deviſor were the Incumbent; and ſo the Church did become void by his Death: Yet the Preſentation made of him by the other Executor is good, *Trin.* 13 *Jac. Harris* v. *Auſtin* 3. *Bulſtrode* 43. But tho' a Patron cannot preſent himſelf, yet he may pray to be admitted by the Ordinary and good, but if he preſent himſelf, tho' by a ſtrange Name, he may be put out, 35 *H.* 6. 59. *Br. Quare Impedit* 1.

Laſtly, the Biſhop may refuſe a Preſentee upon the account of the Churches being (as 'tis termed,) litigious; which is, when two ſeveral Perſons do preſent their ſeveral Clerks to the Biſhop to be admitted by him, *Paſch.* 26 *Eliz. C. B. Gerrard*'s Caſe, 3 *Leonard* 98. in which Caſe the Biſhop may, and ought to refuſe both Clerks until the Right be enquired of, and if he doth admit either Clerk (unleſs the Clerk admitted upon Tryal be found to be preſented by the rightful Patron) he will be puniſhed as a Diſturber, by *Hobart, Mic.* 15 *Jac. Brickhead*, v. *Arch-biſhop of York, Hobart* 197.

Where

Where one Patron doth preſent his Clerk before any other hath preſented, the Church is not yet litigious, therefore if the Biſhop doth refuſe him, he is a Diſturber, and tho' another ſhould after preſent, whereby the Church then doth become Litigious, yet that will not excuſe the Biſhop from being a Diſturber, if the firſt Patron be upon Tryal found to have the better Title, nor can he have the benefit of Laps, tho' no Action be brought againſt him, which makes it ſafe for the Biſhop to receive him that comes firſt, but then a Queſtion may be made, how can a Church (the Biſhop acting thus ſafely for himſelf) ever become Litigious, and how can it be truly ſaid that the Biſhop may juſtly refuſe both Clerks upon the account of two ſeveral Patrons making their ſeveral Preſentments to him, unleſs their Preſentees ſhould happen to tender their Preſentments at one and the ſame time, which is not to be ſuppoſed.

In anſwer to which, 'tis true, that if the Biſhop doth unjuſtly refuſe the Clerk of the true Patron before any other Preſentment is made, altho' the Church by another Perſons preſenting after doth become litigious, he will not be excuſed (the true Patron prevailing at Law) from being a Diſturber; but there is a great difference betwixt the Biſhop's ſuſpending the Admiſſion and Inſtitution of a Clerk, and his abſolute refuſal of him: A Biſhop is not bound inſtantly upon a Preſentment tendered to admit, if he hath other Buſineſs in hand, but may appoint the Clerk to repair to him at another time to receive Admiſſion and Inſtitution as hath been ſhewed. And when a Perſon is preſented to him, he may take competent time to examine his ſufficiency, and to enquire and inform himſelf of his Converſation, as hath alſo been ſhewed, *Mich.* 18 *Jac. Hellways* and the Arch-biſhop of *York*'s Caſe, *Jones* 4. and ſo ſaith *Hobart* in the ſame Caſe as reported by himſelf, *Hobart* 317. or he may take time by awarding a *Jure Patronatus*, to enquire of the Patron's Title, altho' only one Perſon hath preſented, *Jones* 4. within which time another may preſent, and then the Biſhop may ſafely refuſe both, and if they do not proſecute, their Rights may have the Turn by Laps, *Br. Quare Impedit* 80.

Alſo a Church is become Litigious, if two ſeveral Patrons claiming by ſeveral Titles ſhall preſent one, and the ſame Perſon ſeverally to a Church, for in this Caſe the Biſhop cannot admit the Preſentee generally, but muſt admit him of the Preſentation of one of them only, *Parſon's Law*, *cap.* 13. *fol.* 100. and therefore may award a *Jure Patronatus*, whereby to inform himſelf in whom the Right is, but this he is not bound to do, but at the requeſt of the Parties. See before, *Chap.* 12. but if no requeſt be made to have a *Jure Patronatus* awarded, and the Patrons do not proſecute their Rights at Common Law, the Biſhop may I conceive after the ſix Months expired collate for Laps.

Alſo a Church may become Litigious, if after a *Jure Patronatus* is awarded, and Verdict given thereupon, another Clerk is preſented by a Patron whoſe Right was not diſcuſſed in the *Jure Patronatus*, before Admiſſion is requeſted of any Clerk by him for whom the Verdict was found, and in this Caſe a new *Jure Patronatus* upon requeſt is to be awarded, *Degg*, *Parſons Counſellor*, *fol.* 14, 15. But if one hath Preſented, and his Title is found upon a *Jure Patronatus*, and then requeſts the Biſhop to have his Clerk admitted, and after another Preſents, in this Caſe the Biſhop ſhould for his ſafety admit the Clerk of him for whom the Verdict is found, becauſe elſe the Church becomes Litigious by his delay, which will make him a Diſturber, and if he doth not admit but ſuffers Laps to come to himſelf and then collate, 'tis ſaid he is a Diſturber againſt both Preſenters. And in this Caſe, in an Action brought againſt the Biſhop, and the ſpecial matter being made appear by the Pleadings, the Iſſue ſhall be, whether he for whom the Title was found, did

did ſue to have his Clerk admitted, and whether the ſecond preſented ſo haſtily to the Biſhop that he could not admit the Clerk of the firſt, before the ſecond Preſentation was made, 21 *H.* 6. *p.* 44. If two Patrons preſent their ſeveral Clerks, and each of them hath at his requeſt a *Jure Patronatus* awarded ſingly, (as they may) and the Verdict of one Jury is contrary to the Verdict of the other, in this Caſe the Church remains ſtill Litigious, and the Biſhop need not admit the Clerk of either Patron, but ſuffer the Church to lapſe to himſelf, as is held, 21 *H.* 6. 44. *Br. Quare Impedit* 80. But Sir *Simon Degge* makes a *Quære* whether the Biſhop in this Caſe may let the Church lapſe and ſo collate, or whether he be not bound to admit one of the Clerks at his Election, *Parſon's Counſellor* 14. But if two Co-partners be of an Advowſon, and the Church doth void, whereupon they do ſeverally preſent to the Ordinary, this doth not make the Church to be Litigious, becauſe they claim both by one Title, *Parſon's Law, Chap.* 13. And ſo it is I ſuppoſe, where Tenants in Common or others that have a Joint Title preſent ſeverally.

Altho' the Biſhop by receiving the Clerk of him that firſt tenders his Preſentation to him, doth thereby quit himſelf of all Danger of being found a Diſturber, becauſe he hath done nothing but as Ordinary; yet it is highly reaſonable upon an avoidance (tho' it happen to be by ſuch means that he is not obliged to give the Patron notice thereof,) that the Biſhop doth not too haſtily admit any Perſons Clerk, but that he give what time he may to all Perſons intereſted to take knowledge of the Avoidance, eſpecially if a Preſentation be made within a ſhort time after the Church falls void, or if a Caveat hath been entred, whether it be entred before or after the Church is void, altho' it be ſaid that the Biſhop need not regard a Caveat entred before the avoidance of the Church, *Mich.* 15 *Jac. B. R. Rone*'s Caſe, *Popham* 133. and by *Mountague*, *Hil.* 15 *Jac. B. R. Hutchins*, v. *Glover* 2 *Croke* 463. & *Rolls* 1. *Rep.* 191, 227. For a Biſhop in theſe Matters is a Judge, and not only ſo, but alſo the great Paſtor of his Dioceſs, and ought ſo to bear himſelf, as to manifeſt that he hath a due reſpect as well to Equity as Juſtice, and therefore to do what he lawfully may, that no Perſon by his haſte be ſo ſurpriſed, but may have Time and Opportunity to ſet up his Intereſt without diſadvantage thereto, *Parſon's Councellor* 16. But it is not adviſeable that the Biſhop doth refuſe to admit and inſtitute a Clerk only, becauſe a Caveat was entred before the Church was void, but that he do only ſuſpend the Admiſſion of him to enquire about the Clerk's Converſation or the like, otherwiſe ſuppoſing the Caveat (becauſe entred too ſoon not to be void) the Biſhop may be found to be a Diſturber for that cauſe in a *Quare Impedit*, and by this means, the ſame Perſon, or other that hath Intereſt, may enter a new Caveat after the Church is void, or Preſent, and then the Biſhop will not be found a Diſturber, if ſued in a *Quare Impedit*, according to *Coke* and *Dodderidge*, *Paſch.* 13 *Jac. B. R.* in *Hitching* and *Glover's Caſe*, *Rolls* 1 *Rep.* 191. 227.

But if a Perſon doth before his Church is void, ſuſpect that the Title to his Advowſon will be drawn into Queſtion by any Pretender thereto, it is beſt for his Security, that he enter a Caveat with the Biſhop before the Church doth void, leſt he ſhould not have notice of an Avoidance ſo ſoon as it happens, which Caveat (altho' void as is ſaid before, becauſe made too ſoon) may ſerve his Turn, with a prudent and careful Ordinary, until ſuch time as he may upon notice enter another, which he had beſt do with Speed, for then the Biſhop may ſtop any Proceedings to inſtitute another Clerk, and ſhall not be found to be a Diſturber in a *Quare Impedit*, by *Coke and Dodderidge*, in *Hitching* and *Glover*'s Caſe, *Rolls Rep.* 191. For a Caveat being regular-

ly entred, if another do preſent, and the Biſhop doth inſtitute his Clerk before he that entred the Caveat is called and acquainted therewith, by the Common Law the Inſtitution is void, and this ſeems to be granted at the Common Law, *Mich.* 15 *Jac. B. R. Rone's Caſe*, *Popham* 133. and by *Mountague*, *Mich.* 15 *Jac. Hutchins* v. *Glover*, 2 *Croke* 463. where it is concluded that a Caveat is void if entred before the Church is void, and upon that reaſon only, which implies that if it had been ſeaſonably entred, it ſhould have had its Effects by the Common Law; and by Doctor *Amicus*, if a Church becomes void, and a Stranger doth enter a Caveat with the Regiſter of the Biſhop, that none be Inſtituted to the Church until he be made privy thereto, and the Biſhop before he hath notice of the Caveat inſtitutes an Incumbent, the inſtitution is meerly void in the Spiritual Law, for the Regiſter ought to notifie the Caveat to the Biſhop, and his negligence in that Caſe ſhall not prejudice him that entred it, and if the Biſhop hath notice of the Caveat, and gives day to him that puts it in, and before the day doth inſtitute an Incumbent, this is meerly void, for the entring of the Caveat is as a *Superſedeas* at the Spiritual Law, *Hill.* 43 *Eliz. Lord Zouch's Caſe*, *Gouldsborough* 146. And Doctor *Tallbot* ſaid, That a Caveat is of force for three Months only, and that any one may ſafely preſent after the end thereof, as if no Caveat had been entred, in *Hutchin* and *Glover's Caſe*, *Hill.* 15 *Jac.* 2. *Croke* 464. But notwithſtanding this, it hath been adjudged, that if after a Caveat is entred, *&c.* a Clerk is Preſented, Inſtituted and Inducted; altho' this is not good by the Canon-Law, yet the Church is full at the Common-Law, for the breach of the Caveat is but a breach of the Canon, and doth not make the Inſtitution void, and a Prohibition was granted to ſtay a Suit in the Arches after the Induction, to avoid the Inſtitution upon this Cauſe, *Mich.* 15 *Car. Phipps* and *Hayter's Caſe*, *per Curiam*, *Rolls Abridg. p.* 2. *p.* 361. and *Paſch.* 13 *Jac. B. R.* in *Hitchin* and *Glover's Caſe*, *Rolls Rep.* 191. and 227. *per Curiam.* in *Offley* and *Beſt's Caſe*, *Trin.* 20 *Car.* 2. *B. R.* there it was ſaid, That a Caveat doth not preſerve *Jus illæſum*, as to make a nullity of all ſubſequent Proceedings, but is only a caution for the Information of the Court, and is like a Caveat entred in the Chancery, that a Patent ſhall not paſs, or as a Caveat in the Fine-Office in the Common Pleas, that ſuch a Fine ſhall not be levied; yet a Patent or Fine paſſing contrary to ſuch Caveats, are not therefore void. *Fieri non debet ſed factum valet* 1 *Sid.* 293. 372. 2 *Keble* 392, *&c. Quære*, Whether the Ordinary that inſtituted anothers Clerk (after the Caveat entred) without the privity of him that entred it, may not be puniſhed at the Common-Law as a Diſturber, if he that entred the Caveat be found there to have the better Title, and if not, whether he may not be puniſhed in the Spiritual Court for his Breach of the Canon. *Parſons Counſellor* 16.

CHAP.

CHAP. XXI.

What Remedy for a Clerk Preſented, if the Biſhop refuſe to admit him, &c. *Of* Duplex Querela & Jure Patronatus.

THeſe things being thus premiſed, I come to the Queſtion, what courſe a Clerk may take, or what Remedies he may make uſe of, if he be ſtopped in taking a Title to an Eccleſiaſtical Benefice: And firſt if he be refuſed by the Biſhop.

When the Biſhop doth without good cauſe refuſe, or unduly delay to admit, and inſtitute a Clerk to the Church to which he is preſented, the Clerk may have his Remedy againſt the Biſhop in the Eccleſiaſtical Court, as the Patron may in the Temporal Court.

Firſt, the Clerk may have his Remedy in the Eccleſiaſtical Court, and that before the Ordinary to whom Appeals are to be made, *viz.* by the way of a *Duplex Querela*, that is, if a Biſhop doth refuſe, then before the Arch-biſhop in his Court of Appeals, and if an Arch-biſhop doth refuſe before the Delegates, and if the Biſhop doth admit the Clerk, and then doth refuſe to inſtitute him, the Clerk may have the ſame Remedy againſt the Ordinary, to enforce him to do his Duty, *Hutton's Caſe, Hobart* 15. that is, the Clerk preſented having exhibited his Preſentation to the Biſhop or his Vicar General, (he having power to inſtitute) and being refuſed, or unjuſtly delayed, complaining to the Judge of Appeals thereof, the Judge is wont to write to the Biſhop in form of Law, and this Writing they call a *Duplex Querela.*

This *Duplex Querela* is to contain a Monition to the Biſhop or his Vicar General, having Power to give Inſtitution, that within a certain time (*viz.*) 9 or 15 days he admit the Party complaining, and alſo a Citation whereby the Biſhop may be cited to appear by himſelf, or Proctor at a day after, in caſe he doth not inſtitute, *&c.* to ſhew cauſe why by reaſon of his neglect of doing Juſtice, the right of Inſtitution is not devolved to the Superiour Judge. It is alſo expedient, that the ſame *Duplex Querela* doth contain an Inhibition to the Biſhop and his Vicar, (if he hath the power of inſtituting) that nothing may be done by either of them, *pendente lite*, to the prejudice of the party complaining. The Clerk refuſed having obtained from the proper Judge a *Duplex Querela*, is to take care that ſome Perſon ſufficiently learned for that purpoſe, doth admoniſh the Biſhop to admit him, and do him Juſtice, within the time mentioned in the *Duplex Querela*, and alſo according to the Contents thereof to inhibit the Biſhop; If the Biſhop after he is admoniſhed to inſtitute the Preſentee, ſhall expreſly refuſe to admit him, the Mandatory may preſently cite the Biſhop to appear according to the Contents of the *Duplex Querela*; but if no refuſal be made, the Biſhop being admoniſhed as aforeſaid, the Clerk is firſt to repair to the Biſhop or his Vicar (if he inſtitute) on the third day after, if no more than 9 days are mentioned in the *Duplex Querela*, or on the fifth day after, if fifteen days be appointed therein, and to exhibit his Preſentation, and to require Admiſſion and Juſtice in all reſpects to be done him, and to offer himſelf ready to ſubſcribe the 39 Articles of Religion, and the Declaration as required by Law, and to take the Oaths of Supremacy, and of Canonical Obedience, *&c.* and to do every other thing required by Law to be of him performed in reſpect of his Admiſſion and Inſtitution unto that Benefice. And this he is to do two times more, if not received,

viz. every third, or every fifth day, according to the time given in the *Duplex Querela.* But if he cannot come to the presence of the Bishop, he is to protest his readiness to receive his Admission, *&c.* and to subscribe, *&c.* as aforesaid, and to have at least two Witnesses thereof. If the Bishop shall not do the Clerk Justice within the time limited after the expiration thereof, the Party presented is to take care that the Bishop be cited according to the Tenor of the *Duplex Querela.* If the Person that is to cite the Bishop cannot come to his Presence, he is to signifie to some of the Bishop's Servants, that he hath a *Duplex Querela*, at the instance of *A. B.* the Person presented to the Church of *C.* to be by him Executed, and to desire that he may come to the presence of the Bishop. If he may not come to the Bishop's Presence, so that he cannot cite him, the Presentee is to expect till the day in which the Bishop should appear had he been cited, at which time he is to be called, and if he appear not by himself or Proctor, a Citation, *Viis & Modis* is to be decreed, which is to be executed Personally, if the Bishop may be spoken with, and if not, then by affixing it to the outward Doors of the Bishop's Palace, or of the House where the Bishop resides, or of his Cathedral Church. After the Bishop is cited, whether by the first or by a second Mandate, the Person citing is to certifie to the Clerk or his Proctor by his Letters, or by subscribing upon the backside of the Mandate, the day of executing the Monition, to institute, and the Inhibition, the several days of the Presentees asking Admission, and the day of his citing the Bishop, and if the Bishop refused expresly to admit, that also is to be Certified. If the Bishop appear not at the day, upon the Petition of the Presentees Proctor, the Bishop being thrice called, is by the Judge pronounced Contumacious, and as a punishment of his Contumacy, the Judge doth pronounce the Right of instituting the Presentee to his Benefice, to be devolved to the superiour Judge, and doth decree that the Clerk shall be Instituted, and that he will write to the Arch-deacon or Ordinary of the Dioces where the Church is, commanding him to induct him. Then the Clerk is remitted (if the Proceedings be in the Court of the Arches or Audience) to the Arch-bishop to examine him, and the Arch-bishop approving of him, returns him with his *fiat Institutio* to the Judge, who before he institutes, is wont to require a Bond of the Presentee to save him harmless upon that account. But if the Bishop doth appear, and doth alledge some just Cause why he refused the Clerk, then are they to proceed to the Tryal of that, as in other Summary Causes. If the Cause alledged by the Bishop be not proved, the Judg pronounces as before for his own Jurisdiction, and the Bishop is to be condemned in Expences; and so if he doth alledge an insufficient Cause, as that the Church is litigious, for this he ought to have tryed. If the reason of the Bishop's refusal was for that the Church was full before, or was become litigious, the other Clerk concerned may appear when the Bishop should, and defend his Cause as his own, and in his own Name, or having obtained the Bishop's Mandate, he may imploy a Proctor to manage his Defence in the Bishop's Name, and then the Judge shall not pronounce for his own Jurisdiction, if the Church be not full unless upon cause after appearing. See for this matter Clerks *Praxis Tit. Duplex Querela*, &c. And this way of proceeding in this Case against a Bishop is allowed of by the Common-Law, *Hutton's Case*, *Hobart* 15. and no prohibition lies for the Bishop, in *Stoke*'s Case, v. *Sykes*, *Hill.* 2 *Car. Latch* 192.

Tho' the Clerk be relievable in the Spiritual Court as is aforesaid, in Case that he be not admitted, *&c.* yet the Patron hath no Remedy there for any Disturbance, and therefore if the Church being Litigious by reason that two have presented to the inferiour Ordinary, and one Patron doth libel in the Court

Court of Audience, affirming the Title to preſent to be in him, this Libel being of the nature of a Declaration upon a *Quare Impedit* at Common-Law for the right of preſenting, and ſo for a thing tryable at Common-Law, a Prohibition lies, *Paſch.* 13 *Jac. B. R. Baile* and Sir *Henry Wallop*'s Caſe, *Rolls* 1 *Rep.* 173.

And if the Biſhop be ſued by a *Duplex Querela* for refuſing one Clerk, and after doth inſtitute the Clerk of another Patron, and then doth ſue for a Prohibition againſt the Clerk that ſues him in the Spiritual Court to ſtop his proceeding there, tho' a Prohibition be granted, yet a Conſultation may be had, the Libel containing nothing but the contumacy of the Biſhop, in admitting *pendente lite*, eſpecially after he was inhibited, for he is to be puniſhed by the Spiritual Judge, altho' the Biſhop to have a Prohibition doth ſuggeſt to the Court, that there is no ſuch Church in his Dioceſs to which the firſt Clerk was Preſented, *Trin.* 31 *Eliz. B. R. Slug* v. *the Biſhop of Landaffe*, 1 *Leonard* 181. *Trin.* 15 *Jac. Middleton*, v. *Lawte*, *Moor* 879.

So if two Clerks be preſented by one Patron, and the one doth ſue the other by a *Duplex Querela*, a Prohibition doth not lie before Inſtitution, by *Dodderidge*; but *Jones* denyed it, and ſaid that it had been reſolved to the contrary; to which *Dodderidge* ſaid, that then the Induction was *pendente lite*, *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch p.* 192.

If a Biſhop refuſing a Preſentee, be ſued thereupon before his Metropolitan, whereupon the Metropolitan doth ſend to ſuch Biſhop a Monition to receive the Clerk within a certain time, or elſe to appear before him to anſwer as aforeſaid, and the Biſhop doing neither, the Arch-biſhop doth receive the Clerk and inſtitute him, and by his Warrant cauſe him to be Inducted, and after the Biſhop and the Preſentee of another Patron do ſue in like manner before the Delegates to void the Inſtitution made by the Arch-biſhop as null, and by conſequence the Induction is void alſo; ſuch Suit may be ſtopped by a Prohibition, for if by Induction which is a Temporal Act, and tryable by Temporal Law, the Church is abſolutely full; it may not be avoided but by a Suit upon a *Quare Impedit*, or the like, at the Common-Law, and may notbe undermined by alledging inſufficiency in the Inſtitution in the Court Chriſtian, *Hutton*'s Caſe, *Hobart* 15. *Mich.* 12 *Jac. Rowth* v. *the Biſhop of Cheſter*, *Moor* 861. *Trin.* 15 *Jac. Middleton*, v. *Lawte*, *Moor* 879. *Trin.* 15 *Jac. Wilſon's Caſe*, *Hil.* 15 *Jac. B. R. Hitching* v. *Glover*, *Rolls Abr.* 2. 283, by which it appears, that after another Clerk is Inducted, this way of proceeding by a *Duplex Querela* in the Spiritual Court is not to be uſed, tho' the Church be filled by the Biſhop Pendent the *Duplex Querela*. And it is generally ſaid, that after a Clerk hath got Induction he is not to be queſtioned, neither as to the validity of his Inſtitution, nor of his Induction, *Trin.* 9 *Jac. B. R. Holt*'s Caſe, 1 *Bulſtrode* 179. And accordingly, if a Man be Admitted, Inſtituted and Inducted to a Church, and after be deprived, for that he was inſtituted againſt the Courſe of the Canon Law; this is a void Sentence of Deprivation, for that it is now a Lay-Fee by Induction, *Hill.* 15 *Jac. B. R. Hitching*, v. *Glover*, *Rolls Abr.* 2 *p.* 282. And it is alſo held, that Inſtitution cannot be voided by Sentence in the Spiritual Court, for which *Linwood* is vouched, and if ſo, this Remedy by *Duplex Querela* muſt fail, if a former Clerk be inſtituted, altho' unjuſtly, *Mich.* 15 *Jac. B. R. Rone*'s Caſe, *Popham* 133. But in *Offley* and *Beſt*'s Caſe, *Trin.* 18 *Car.* 2. *B. R.* 1 *Siderfin* 293. It is agreed, that if after Induction the Spiritual Court goes about to repeal the Inſtitution, a Prohibition ſhall be granted, but if the Repeal be before Induction, there no Prohibiton ſhall go, and where it is ſaid that the Spiritual Court cannot proceed againſt an Incumbent after that he is Inducted into the Church, that is not to be intended generally

generally ſo underſtood, for without doubt, the Spiritual Court after a Clerk is Inducted, may proceed againſt him, and deprive him upon the account of Crimes he may be guilty of, or any Incapacities he lies under,as they may deprive any Incumbent upon the Account of Simony as hath been before obſerv'd,or if he entred into Deacons Orders before 23 Years of Age,and into Prieſts Orders before 24,as was *Roberts* and *Pain*'s Caſe,1 *Jac.* 2. *B. R.* 3 *Modern Rep.* 67. and no Prohibition in ſuch Caſes ſhall be granted: So if he be a Drunkard, or otherwiſe,of an ill Life and Converſation,as was ſaid by the Court in that Caſe.

If a Clerk be unjuſtly refuſed, or delayed by the Biſhop, tho' he may have the aforeſaid Remedy, yet his Patron may alſo bring his Writ of *Quare Impedit*, or *Darrein Preſentment*, as his Caſe ſhall require, and thereby enforce the Admiſſion and Inſtitution of his Clerk; but tho' the Patron ſhould ſo proceed againſt the Ordinary for diſturbing him to preſent, yet the Clerk may alſo proceed by a *Duplex Querela* againſt him in the Eccleſiaſtical Court,as ſeems to be implyed by *Hutton*'s Caſe, *Hobart* 15. and if by means of ſuch Proceeding, he doth get himſelf to be Inſtituted and Inducted, yet this is no abatement of his Patron's Writ; but if the Patron be put afterwards to ſue for a Prohibition to ſtop a Suit in the Delegates brought by any Perſon to avoid his Clerk's Inſtitution and Induction, had upon his Suit in the Eccleſiaſtical Court from the Metropolitan, the Patron muſt make his Surmiſe, that the Church being full of his Preſentation, they attempt to avoid it in the Spiritual Court, upon a Pretenſe that the Inſtitution is null, and by conſequence the Induction alſo, without making any mention of the *Quare Impedit*, otherwiſe that his *Quare Impedit* will abate, by his own ſhewing, *Hutton*'s Caſe, *Hobart* 15. *Quære*. But whatever the Patron pleaſeth to do, the aforeſaid courſe of Proceeding in the Eccleſiaſtical Court,is the moſt proper Remedy that the Clerk can uſe, in caſe he be refuſed by the Biſhop upon the account of any perſonal Fault or Defect, and not only becauſe by ſuch Courſe the Clerk in a ſhort time, leſs Charge, and hazard of loſing of his Living by Errors, (which are eaſily faln into at Common-Law) may gain Inſtitution, but alſo becauſe, altho' his Patron bring his Action at Common-Law, for refuſing his Clerk for Crime or Inſufficiency, ſuch cauſe of refuſal ſhall be tryed by a Spiritual Judge, that is, if a Biſhop refuſe by the Metropolitan of the Province, as was granted by *Skuttleworth, Serjeant, Mich.* 30 *Eliz. C. B.* in *Specot's Caſe*, 3 *Leonard* 199. ſame Caſe in *Gouldsborough* 35. If the Arch-biſhop of *York* refuſe, the cauſe of refuſal ſhall be tryed by himſelf only, by *Dyer*: But *Manwood* Juſtice ſaid, that it ſhould be tryed by the Arch-biſhop of *Canterbury*; but that I doubt, and the Eccleſiaſtical Judge is to make Certificate of his Judgment to the Temporal Court, upon which they may proceed to Sentence; but if the party in whom diſability is alledged, be dead before his ſecond Examination,ſo as he cannot be examined, the tryal of his Ability,or Diſability ſhall be by the Country, for which was cited, 39 *Ed.* 3. *Mich* 15 *Eliz. C. B. Leonard* 3 *part* 199. 40 *Ed.* 3. 25. 4 *Ed.* 3. 26 and by *Dyer*, *Mich.* 15 & 16 *Eliz. C. B. Dyer* 327. *Mich* 8 *Ja. Robert's Caſe*, 2 *Croke* 269. *Watſon* & *Baker's Caſe*, 20 *Car.* 2. 1 *Siderfin* 390. So in a *Quare Impedit* againſt the Arch-biſhop of *Canterbury*, if the Ability of the Clerk come in queſtion, it is ſaid by *Hardres* Serjeant, that it ſhall be tryed by the Country, and not by any inferiour Ordinary, *Trin* 1656. *Hardres* 65. and the ſame reaſon ſeems to be as to the Arch-biſhop of *York*.

This Remedy alſo is proper for the Clerk, in caſe the Biſhop doth refuſe him upon Pretenſe that the Church is full; for that full or not full for the moſt part, ſhall be tryed by the Certificate of the Biſhop, being that Plenarty is by Inſtitution, but void or not void, being an Act notoricus

rious to the Country, and diſtinguiſhable by them, ſhall be tryed by the Country, *Mich.* 20 *Car.* 2. *Watſon* v. *Baker* 1 *Siderfin* 390. but whether the Church be void by Deprivation or Ceſſion ſhall not be tryed by the Ordinary, 15 *Ed.* 4. 25. *Rolls* 2. *Abridg. tit. Tryal* 583. Yet in the Caſe of *Watſon* and *Baker* as reported, 2 *Keble* 446, its ſaid that the Court was of Opinion that voidance by Reſignation ſhould be tryed by the Country.

If the Clerk be refuſed by the Biſhop, upon a Pretenſe only that the Church is become Litigious, he may have his Remedy by the ſame Biſhop that refuſed, by requiring the ſaid Biſhop to award a *Jure Patronatus*, to enquire in whom the right of Preſenting is, and where a *Jure Patronatus* is awarded, the Ordinary ought in Juſtice to admit him, in whom the right is found by the Verdict, and certified to be by the Commiſſioners, altho' it be found and certified againſt the true Patron, 34 *H.* 6. 11. 34 *H.* 6. 38. And according to the Commiſſioners Certificate, in caſe they certifie contrary to what is found, 22 *H.* 6. 30. for the Ordinary is a Judge in this Caſe, and therefore ought to carry himſelf indifferently amongſt Pretenders; and having put the Patron to the charge of an Enquiry, he ought in Juſtice to follow the Verdict and Certificate, eſpecially becauſe the Law hath provided this Means to ſatisfie the Biſhop, and to ſecure him from being puniſhed as a Diſturber, if he pleaſe to follow ſuch Verdict as ſhall be given and certified to him, *Paſch.* 17 *Jac.* Sir *William Elvis* v. the Arch-biſhop of *York*, *Taylor* and *Biſhop*, *Hobart* 317. And if the Biſhop in going againſt the Verdict chance to admit the Clerk of the true Patron, yet this will not excuſe him from diſturbance in a *Quare Impedit* brought againſt him by the Perſon for whom the Verdict was found, for it is no Plea to ſay that he admitted the true Patron Clerk. However, the Biſhop is not compellable to award a *Jure Patronatus* when the Church is Litigious, nor after he hath awarded it to follow the Verdict given, but if he pleaſe may inſtitute the Clerk of the Patron he takes to have the better Title, either before a *Jure Patronatus* is awarded, *Hitching* & *Glover*'s Caſe, *Rolls Rep.* 227. or whilſt it is depending, or after it is executed, altho' it be contrary to what is certified; and the Biſhop having ſo admitted a Clerk to the Church, he is not to be ſued in the Spiritual Court for that Cauſe, if he be, may have a Prohibition to ſtop ſuch Suit. But if the Patron of the Clerk that is rejected, doth bring his *Quare Impedit* againſt the Biſhop, *&c.* and will maintain him to be a Diſturber, if either the Patron whoſe Clerk he hath inſtituted will not plead and defend his Title, (for the Biſhop may not do it) or if he doth defend it, and the other be found to have the better Title, the Biſhop will be puniſhed as a Diſturber, whether his Caſe be, that after the Church became Litigious, he upon requeſt refuſed to award a *Jure Patronatus*, and inſtituted without it, or whilſt it was depending or having awarded it, he inſtituted contrary to the Verdict, or if ſuch Patron doth not name the Biſhop in his Writ, but only the Patron and Incumbent, and proves his Title, by the Opinion of *Hobart*, he may have an Action upon the Caſe againſt the Ordinary for that wilful Wrong, and Trouble he hath put him to, and recover his Coſts and Damages, not in reſpect of the value of the Church, (for there is no damage for that by the Common-Law, but by the Statute of *Weſt.* 2.) but for the Injury and Wrong he hath done him by ſuch Admiſſion; but if he name the Ordinary in his *Quare Impedit*, he can have no ſuch Action, and if he doth not name him, yet he cannot have ſuch an Action upon the Caſe before he hath tryed his Title in a proper Action, and againſt the proper Parties; but if he happen to inſtitute the Clerk of him that upon Tryal at Common-Law is found to have the better Title, the other is without all Remedy againſt the Biſhop, as much as if the Biſhop had awarded a *Jure*

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Patronatus, and followed the Verdict given thereupon, *Pasch.* 26 *Eliz. C. B.* Gerrard's Case, 2 *Leonard* 168. *Pasch.* 17 *Jac.* Sir *William Elvis* v. *Arch-bishop of York*, *Taylor* & *Bishop*, *Hobart* 318. and *Lord Stanhop's Case*, v. *Bishop of Lincoln*, &c. *Hobart* 242. See *Chap.* 20.

This Enquest by a *Jure Patronatus* is by Law allowed, not only for the security of the Ordinary when a Church is Litigious, so that Disturbance may not be imputed to him if he duly proceed therein, and act according to the Verdict thereupon given, and as a Remedy by which one of the Pretenders Clerks may have Admission, and so the Cure may not be long neglected; but also to satisfie the Ordinary when the Church is not Litigious, that is, when but one Person doth Present, if the Bishop doubts that he which presents hath no good Title to the Advowson, or present avoidance of the Church, *Pasch.* 17 *Jac.* Sir *William Elvis*, v. *Arch-bishop of York*, *Taylor* & *Bishop*, *Hobart* 317. And indeed, the Bishop if he please may enquire of the Right of every Person that Presents a Clerk to him, by awarding a *Jure Patronatus* before he admits his Clerk, 21 *H.* 6. 44. And if in such Case it be found that a Stranger hath a Right, if the Stranger doth pesent in six Months, the Ordinary is to admit his Clerk, but if he let the six Months pass, the Ordinary is obliged to admit the Clerk of the Disturber, and so is however barred of the Benefit of Laps, 34 *H.* 6. 40.

When a *Jure Patronatus* is awarded, the Bishop doth proceed either by himself, or and that more usually by a Commission made under his Seal to certain Persons as best pleaseth him; if by Commission, then it is done after this manner, the Bishop doth appoint to sit in the void Church on a certain day, and doth decree a Monition against the Patrons presenting, and the Clerks presented, to be present there at the day appointed to see the Proceedings. Also the Bishop is to Decree, and send forth a publick Edict against all having or pretending to have any Interest or Right of presenting to the vacant Church, to appear at the Day and Place appointed, to shew their Right, *&c.* And this publick Edict is to be affixed to the Door of the void Church in time of Divine Service. And against the day of appearance, certain Articles are to be prepared, which are to contain the particulars about which the Jury are to enquire, *viz.* (1.) Whether the Church be void, and how it became void. (2.) Who presented at the last preceeding Avoidance, and to the two foregoing Avoidances. (3.) Whether the Persons presenting, presented in their own Right. (4.) In whom the Inheritance of the Advowson is, and who ought to present to the void Turn. (5.) Whether any of the Clerks presented be known, or suspected to be guilty of any Crime rendring him uncapable of Admission to the said Benefice, as Heresie, Simony *&c.*

At the day appointed for this Enquiry, the Person or Persons executing the aforesaid Mandats or Citations, are to make Oath of the due Execution thereof, or the Execution of them may be certified upon the back-side of the said Mandats, which must be done under some authentick Seal, *viz.* Of the Arch-deacon, Commissary, or Rural Dean, against which day, the Bishop is also to summon a Jury for this purpose by way of Citation, which Jury is to consist of six Clerks, and six Lay-men that live near to the void Church, and then the Parties cited, and those of the Jury are to be publickly call'd, and if any of the Jury appear not, being duly summoned, they may be punished, that is, the Clergy-men by Sequestration, the Lay-men by Excommunication, and so compell'd to appear; but lest any fail, it is best to summon more than the number of Twelve, for that more if the Judge think fit may be Sworn of the Jury, provided that there be an equal number of

of the Lay and Clergy. And if others cited appear not, they are to be pronounced contumacious, and the Proceedings are to go on however, *& in Pœnam Contumaciæ* of them that do not appear. If ſix Clergy and ſix Lay-men appear to be of the Jury, which is the competent Number, they are to be Sworn, faithfully to enquire of the Articles, and in Swearing them, firſt a Clerk, then a Lay-man is to be Sworn, till a Jury of Twelve be made up. The Jury being impannelled, the Articles to be enquired of are to be publickly Read, and delivered to them, and then the Parties or their Council are to ſet forth their Intereſts or Titles, and produce their Evidences to prove them. When the Parties and their Council have been fully heard, the Jury may give their Verdict at any time the ſame Day, or if the Cauſe be doubtful, the Judge may aſſign them a longer time for to conſider of the Matter, and aſſign alſo a place where they ſhall give their Verdict.

If the Verdict be that one of the Preſenters is Patron, or hath Right to preſent to the Avoidance, his Clerk ought to be admitted, unleſs they find alſo, that the Clerk is guilty of ſome Crime. But ſuppoſe the Jury will not give any Verdict, or that they be equally divided, half for one Patron, and half for the other, or give a ſpecial Verdict, *Quære*, what farther Courſe is to be taken, *viz.* Whether the Biſhop may Summon a new Jury, or ſuffer the Church to Lapſe, as if no *Jure Patronatus* had been awarded, which I rather think, *Vide, Clarks Praxis, Chap.* 98, 99, 100. *Parſons Counſ.* 19. 21. 34 *H.* 6. 41. 35 *H.* 6. 19.

The Biſhop is not bound to make this Enquiry in Perſon, but may (as is uſual) ſubſtitute others, either of the Clergy or Laity, by his Commiſſion under his Seal to act for him; but if his Commiſſioners neglect to execute their Commiſſions duly, it will not excuſe the Biſhop, for that they are of his own making: But the *Civilians* ſay, that the Commiſſioners ſhall be named by the Parties, and they only ſhall be prejudiced by the Commiſſioners neglect, *Parſons Counſellor* 22. And Note, That the *Jure Patronatus* ſhall be ſued at the Coſts of the Party, or his Clerk, and not of the Biſhop, *Br. Quare Impedit.* 12 34 *Hen.* 6. 38. 5 *Hen.* 7. 22. *a. Contra. Bro. Coſts* 2.

CHAP. XXII.

Of the Writs of Quare Impedit, *and Aſſiſe of* Darrein Preſentment, *for what and for whom they are maintainable*, *and upon what Seiſin*, &c.

AS the Clerk may have his Remedy in the Eccleſiaſtical Court, if the Biſhop doth unjuſtly refuſe or delay to Inſtitute him, *&c.* that is, until ſuch time as another Clerk is Inducted, or at leaſt Inſtituted, ſo as hath been ſaid upon what Account ſoever the Patron is diſturbed in preſenting, he generally ſpeaking, may have his Remedy at the Common-Law againſt the Biſhop, and all other Diſturbers.

A Patron is ſaid to be diſturbed in Preſenting, either when the Biſhop hath admitted and inſtituted a Clerk, upon the Preſentment of another pretended Patron, or when the Biſhop will not admit the Patron's Clerk preſented to him upon any Pretenſe; but if the Ordinary hath filled the Church by a wrongful Collation, the Patron is not thereby diſturbed; and therefore in ſuch Caſe the Patron muſt actually preſent, and the Ordinary muſt refuſe to admit his Clerk before the Patron can bring his Action; for tho' the Ordinary hath collated, yet the true Patron may preſent to the ſame Ordinary, and he may inſtitute, *&c.* his Clerk, and then the two Clerks in Treſpaſs, Ejectment or Aſſiſe, ſhall try who hath the better Title, *Grendon*'s Caſe, *Plowden* 100 *b.* Neither is the true Patron diſturbed by a Strangers preſenting a Clerk to the Biſhop to be admitted to his Church, unleſs the Biſhop hath admitted him accordingly; but the Biſhop's refuſing to admit the Patron's Clerk when Preſented, is no diſturbance, and therefore the Patron before he can bring his Action for any Diſturbance, muſt cauſe his Clerk to tender his Preſentment to the Biſhop, and require Admiſſion, and the Biſhop muſt refuſe his Clerk, or elſe, tho' the Biſhop be named in the Writ, he may at the end of the ſix Months collate for Laps, *Jenkins Cent.* 1. *Caſe* 19. *Paſch.* 14 *Jac. Brickhead* v. *Arch-biſhop of York*, *Brownlow* & *Gouldsborough*, 1 *part* 164. the ſame Caſe *Hobart* 200. that is, if his Church be not filled, or only filled by Collation, but if it be filled upon a Preſentment made by a Stranger, the Patron is thereby diſturbed, and may bring his Action without making any Preſentment to the Biſhop, (as I conceive,) becauſe his Preſentment to the Biſhop when the Church is ſo filled is vain; and if the Biſhop ſhould admit and inſtitute the Clerk, upon ſuch Preſentment all would be void.

The Patron being ſo diſturbed that he hath cauſe of Action thereby, the next thing is to conſider what Remedy the Law affords in ſuch Caſe moſt proper for him, and theſe Remedies muſt be either ſuch as are given by ſome Act of Parliament, or elſe ſuch as are by the Common Law. Firſt, then it is provided, **Where an Agreement is made between many claiming one Advowſon, and inrolled before the Juſtices in the Roll, or by Fine, in this Form; That one ſhall preſent the firſt time, and at the next Avoidance another, and the third time another, and ſo of many, in caſe there be many; and when one hath Preſented, and had his Preſentation which he ought to have according to the Form of their Agreement and Fine, and at the next Avoidance he to whom the ſecond Preſentation belongeth is diſturbed by any** that

that was party to the ſaid Fine, or by ſome other in his ſtead. It is Provided, That from henceforth they that be ſo diſturbed ſhall have no need to ſue a Quare Impedit, but ſhall reſort to the Roll or Fine.

And if the ſaid Concord or Agreement be found in the Roll or Fine, then the Sheriff ſhall be commanded that he give knowledge unto the Diſturber that he be ready at ſome ſhort day, containing the ſpace of Fifteen Days or Three Weeks (as the Place happeneth to be near or far) for to ſhew if he can alledge any thing wherefore the Party that is diſturbed ought not to preſent; and if he come not, or peradventure doth come, and can alledge nothing to barr the Party of his Preſentation, by reaſon of any Deed made or written, ſince the Fine was made or inrolled he ſhall recover his Preſentation with his Damages, 13 E. 1. Chap. 5.

This Clauſe of the Statute extendeth as well to ſtrangers of Blood, as to Coparceners who are privies in Blood, and if one of the Parties, or his Heirs, or a ſtranger uſurp in the Turn of another, the Party wronged is not driven to his *Quare Impedit*, for it may be, that the *Quare Impedit*, or Aſſiſe of *Darrein Preſentment* may fail, and yet he may have remedy by this Branch of this Statute, for albeit there be a plenarty of ſix Months, yet the Party may have a *Scire Facias* upon the Roll or Fine, and therein recover the Preſentation and Damages, 2 *Inſtitutes* 362.

In other Caſes when the Patron is diſturbed in preſenting, tho' there lies no Action of the Caſe againſt the Biſhop for not inſtituting, as is ſaid *Mich.* 12 *Jac. B.R.* in *Powle & Godfrey's Caſe*, *Rolls* 1. *Rep.* 64. yet ordinarily he hath his Remedy by the Writ of *Quare Impedit*, or of *Darrein Preſentment* as his Caſe ſhall be; yea, tho' the Patron be but an Infant, for of Advowſon of Churches, there be but three original Writs, that is to ſay, one Writ of Right, and two of Poſſeſſion, *viz.* theſe of *Quare Impedit*, and *Darrein Preſentment*, *Stat.* 13 *Ed.* 1. *Chap.* 5. And having already ſpoken of the Writ of Right in *Chap.* 13. theſe two Writs of Poſſeſſion which indeed chiefly relate to this matter, are here to be treated of.

But note firſt, that there are other Writs that are of uſe to the Perſon that is to recover a Preſentment, as *Ne Admittas*, *Quare Incumbravit*, and *Quare non Admiſit*. The Writ of *Ne Admittas*, lies for a Patron of a Church after a *Quare Impedit* by him brought and depending, *viz.* returned, 2 *E.* 4. 11. That is, if he doubt that the Biſhop will collate, or admit the Clerk of another Perſon, *Pendente lite*: The Writ is to be directed to the Biſhop to prohibite him, *Terms of Law*, *Quare Impedit*, *Mich.* 6 *Jac. in Langdale's Caſe* 12 *Coke* 59, 60. *Fitz. Nat. Br.* 37. *Lit. F.* But Writ muſt be ſued out within the ſix Months, and not after, unleſs it be in the Caſe of the King, *Regiſt. Orig.* 31. *a.* and a Writ may be directed to the Chief Juſtice of the Common-Pleas, to Certifie whether there be any Plea depending in that Court concerning that Church, *Regiſt. Orig.* 31. *b.* And if the Biſhop doth admit the Clerk of any other Perſon pending the Suit, and he that brings the *Ne Admittas* doth recover, he ſhall have a *Quare Incumbravit*, and thereby remove him who came *in Pendente lite*, by whatſoever Title he came in, and ſhall force him that hath Right to recover by *Quare Impedit*, *Mich.* 3 *Jac. B. R. Lancaſter* v. *Lowe* 2 *Croke* 93. But if the *Ne Admittas* be ſued out before any Writ of *Quare Impedit* pending, if a *Quare Impedit* be after brought, and made retornable before any Certificate had from the Chief-Juſtice of the Common-Pleas, whether there be ſuch a Suit pending or not, I ſuppoſe it may be well enough. If two be in Suit for an Advowſon, and the Biſhop doth admit the Clerk of one of them within the ſix Months, and the other recovers, he may have the Writ

of *Quare Incumbravit* againſt the Biſhop, but one ſhall not have this Writ of *Quare Incumbravit* without making mention in the Writ of ſome Recovery by him had, *Regiſt. Orig.* 32. *b.* *Fitz. Nat. B. R.* 42. *k.* And this Writ lies not but after a *Ne Admittas* ſued out, *Fitz. Nat. Br.* 42 *h.*

When a *Quare Incumbravit* is brought againſt the Biſhop, if it be found by the Verdict that the Biſhop hath incumbred the Church after the Prohibition of *Ne Admittas* delivered to him, and within the ſix Months after the Avoidance, to the Damage of the Plaintiff, the Damages taxed by the Enqueſt are to be awarded to the Plaintiff, and a Writ for him is to be directed to the Biſhop to diſincumber the Church; but the Temporalities of the Biſhoprick are not to be ſeiſed in this Caſe, for the Contempt, as they may be in an Attachment upon a Prohibition; and if the Biſhop endeavour to prevent the taking of the Enqueſt, by alledging that he hath received the Clerk of the Plaintiff, and hath inſtituted him, this will not be allowed, 21 *Ed.* 3. 3. *Br. Quare Incumbravit.* But it is a good Plea for the Biſhop, that he did not incumber the Church after a Prohibition delivered to him. If the Plaintiff be Non-ſuit in a Writ of *Quare Incumbravit*, he may have another Writ of *Quare Incumbravit*, and may vary from his firſt Declaration, *No. Na. Br.* 48. 21 Ed. 3. 42. And note, that this Writ is to be brought in the County where the Church is, 38 *H.* 6. 15. *Fitz. Nat. Br.* 48 *d.*

And now to conſider in what Caſes the Patron may be relieved by the Writs of *Quare Impedit* or *Darrein Preſentment*; Firſt, a Patron may have a *Quare Impedit* for a Chapel, Prebend, Vicarage, Hoſpital, 18 *Ed.* 3. 1. *Regiſt. Orig.* 31. *a.* or other Houſe that is of the Advowſon of other Men, by *Stat.* 13 *Ed.* 1. *Chap.* 5. So a *Quare Impedit* doth lie of a Donative, and the Writ ſhall be *quod permittat ipſum præſentare ad Eccleſiam*, and the Patron is to ſet forth the ſpecial Matter in his Declaration, *Coke Littleton* 344. ſo it doth lie of a Free Chapel, which a Man hath by the Patent of the King, if the Sheriff will not put him into poſſeſſion, 14 *H.* 4. 11. *b.* ſo it doth lie for a Deanry by the King, altho' that it be Elective, 17 *Ed.* 3. 40. and for an Arch-deaconry, for it is not a meer Function, but is local, in that an Archdeacon hath *locum in Choro*: Alſo for a Prebend, by the Equity of the Statute of 13 *Ed.* 1. *Chap.* 5. *Trin.* 31 *Eliz. C. B. Smallwood*, &c. v. *the Biſhop of Litchfield*, &c. 1 *Leonard* 205. and *Trin.* 31 *Eliz.* 3 *Croke* 141. 24 *Ed.* 3. 42. *Paſch.* 31 *Eliz. C. B. Sale* v. *the Biſhop of Litchfield*, *Owen* 99. but it doth not lie of a Chancellorſhip or Commiſſaryſhip, becauſe they are but meer Offices, tho' they be granted for the Life of the Patentee, and are not local, ſuch Officers having no place in the Cathedral.

And what is ſaid of the *Quare Impedit*, I ſuppoſe is true alſo of the Writ of *Darrein Preſentment*; only I find that the Writ of *Darrein* Preſentment, is ſaid not to lie of Prebends, or Churches Prebendated, altho' that the Writ of *Right of Advowſon*, and *Quare Impedit* doth lie thereof, *Fitz. Na. Br.* 32. *d.* 19 *H.* 3. *Fitz. Darrein Preſentment* 23. and the reaſon given is, that an Aſſize of *Darrein Preſentment* doth require the Jurors to view the Church by the words of the Writ, and therefore out of reverence to Cathedral Churches where Prebends are, theſe Writs lie not thereof, *Jenkins, Cent.* 1 *Caſe* 1.--See 2 *Inſt.* 363.

Tho' theſe Writs do lie even indifferently for the Preſentments aforeſaid, yet they do not lie indifferently for all Perſons. Where a Man may have an Aſſiſe of *Darrein Preſentment* he may have a *Quare Impedit*, but not contrariwiſe; an Aſſiſe of *Darrein Preſentment*, lies where a Perſon or his Anceſtors hath preſented formerly to a Church, in preſenting to which being void, he is diſturbed; but a *Quare Impedit* lies upon diſturbance for a Perſon that had never before Preſented. See *Terms of Law*, *Quare Impedit.*

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Tho' it be ſaid that an Aſſiſe of *Darrein Preſentment* doth lie where a Perſon or his Anceſtors hath preſented formerly, yet if *J. S.* doth preſent in my Name, and with my Aſſent, and afterwards the Church becomes void, this is a ſufficient Preſentment for me to have an Aſſiſe of *Darrein Preſentment* againſt *J. S.* for that this was as my Preſentment, *Trin.* 5 *Ed.* 1. *Rot.* 25. He that is Tenant in Fee of an Advowſon may have this Writ, *Rolls Abr. part* 2. *p.* 382. and ſo may Tenant in Tail of an Advowſon, and is not driven of neceſſity to his *Quare Impedit*, 46 *Aſſiſe* 4. And not only he who hath the Free-hold, but alſo he who is a Leſſee for Years only, having preſented before, may bring this Writ, *Fitz. N.* 31 *J.* 5 *H.* 7. 16. *b. Farfax Contra. Kellway* 118. *b.* 50 *Ed.* 3. 14. by *Holt.* And ſo may Tenant at Will who hath preſented, *Rolls Abr. part* 2. *p.* 380, 381. *Contra* 50 *Ed.* 3. 14. This Writ, as hath been ſaid, is not only maintainable upon a Preſentment made by him that brings it, but alſo upon a Preſentment made by any of his Anceſtors; and therefore an Heir that comes in by Deſcent, his Anceſtor having preſented, may maintain this Writ, *Britton, fol.* 242. *b.* and the Preſentment of the Grand-father is ſufficient for the Grand-ſon to have it, who had never preſented, if it be the laſt Preſentment, *Trin.* 5 *Ed.* 1. *Rot.* 25. And altho' the Church became void by Reſignation, Deprivation, *&c.* yet the Writ ſhall be to inquire, *Quis advocatus* &c. *Præſentavit ultimam perſonam quæ mortua eſt*, &c. 6 *E.* 3. 41. *b.* But this Writ doth not lie amongſt Coparceners, when one doth uſurp in the Turn of the other, by reaſon of the Privity that is between them, and by the words of the Writ it is againſt him that *advocationem deforceat*, 20 *Ed.* 3. 15 *Ed.* 3. *Fitz. Darrein Preſentment.* but in ſuch Caſe a *Quare Impedit* lies, *Jenkins Cent.* 1 *Caſe* 1. And note, that when 'tis ſaid that to the maintaining of this Writ he that brings it, or his Anceſtor muſt have preſented, it is to be underſtood, that the Clerk preſented be alſo Inſtituted, and Inſtitution without Induction is ſufficient, 38 *H.* 6. 16. *b.*

To the maintaing of this Writ of *Darrein Preſentment*; it is further Required, That he who brings it have the ſame Eſtate, or parcel of the ſame Eſtate, by which the former Preſentment was made, *Rolls Abr. part* 2. *p.* 381. Therefore if a Man being Tenant for anothers Life of an Advowſon doth preſent, and after his Eſtate is enlarged for his own Life, and then the Church doth void again, he ſhall not maintain an Aſſiſe of *Darrein Preſentment* upon the ſaid Preſentment, becauſe this is not the ſame Eſtate, nor any parcel of the Eſtate upon which the firſt Preſentment was made, but a new Eſtate, *Kellwey* 118. *b.*

So if Leſſee for Years of an Advowſon doth preſent, and after his Eſtate is enlarged for Life, or in Fee, and then the Church doth void, he ſhall not have an Aſſiſe of *Darrein Preſentment*, becauſe he hath a new Eſtate by the enlargement; the ſame Law is if Leſſee at will doth preſent, and after his Eſtate is enlarged for Life or for Years. If Leſſee for Years of an Advowſon doth preſent, and his Leaſe being ended, he takes a new Leaſe for Years of the ſame Advowſon; it ſeems clearly that he ſhall not have this Writ, becauſe he hath another Eſtate than that upon which the Preſentment was made, or if Leſſee for Years, or for anothers Life doth preſent, and after doth purchaſe the Reverſion, and then the Years expire or *Ceſtuy que vie* dieth, and after the Church doth void, he ſhall not have this Writ, for that he is in of another Eſtate, and ſo it ſhall be, altho' that the Church doth void during the Years, or during the Life of the *Ceſtuy que vie*, for the firſt Eſtate is extinct by his own Act, and therefore he ſhall not have any benefit of the firſt Eſtate. Or if the Grantee of the next Avoidance doth preſent, and then purchaſeth the Advowſon, he ſhall not have this Writ upon the next Avoidance, becauſe this is meerly a new Eſtate, and no parcel of the firſt Eſtate upon which the Preſentment was made.

If

If a Feme be Leſſee for Life of an Advowſon, the remainder for Life to the Husband, the Husband preſents, and then the Wife dieth, the Husband ſhall not have this Writ at the next voidance, becauſe that the firſt Preſentment was in the right of his Wife by reaſon of her Eſtate, and now he is ſeiſed of another Eſtate in his own Right. So if the Husband being ſeiſed of an Advowſon in the Right of his Wife, doth preſent, and after hath Iſſue, and then the Wife be-being dead, the Church becomes void, the Husband ſhall not have this Writ, becauſe that now he is ſeiſed of another Eſtate than that upon which he preſented before, for at the firſt he had not any Eſtate but only in the Right of his Wife, and now he is ſeiſed of an Eſtate for his own Life, as Tenant by the Curteſie, *dubitatur*, *Kellwey* 118. *b.* But if the Husband hath preſented after he hath Iſſue, and then the Wife doth die, and the Church doth after become void, the Husband ſhall have this Writ, becauſe that he had an inception of an Eſtate for Life by the Courteſie at the firſt Preſentment, which by the death of the Wife is become compleat.

If Leſſee for Life of an Advowſon upon Condition to have the Fee doth preſent, and after the Fee doth accrue when the Church doth void, it ſeems that he ſhall have this Writ, becauſe that parcel of the old Eſtate doth continue, and it had a poſſibility of accruing at the time of the firſt Preſentment.

So if two Joint-tenants for Years, Life, or in Fee do preſent, and after one of them doth die, the Church after becoming void, the Survivor ſhall have this Writ, becauſe he hath the ſame Eſtate that he had upon the firſt Preſentment. So if Tenant in Fee, or in Tail of an Advowſon upon Condition to have it for Life, or for Years doth preſent, and after his Eſtate doth decreaſe, he ſhall have this Writ when the Church doth void again, becauſe he hath parcel of the old Eſtate. So if Tenant in Tail doth preſent, and afterwards becomes Tenant after Poſſibility, at the next avoidance he ſhall have this Writ, becauſe this is a Remnant of the Eſtate Tail, for all which laſt Caſes ſee *Rolls Abr. part* 2. *p.* 381.

But ſeeing the Writ of *Quare Impedit* doth lie for all Perſons who may maintain an Aſſiſe of *Darrein Preſentment*, it ſeems to be the ſafeſt Courſe to bring that Writ upon any diſturbance: But altho' it be ſaid, that a Man may in many Caſes have either Writ, yet in no caſe can he maintain both, therefore if the Plaintiff hath brought a *Quare Impedit* upon a Diſturbance, and hanging the ſame, doth bring an Aſſiſe of *Darrein Preſentment* againſt the ſame Defendants, the Defendants may in Pleading ſhew this ſpecial Matter in certain, and averr that both Writs are upon the ſame Avoidance, and the Writ of *Darrein Preſentment* will be abated, *Mich.* 15 *Jac. William Andrews*, v. *Archbiſhop of York, Mary, Counteſs of Shrewsbury and Haker*, *Hobart* 184. and *Hutton* 3. and *Moor* 883. For if an Aſſiſe of *Darrein Preſentment* be brought, and after that a *Quare Impedit* for the ſame Avoidance, the Aſſiſe ſhall abate, and the *Quare Impedit* ſhall ſtand, for the *Quare Impedit* is of a higher nature than the Aſſiſe, 10 *Ed.* 3. *Statham in Darrein Preſentment*, 3. *vouched by Juſtice Warburton, in Hutt.* 4. *Regiſter Orig.* 30. *a.* and a *Quare Impedit* is ſaid to be depending when it is returned, 2 *Ed.* 4. *fol.* 11. And it is alſo ſaid, that if he againſt whom an Aſſiſe of *Darrein Preſentment* is brought, doth bring a *Quare Impedit*, the *Darrein Preſentment* ſhall abate, *Regiſt. fol.* 30. See *Stat. Weſtm.* 2. *Chap.* 5. which gives to him that is diſturbed the Election of the one Writ or the other, but not both Writs, *Mich.* 15 *Jac. Andrews* v. *Hacker Hutton* 4.

As

As a Patron that is diſturbed cannot have both a *Quare Impedit*, and an Aſſiſe of *Darrein Preſentment* for the ſame Avoidance, ſo neither can he have two *Quare Impedits*; and altho' the Patron after the firſt *Quare Impedit* brought, the Church remaining void, doth preſent a ſecond Clerk to the Biſhop, who is as the former refuſed, and doth bring his ſecond Writ, and declare upon the latter diſturbance; yet the ſecond Writ ſhall abate, becauſe the principal Effect of the Suit is to gain, and recover the Preſentation, and if the ſecond Writ ſhould not abate, he ſhould have two Suits at once for the ſame thing; beſides, the nature of a *Quare Impedit* is to be Final, upon Non-ſuit or Diſcontinuance, but this way were to defeat the Law in that Point, and the adding a new Defendant in the latter Writ to the Defendants in the former Writ, will not amend the Caſe, for ſtill there are two Suits depending againſt one Man for the ſame thing: but 'tis ſaid, that a Man may have as many *Quare Impedits* as he will againſt ſeveral Perſons, *Trin* 14 *Jac. Edward Earl of Bedford*, v. *William Biſhop of Exeter, and Henry Wilſon*, *Hobart* 137. the ſame Caſe, *Brownlow* and *Gouldsborough*, 1 *part* 163.

Concerning the Writ of *Quare Impedit*, we muſt know, that altho' it be of more general uſe than an Aſſiſe of *Darrein Preſentment*, yet it doth not lie for all Perſons, and in all Caſes; for if when a Church is void, the Ordinary doth by wrong Collate, and after the Rightful Patron doth grant away the Advowſon in Fee, as by ſuch Grant, the Grantee cannot have the void Turn, ſo neither can the Grantor have any Action for it, he having deſtroyed, not transferred over all his Right and Remedy to it, by his Grant of the Advowſon, *Hill.* 14 *Eliz. Leake* v. *Biſhop of Coventry, and Doctor Babington*, 3 *Croke* 811. 6 *Ed.* 3. *Br. preſent. al Eſgliſe* 62. From which it ſeems to follow, that if one who is ſeiſed in Fee of an Advowſon, doth Mortgage the ſame for a Sum of Money, and the Money being not paid, the Grant becomes abſolute, and the Church doth then void, if during the Avoidance the Money being paid, and the Advowſon reconveyed, the Mortgager doth get the Clerk inſtituted to the void Church, the Mortgagee is without all Remedy, altho' the void Turn was in him, and could not paſs by his reconveyance of the Advowſon, or if the Biſhop doth in ſuch Caſe Collate, or other Perſon doth get the Church filled by Uſurpation, both Mortgager and Mortgagee are without all Remedy for that Turn, *Quære.* Yet it hath been held, that if two Coparceners be of an Advowſon appendant to a Mannor, and the Church voiding, the one of them doth alien before their Clerk is admitted, yet both of them ſhall have a *Quare Impedit* for the void Turn, as being veſted in them. So if he that is ſeiſed of Land to which an Advowſon is Appendant be diſſeiſed, and the Diſſeiſee doth Levy a Fine to a Stranger of the Land to which, *&c.* the Diſſeiſor ſhall keep the Land, and by Conſequence the Advowſon for ever, for the Diſſeiſee againſt his own Fine cannot claim, and the Conuſee cannot enter, the right which the Diſſeiſee had, being extinct by the Fine, 2 *Coke* 56. See *Terms of Law*, Diſſeiſor; but 1 *Croke* 484. ſeems to be to the contrary.

Alſo it is to be noted, that when it is ſaid that the Patron may have his Remedy, as well when the Church is full as when it is void; it is to be underſtood, if the Patron doth uſe his Remedy before the Uſurpation be ſo compleated, as that the Uſurper's Clerk may plead Plenarty by ſix Months, for then that Turn is gone without Recovery, *Jenkins Cent.* 3 *Caſe* 7. but when an Uſurpation is ſo compleated, and when thereupon the Patron is barred of all Remedy at Law for the Avoidance that ſhall afterwards happen, ſo that he doth thereby loſe his Advowſon for ever without Remedy, ſee *Chap.* 10 & 13. But Plenarty is not pleadable ordinarily by an Incumbent againſt the King, for that he at any time having Right, may bring his Writ, yet if a Clerk

Clerk by Inſtitution and Induction upon the preſentation of a Stranger, being become Incumbent, *de facto*, of a Church of the King's Gift, the King may by ſpecial Words confirm to ſuch Incumbent, ſo that the King cannot afterwards remove him by a *Quare Impedit*, 7 *H.* 4. 37. and by *Popham*, *Trin.* 4 *Jac. King* v. *Matthew Brownlow* and *Gouldsborough*, 1 *part* 166. and *Jenkins Cent.* 7. *Caſe* 96. which alſo ſeems to be granted, *Mich.* 13 *Jac. King*, v. *Biſhop of Norwich* & alios, *Rolls*, 1 *Rep.* 235. but it is there ſaid, that the King may preſent after the death of the Incumbent. But if the King doth preſent to a Prebend, *Ratione Temporalium Epiſcopi*, *ſede vacante*; and before Inſtitution the King doth repeal his Preſentment, and after the ſame Preſentee is Inſtituted and Inſtalled by the Guardian of the Spiritualties, altho' that the King ſhould recite that the Preſentee was canonically Inſtituted, *ex ſua Præſentatione*, and ſhould ratifie his Preſentation and Incumbency, yet the King may either preſent another, and his Admiſſion ſhall be good, or have his Remedy at Law to enforce the Admiſſion of another Preſentee, becauſe the Clerk was never in *ex Præſentatione Regis*, nor by Collation, or Inſtitution, and Induction when the Confirmation was made, and ſo the Confirmation being made of a Title when there was none, was void, *Trin.* 12 *Eliz. Dyer* 292. ſee 25 *Ed.* 3. *fol.* 47. 90. So if the King be uſurped upon, and the Uſurper's Clerk be only Inſtituted, and then the King by his Letters Patents, doth ratifie and confirm to him his Eſtate for Term of his Life: This Confirmation will not bar the King, but he may bring his Writ and remove the Clerk, by reaſon that he was not in Poſſeſſion for want of Induction when the Confirmation was had, 7 *H.* 4. *fol.* 7. vouched by *Manwood* in *Hare* and *Buckley's Caſe*, *Trin.* 20 *Eliz. C. B. Plowden* 528. So if the Clerk be Complete Incumbent by Uſurpation, and the King doth bring his *Quare Impedit*, and after the King doth Confirm the Incumbent's Title, yet if the Court doth perceive that the Confirmation ſhall be to the prejudice of the King in after-times, the Court ſhall adjudge the Confirmation void, and proceed in the *Quare Impedit*, 45 *Ed.* 3. 19. *Br. Preſentation al Egliſe* 8. *Quære.* However, the Clerk who obtains the King's Confirmation in ſuch Caſe, muſt be as well Inducted as Inſtituted, otherwiſe the Confirmation will nothing avail him, 11 *H.* 4. 7. *Br. Quare Impedit* 150.

And as the King, ſo as I ſuppoſe any common Patron may confirm the Title of an Uſurper's Clerk to bar himſelf of his Remedy to remove him, but if there be two Tenants in Common of an Advowſon, and one of them being Summoned and Severed, the other doth recover alone, he that is Severed after the Recovery, cannot Releaſe or Confirm to the Incumbent, ſo as to bar the other that recovered, by *Dodderidge*, *Haughton* and *Damport*, *Mich.* 13 *Jac. B. R. Fairbank* v. *Durham*, &c. 1 *Rolls Rep.* 244. However, he may releaſe to the Uſurper, when his Clerk is Inſtituted and Inducted, and ſo bar himſelf of all Action at Law, whereby the Uſurper's Clerk might be removed; but if divers Perſons, as Coparceners be ſeiſed of an Advowſon, and one of them doth releaſe to the Uſurper's Clerk, all Demands, Actions, and Wrongs, touching the Preſentment; this is only available to bar him that doth releaſe, and not the others, *Mich.* 39 & 40 *Eliz. C. B. The Counteſs of Northumberland's Caſe*, 5 *Coke* 97. and *Moor p.* 455. and 2 *Anderſon's* 48.

Alſo if a Preſentation be made by a Stranger to an Appropriation, upon which his Clerk is Inſtituted and alſo Inducted, yet the Patron of the Appropriation cannot have this Writ, becauſe by ſuch Induction he cannot be put out of Poſſeſſion, 44 *Ed.* 3. 33. *b. Grendon's Caſe*, *Plowd.* 500 *b.* And before the Statute of 27 of *H.* 8. of Uſes if *Ceſtuy que uſe* of a Mannor to which an Advowſon was Appendant, had preſented to the Church when it was void by the ſuffe-

ſufferance of the Feoffee; yet if he had been diſturbed, he could not have maintained this Writ, for that he had not any Eſtate in him, 17 *H.* 7. *Kell.* 42. *b.* but now he may. If one hath a Grant of an Avoidance for Years, or the like, and the Church being void, is diſturbed in Preſenting, and dies, his Executors may have a *Quare Impedit* ſpecially upon their Caſe for ſuch diſturbance, *Trin.* 31 *Eliz. Smallwood*, &c. v. *Biſhop of Litchfield*, &c. 1 *Leonard* 205. and that by equity of the Statute, 4 *Ed.* 3. *Ch.* 7. *Paſch.* 32. *Eliz. C. B. Sale* v. *the Biſhop of Coventry*, &c. 1 *Anderſon* 241. and ſhall recover Damages, *Mich.* 32 & 33 *Eliz. Smallwood* and others, v. *Biſhop of Coventrey*, &c. 3 *Croke* 241. which ſhall be Aſſets in the Hands of the Executor, *Paſch.* 31 *Eliz. Scale* v. *the Biſhop of Litchfield*, *Owen* 99. So if an Husband be ſeiſed of an Advowſon in the Right of his Wife, and the Church doth become void during the Coverture, he may have a *Quare Impedit* in his own Name as ſome hold, but the Wife ſhall have it if ſhe Survive, and the Husband if he Survive her, 1 *Inſt.* 351. *a.* but if the Church had fallen void before the Coverture, the Turn is a thing meerly in Action, and therefore the Husband ſhall not have it if he ſurvive her, 1 *Inſt.* 351. *b.* A Chapter may have this Writ againſt their Dean of their ſeveral poſſeſſions, 40 *E.* 3. 28 *b.* Generally he that will maintain this Writ muſt be able to count of ſome Seiſin or Poſſeſſion, for 'tis a Writ of Poſſeſſion, and the Preſentment is the Poſſeſſion, and he that brings it muſt be capable of alledging a Preſentment in himſelf, or in ſome other Perſon whoſe Eſtate he hath, 21 *Ed.* 4. 2. and by *Warburton Trin.* 14 *Jac. Digby* and *Fitzherbert*, *Caſe* 1. *Brownlow* and *Gouldsborough* 167. That is, that his Clerk be inſtituted at leaſt upon ſuch Preſentment, for that is ſufficient without Induction, 38 *H.* 6. 15. *b.* by *Markham*; and upon this Reaſon it is, that the Lord *Coke* ſaith, Admiſſions and Inſtitutions are the life of Advowſons, and therefore if the Patron ſuſpect that the Regiſter of the Biſhop will be negligent in the keeping of them, he may have a *Certiorari* to the Biſhop to certifie them into the Chancery, 2 *Inſt.* 358.

If a Man doth erect a Church at this day, and be diſturbed in Preſenting, it is ſaid that he cannot maintain a *Quare Impedit*, becauſe he cannot alledge any Preſentment, *Rolls Abr. part* 2. 376. *Dubitatur*, 20 *Ed.* 4. 14. *b. Contra* 21 *Ed.* 4. 3. But by *Fitz. Nat. Br.* 33. *h.* vouched in the caſe of the King againſt the Biſhop of *Worceſter*, *&c. Vaughan*, 57. he may in ſuch Caſe have a *Quare Impedit* without alledging a Preſentation by any Perſon, declaring upon the ſpecial matter, and ſo I ſuppoſe the Law is now taken to be. If a Church hath been Appropriated time out of Memory to an Abby, and then the Abby to which it was appropriated is diſſolved; this perpetual Incumbency is not a ſufficient Seiſin for the Patron, for that the Church was not preſentative, *Rolls Abr.* 2. *p.* 377. *Dubitatur*, 20 *Ed.* 4. 15. But if the King be ſeiſed of an Advowſon which hath been ever held as appropriated, he ſhall have a *Quare Impedit* without alledging any Preſentation, 17 *E.* 3. 10 *b.* 20 *E.* 4. 15. So a Preſentation unto a Prebendary, which is afterwards changed into a Treaſury, is ſufficient to maintain a *Quare Impedit* upon a diſturbance to the Treaſury, 50 *E.* 3. 26. cited in *Bevil's* Caſe, 4 *Co.* 9. *b.* But if an Advowſon be granted to one by Parliament, ſuch Perſon being diſturbed may have his *Quare Impedit*, 21 *Ed.* 4. 3. *b.* ſo if the King be Entitled to an Advowſon by Office, he ſhall have his Writ without Preſentation, 21 *Ed.* 4. 16 *H.* 7. 2. but 17 *Ed.* 3. 10. is to the contrary, for there a Preſentment is alledged and Traverſed, and the Traverſe allowed by the Court, where the King made Title by a ſeiſure by Office of the poſſeſſion of a Prior Alien, and a Preſentment alledged in the Proctor of the Prior; but it is ſaid, that if the Eſcheater ſeiſe an Advowſon upon particular Command to ſeiſe it, the King

may have a *Quare Impedit* without alledging any Preſentment, for the ſeiſure made Title without more.

If a Man doth recover in a Writ of Right of Advowſon, and hath Execution, he may have a *Quare Impedit* without alledging any Seiſin, for that the Recovery doth very ſufficiently affirm his Right, 14 *Ed.* 2. *Quare Impedit* 171. And it is ſaid that he may alledge Seiſin in the recoveree by Preſentment, but this is not traverſable, 17 *Ed.* 3. 10. *b.* So a Recovery againſt one in a *Quare Impedit*, and Damages for two Years, for that the Church was full of an Incumbent, is a good Title after in another *Quare Impedit*, without alledging any Preſentment; but in this Caſe, if he had once Preſented, and the Church full after the Recovery upon his Preſentment, this Recovery is no ſufficient Title, 42 *Ed.* 3. 8. *b.* But it is ſaid, that a Recovery in a *Quare Impedit* without alledging a Preſentment is not ſufficient, for that it may be againſt a Deforceor that claimeth nothing in the Patronage, 39 *H.* 6. 25. *b.*

But generally, he that will have this Writ, muſt alledge a Preſentment in himſelf, or in him whoſe Eſtate he hath, and ſuch Preſentment which was not before the time of Memory, for that ſuch Preſentment is not tryable, 17 *Ed.* 3. 10, 11. 14. *b.* 20 *Ed.* 4. 15. 42 *Ed.* 3. 4. *b.* but in ſuch Caſe may alledge the Preſentment to be within the memory of Man, and then it is good, becauſe the time is not traverſable, 17 *Ed.* 3. 14. *b.*

If the King be ſeiſed of a Mannor to which an Advowſon is Appendant, and the Church voiding, a ſtranger doth Uſurp, and after the King doth grant the Mannor and Advowſon in Fee to another, as he may, for that the ſaid Uſurpation doth not put the King out of Poſſeſſion, and then the Church doth void, the Grantee ſhall have his *Quare Impedit* being diſturbed, and make his Title by the laſt Preſentment of the King, without making mention of the Preſentation of the Stranger, *Hobart* 140. *Mich.* 14 *Eliz. Leonard* 3. 61. So if upon an Alienation in Mortmain of an Advowſon, if the Lord of whom it is held, at the next Avoidance, doth bring a *Quare Impedit*, it is ſufficient for him to alledge a Preſentment in his Tenant that did alien it in Mortmain, 21 *Ed.* 3. 27. *b.* So a Preſentment or Collation made by an Ordinary upon the account of a Laps is a ſufficient Seiſin for the Patron, 39 *H.* 6. 24. *b.* becauſe the Ordinary in ſuch Caſe doth Preſent or Collate as in the Right of the Patron, and the Law interprets it as done by the Patron himſelf, *Mich.* 32, 33 *Eliz. B. R. Lancaſter* v. *Lucas*, 1 *Leonard* 234. *Hob.* 154. in *Colt* and *Glover*'s Caſe. So a Preſentment in the Grantor of an Advowſon is ſufficient in a *Quare Impedit* brought by the Purchaſer, 2 *Inſtit.* 356. and if the Purchaſer be diſturbed by his Grantor, he ſhall have a *Quare Impedit* againſt him, 39 *H.* 6. *Quare Impedit*, 95 *per Cur.* and ſaid to have been very often ſo adjudged; ſo a Preſentment by the Father is ſufficient; for the Wife of the Son being Tenant in Dower of the Advowſon, and alſo for the ſecond Husband in the Right of the Wife, 14 *H.* 4. 12. So the Preſentment of the Grantee of a next Avoidance is a ſufficient Title for the Patron in Fee to have this Writ, becauſe the Preſentment of the Grantee is made in the Right and Title of the Grantor, 9 *H.* 7. 23. *Counteſs of Northumberland's Caſe*, 5 *Coke* 97. *b.* 6. But againſt this it was ſaid, that in a *Quare Impedit* the Preſentment ought always to be alledged in him who hath the abſolute Inheritance, and not in any other, for which were cited, 18 *Ed.* 3. 15. 24 *Ed.* 3. 37. 40 *Ed.* 3. 10. 43 *Ed.* 3. 4. 33 *H.* 6. 32. 7 *Ed.* 4. 20. 9 *H.* 7. 23. 16 *H.* 7. 7. In which Books it is held, that a Preſentment by a Tenant for Life, or for Years, or by a Guardian, or by a Grantee of the next Avoidance is no Title for him in Reverſion, but all the Juſtices but *Owen* held as before, and anſwered, that thoſe Books be not directly, that a Preſentment alledged

alledged in the Grantee is not good, but that where a Preſentment is alledged in the Grantor and Grantee, that the Preſentment in the Grantor is only Traverſable; for that is the Principal, and the alledging of the Preſentment in both is not double, and here the Title is not only alledged by the Preſentment, but alſo by the deſcent principally, (which note) and ſo Judgment was given, *Mich.* 38, 39 *Eliz. C. B. Fitton, and the Counteſs of Northumberland*, &c. v. *Hall* 3 *Croke* 518. & *Moo.* 455. So if a Grantee of a next Avoidance doth preſent, and after the Heir of the Grantor doth grant the next Avoidance, the ſaid Preſentment is ſufficient for the ſecond Grantee, 9 *H.* 7. 23. or if the Grantee of a next Avoidance doth preſent, and after the Grantor doth grant away the Advowſon to *A.* who doth grant it to *B.* the ſaid Preſentment is ſufficient for *B.* without alledging any Preſentment in his Grantor or *A. Dyer*, 1 & 2 of *Mary* 106. So if a Tenant for Years doth preſent during his Term, it is ſufficient for him in Reverſion, 22 *Ed.* 4 9. *b.* the like if Leſſee for Life doth preſent, 22 *Ed.* 4. 9. *b. Co.* 5. 97. *b. Co.* 6. *Brediman*'s Caſe 57. *b.* 9 *H.* 7. 23. or Tenant at Will, 22 *Ed.* 4. 9. *b.* Tenant in Dower, or by Courteſie, Tenant by Statute Merchant, Staple or Elegit, *Co.* 5. 97. *b.* or Guardian during the Wardſhip, 22 *Ed.* 4. 9. *b. Co.* 5. 97. *b.* altho' that the King be the Guardian; and ſo where a Mannor doth deſcend, and no Preſentment hath been before by the Anceſtors of the Heir who was the Purchaſer of the Mannor, 42 *Ed.* 3. 4. *b.* Alſo if the King doth preſent in the Right of his Ward, tho' the Ward hath no Right, this is an Uſurpation for the Ward, and is a ſufficient Preſentation for the King, if the Church doth void again during the Nonage, and for the Heir afterwards, 42 *Ed.* 3. 4. *Contra* 21 *Ed.* 4. 9. *b.* as to the Heir. However it is ſaid, that a Preſentation made by the Proctor of an Abbot in the Right of the Abbot, is a ſufficient Seiſin for the Abbot, 17 *Ed.* 3. 14. Admit. 60, 76. and that this Preſentment by the Proctor ſhould have been ſufficient for the King, having the poſſeſſion by reaſon of War, the Abbot being an Alien, 17 *Ed.* 3. 10. Admit 60. Adjudg. 76. ſo a Preſentment by a Biſhop as Patron is ſufficient for the King to maintain a *Quare Impedit* for an Advowſon that comes to him with the Temporalties of a Biſhoprick, 50 *Ed.* 3. 26.

CHAP. XXIII.

Writs of Quare Impedit *and* Darrein Preſentment, *how to be brought.*

HAving ſhewed of what Preferments, and for whom the Writs of *Darrein Preſentment* and *Quare Impedit* do lie; The next thing to be ſhewed, is how theſe Writs are to be brought, and in bringing of which the Plaintiff muſt be very careful; as alſo in managing his Suit in every Reſpect.

Firſt, therefore the Patron muſt ſee that his Writ be duly made out, and that in reſpect of the Latin and Form thereof, *Paſch.* 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Co.* 27. for tho' if the Writ abate upon that Account, the Plaintiff may have a new Writ, yet if ſuch new Writ may not be brought within the ſix Months, he cannot recover that Avoidance, and for that reaſon the Judges have frequently been very tender in abating Writs upon nice

Exceptions to the Form orLatin of the Writ, where the Party can have no new Writ, but ſhould remain remedileſs if the Writ brought ſhould abate, as where the Writ ſhould have been, *quæ ad donationem ſuam ſpectat*; and (*ad*) was left out thereof, yet the Writ was amended after divers motions, becauſe the ſix Months were paſt, and ſo the Preſentation ſhould otherwiſe have been loſt, *Mich.* 30 & 31 *Eliz. Rooksby*'s Caſe, 3 *Croke* 119. So a *Quare Impedit* being brought by the Queen, exception was taken to the Writ, becauſe the Words were, *Quod permittat ipſam præſentare ad Rectoriam de D.* where it ought to be *ad Eccleſiam.* The Court awarded that the Writ ſhould be openly amended in Court by a Clerk of the Chancery, *Paſch.* 37 *Eliz. C. B. Leonard* 4 *part*, *Caſe* 47. So one having Title to preſent to a Vicarage, brought his Writ of *Quare Impedit ad Præſentandum ad Eccleſiam de W.* which word *Eccleſiam* always intends Right of Advowſon of the Parſonage, but when the Title is to the Vicarage only, there is a ſpecial Writ, *ad Præſentandum ad Vicariam*, *Regiſt. Orig.* 31. *a.* ſo the Writ was miſtaken before the appearance of the Defendant the Plaintiff moved, that the Writ might be amended, and it was amended accordingly, but this amendment was made upon Special and particular Reaſons which were in the Caſe, *viz.* becauſe it was a Peremptory Action; and the ſix Months being paſt, and the Plaintiff a Purchaſer of the Advowſon, and if this Writ failed, he had loſt his Advowſon for ever, and the Miſ-priſion happened (as was made to appear) by the Clerk, who did not purſue his Direction, *Trin.* 3 *Car. C. B. Turner* v. *Palmer*, 1 *Croke* 74. but this Caſe being upon ſuch Special and particular Reaſons, is not to be depended upon in other Caſes that do not come up to the reaſon of it. See *Freeman*'s Caſe, 5 *Co.* 45. By this Caſe it ppears, that if a Patron be diſturbed to collate to a Vicarage, his Writ ſhall be, *Quod permittat præſentare ad Vicariam*, *F. N. B. fo.* 32. and 15 *Eliz. Dyer* 323. *Regiſt.* 31. and not *ad Eccleſiam*, but it is not neceſſary to ſay *ad perpetuam Vicariam*, 17 *Ed.* 3. 12. for there is no ſuch Writ: yet we find, that if the Writ be *quod permittat præſentare ad Eccleſiam*, and the Title is *ad Vicariam*, this is no Error, for that *Vicaria* is *Eccleſia*, and by the Grant *de Eccleſia*, the Advowſon paſſes, by *Coke*, to which the Courts ſeemed to aſſent, *Mich.* 13 *Jac. King* v. *the Biſhop of Norwich and others*, *Rolls* 1 *Rep.* 237.

If a Writ be brought upon a diſturbance to collate, yet it ſhall be good if it ſay *Præſentare*, 17 *Ed.* 3. 64. But if a Patron doth bring his Writ for a Chapel, the Writ ſhall not be *quod permittat præſentare ad Eccleſiam*, but *ad Capellam*, 8 *H.* 6. 32. 37. and if he hath the Right of Preſenting, his Writ ſhall be *Præſentare*, not *Nominare*, elſe it will abate, *Brownlow and Gouldsborough* 1 *part p.* 159. If the Clerk of a Donative be diſturbed, his Patron may have a *Quare Impedit*, *quod permittat ipſum præſentare ad Eccleſiam*, &c. and declare upon the ſpecial Matter, *Co. Litt.* 344. 1 *Jac. B. R. Fairchild and Gaire's Caſe*, *Rolls Abr. part* 2. *p.* 380.

If there be two ſeveral Patrons, and two ſeveral Incumbents of one and the ſame Church, ſo that the one Patron hath a diſtinct and ſeparate half of the Tythes for his Incumbent from the other Patron, and his Incumbent as it may be, *Mich.* 15 *Car. B. R. Stoughton* v. *Palmer*, *Jones* 446. 10 *Coke fo.* 136. *F. N. B.* 39. In this Caſe, both the Advowſon and the Church are ſevered in Right and Poſſeſſion, and either Patron ifdiſturbed,to preſent to his Moiety,may have a *Quare Impedit præſentare ad Medietatem Eccleſiæ*, 33 *H.* 6. 11. 1 *Inſt.* 17. *b.* 18. *a.* ſo where there are three Patrons and Parſons of one Church, *&c.* each Patron may have his *Quare Impedit præſentare ad tertiam partem Eccleſiæ*, and not *ad Medietatem Eccleſiæ*, *Vide F. N. B.* 30, 31 *Ed.* 3. *Droit* 68, 69. 22 *Aſſ. p.* 33. And ſo if one be Patron of two parts of a Church, his Writ may be

be *Præſentare ad duas partes Eccleſiæ*; but in theſe Caſes, (by *Coke*) the Patron may if he pleaſe have a *Quare Impedit præſentare ad Eccleſiam*, as well as in the other Form, becauſe upon the matter as to him it is one Church, *Trin.* 10 *Jac. C. B. Richard Smith*'s Caſe, 10 *Coke* 136. to which agreeth the Book of Entries, 477. Title, *Quare Impedit*, 6 *Ed.* 6. *Dyer* 78. *and the Lord Windſor's Caſe*, 5 *Co.* 102. But however, it is ſaid that where there be two Advowſons in one Church, the Declaration muſt be to the Moiety, or the third part, as the Caſe ſhall be, *Mich.* 15 *Jac. Windham* v. *Biſhop of Norwich*, *Brownlow and Gouldsborough*, 1 *part* 165. And according to this, when one brought a *Quare Impedit præſentare ad duas partes Eccleſiæ*, and in his Declaration made Title to the Advowſon of two parts of the Church, it was held *per Curiam*, that the Writ was good, and that the Declaration did well maintain it, becauſe that in a Church there may be ſeveral Portions to which Preſentments may be made; as one of the Firſt, another of the Second, and another of the Third Portion, *&c.* and of them there may be divers Advowſons, and he that is diſturbed may declare that he is ſeiſed of the firſt, ſecond, or third Part, as the Caſe requires. But in the principal Caſe, if the Declaration had not been that he was ſeiſed of the Advowſon of the two Parts, but according to the Writ that he was ſeiſed of the two Parts, and Preſented, the Writ and Declaration would have abated, *Paſch.* 37 *Eliz. Stanhop* v. *the Biſhop of Lincoln*, *C. B.* 2 *Anderſon* 23.

But when there is but one Incumbent of one Church, altho' that the Advowſon be divided and ſevered into ſeveral Hands, to preſent by Turns, yet there ſhall never be a *Quare Impedit præſentare ad Medietatem ſeu tertiam partem Eccleſiæ*, but *ad Eccleſiam* generally, becauſe there being but one Incumbent, one Church, and one Cure, there is not any Moiety in the Church which is the Parſons, but the ſame is entire, altho' that there be in the Advowſon, *Vide F. N. B.* 39. *f. g.* 5 *H.* 7. 8. *Trin.* 10 *Jac. C. B. Richard Smith's Caſe*, 10 *Coke* 136. 1 *Inſt.* 18. *a.* Therefore in a *Quare Impedit* brought to permit him to preſent to the Church of *A.* and declared that he was ſeiſed of a Mannor to which the Advowſon of the Church was Appendant, *viz.* to preſent thereto every firſt Turn, and that another was ſeiſed of another Mannor, to which the Advowſon was Appendant, *viz.* to preſent there to every ſecond Turn, and an Exception was taken to the Declaration, becauſe by the Writ the Plaintiff claimed the entire Advowſon, and by his Count he claimed but the firſt Turn, and alſo becauſe he did not alledge that he ought to have the firſt Turn, but the Exception was over-ruled, becauſe when in ſuch Caſe the Church is void, he to whom it appertains to Preſent, hath the entire Advowſon, *Mich* 13 *Jac. Windham* v. *the Biſhop of Norwich*, *Brownlow and Gouldsborough*, 1 *part* 165.

But if in ancient time, there have been two Patrons of one Church, and the one Patron was wont to preſent to one Moiety, and the other to the other Moiety, and after both the Moieties at two ſeveral times be appropriated to one and the ſame Church or Hoſpital, and after that is held as one entire Rectory, and certified into the Court of Firſt-Fruits as one Rectory, and then this Church is preſented to by the Appropriator, or by him that may happen to be the Impropriator thereof, as to an Entire Rectory, upon any Diſturbance which may after happen, the Writ ſhall be *Quare Impedit præſentare ad Eccleſiam*, for that then there is but one Incumbency, and one Patron of the whole Church, which I collect from *Stoughton and Palmer*'s Caſe, *Mich.* 5 *Car. B. R. Jones* 446.

As concerning the Writ of Right in theſe Caſes, it is ſaid by *Coke*, that where two Patrons do preſent two ſeveral Perſons to one Church, a Writ of Right lieth *de advocatione Medietatis Eccleſiæ*; but when the Advowſon is only

only parted betwixt two Co-partners,and one is disturbed by a Stranger,a Writ of Right lieth *de Medietatis advocationis*, *Trin.* 10 *Jac. C. B. Richard Smith's* Case, 10 *Coke* 136.

The alteration of the Church as to its Name or otherwise, doth no ways obstruct the Patron from having this Writ of *Quare Impedit* for the recovery of the Presentment, if this Writ might have formerly been brought before such Alteration made; therefore if a Patron hath presented to a Provostship, and after the Name is changed, yet the said Presentment is a sufficient seisin to maintain a *Quare Impedit* upon the new Name, 50 Ed. 3. 26. and 4 *Coke* 9. so if a Presentment hath been made to a Church Parochial, and then it is turned to a Church Collegiate, the Patron may have a *Quare Impedit* without other Presentment, or if Presentment hath been made to two Churches, and after they be United, he that is made Patron by this Union may have this Writ without other Presentment, or if Presentment be made to an Advowson, and after it be Appropriated, and a Vicarage made in the same Church, the Presentment aforesaid is sufficient to have a *Quare Impedit* for the Vicarage, without other Presentment to the Vicarage; and after a Vicarage is endowed, if the Patron doth present thereto as to a Parsonage, it is thereby a become Parsonage,and the Incumbent may be sued in a Writ of Annuity as Parson, and the Patron upon disturbance may have his Writ as to a Church, 11 *H.* 6. 18. cited, *Mich.* 4 *Jac. C. B.* Sir *Moyl Finch's Case*, 6 *Coke* 66, so if a Person be Patron of a Chapel that hath *Jura Parochialia*, and doth present thereto by the name of a Church, and the Presentees have been received thereto, as to a Church, it is no longer a Chapel but a Church, and if a Disturbance happen upon any Avoidance thereof, the Patron may have his *Quare Impedit* as to a Church, 47 *Ed.* 3. 5. *a.* cited *Mich.* 4 *Jac. C. B.* Sir *Moyle Finche's* Case, 6 *Coke* 66. and by *Dodderidge* and *Coke*, *Hill.* 12 *Jac. Church-wardens of Ashton*, v. *the Parish of Brummage*, *Rolls* 1 *Rep.* 126. and if the Defendant should plead that the same is a Chapel no Church, that matter shall be tryed by the Country and not by the Bishop, 45 E. 3. 6. 8 *H.* 6. 32. 37. It is also said, that every Chapel shall be intended to be Temporal, and not to belong to the Ordinaries Jurisdiction rather than Spiritual, and within the Ordinaries Jurisdiction, without that be made to appear, 6 *H.* 7. 14. *a.* If a Church be known by two Names, the Patron may have this Writ for the Church by either Name, tho' it hath not had both Names Time out of Mind, 21 *H.* 8. 4. And if Issue be joined, that there is no Church known by that Name in the County where the Writ is brought, yet if there be any Church in the same County known by such Name, it is sufficient to maintain that Writ, which agreeth with the Book of 41 Ed. 3. 30 *Mich.* 4 *Jac. C. B.* Sir *Moyle Finch's* Case, 6 *Coke* 66. And if two Churches be United, and the Advowsons become one, if it be known by the Name of both Churches, the Patron may maintain his Writ by one Name or the other, and need not mention both Names, as to say *Dale cum Sale*; *Coppledicke* v. *Tansy*, *Hutton* 31. neither is it requisite in a *Quare Impedit* or *Darrein Presentment* brought, to name the Saint to which the Church was Dedicated, but only to say generally, *ad Ecclesiam*, or *ad Vicariam De Dale*, as the Case shall be, because the Church is sufficiently known by that Name, *Dr. Ayry's* Case, *Hill* 11. *Jac.* 11. *Coke* 22. But if there be such a Misnosmer of the Church, that there cannot appear to be any such Church, or that it be not sufficiently differenced, so that it may be known from another Church, the Writ will abate. See for this 40 Ed. 3. 17 *Dyer* 259. *b.* In all Writs of *Quare Impedit*, the Test of the Writ ought to be made the very Day it is taken out, and not at any time before, and this by Reason of the Laps, *Regist. Orig.* 30. *a.*

CHAP.

CHAP. XXIV.

Quare Impedit *and* Darrein Preſentment; *by whom, againſt whom, and in what County to be brought; and what ſhall be ſufficient Cauſe to abate ſuch Writs.*

IN the next place, Care muſt be taken that the Writ be brought by proper Perſons, as to that Tenants in Common, and Joint-Tenants ought to join in the Writ, *Paſch.* 37 *Eliz. Stanhop* v. *the Biſhop of Lincoln, Anderſon* 2 *part.* 23. *Mich.* 24, and 25 *Eliz. William Harris* v. *Nichols,* 1 *Anderſon* 63. So if an Advowſon doth deſcend to Co-parceners, and a Stranger doth preſent, all the Co-parceners muſt joyn in the Writ, becauſe he that Uſurps gains the entire Advowſon againſt them all, but if the Writ be brought jointly by many, and they do vary in their Declaration as to the Title they make, the Writ ſhall abate, becauſe the Judgment ought to be according to the Writ, if there be not Summons and Severance; and upon divers Titles a joynt Judgment cannot be given, and they can but have one rightful Title, which muſt be intended to be jointly in them all, the Writ being brought jointly by them, *Moor* 184. 26 *H.* 8. 5. *a.* But if two Co-parceners or Joint-Tenants join in a *Quare Impedit*, and the one will plead covenouſly, he may be compelled in Chancery to join with the others in Plea, *Cary p.* 20.

If an Husband be ſeiſed of an Advowſon in the right of his Wife, the Church voiding, the Husband alone without his Wife, but in the right of his Wife, may maintain a *Quare Impedit*, *Bro. Abr. tit. Baron & Feme*, 28 & 41. for the Preſentment that is to be recovered is but a Chattel, and belongs to the Husband, and the words of the *Quare Impedit* are proper to ſerve him, for that he is hindred to preſent to a Church that is in his Gift, or he may as is ſaid by ſome Books bring an Aſſiſe of *Darrein Preſentment* without joining his Wife, in that the Preſentment alone is recoverable in the one Writ as well as the other, *Jenkin Cent.* 1. *Caſe* 1. *Hill.* 5. *Car. C. B. Dixy* v. *the Bayliffs and Burgeſſes of Derby, Hetly* 159. *Litt. Rep.* 274. 1 *Inſtit.* 351. But in *March* 47. it ſeems to be held that the Wife ought to join with her Husband, being that tho' the Preſentment belongs to the Husband, yet it is in her Right. But it is made a Doubt by ſome Books whether an Aſſiſe of *Darrein Preſentment* doth lie in ſuch Caſe for the Husband alone; for tho' it be granted that the Writ of *Quare Impedit* doth well lie, yet it is ſaid that an Aſſiſe of *Darrein Preſentment* is not maintainable by the Husband without his Wife, for that the Husband ſhall recover nothing but his Preſentation, and Damages, which is the Judgment in a *Quare Impedit*, but an Aſſiſe of *Darrein Preſentment* is a mixt Action in which the Advowſon it ſelf is to be recovered, which the Husband cannot do without his Wife joining with him, *Bro. tit.* Baron and Feme 48. 1 *Brownlow* 159. But this ſeems contrary to what is ſaid by *Coke* in *Harris* and *Auſtin*'s Caſe, 3 *Bulſt.* 38. and alſo to the Regiſter 30. *a.* and to 1 *Brownlow* 160. and to all the Books which own that a *Quare Impedit* is a Writ of a higher Nature than the Writ of *Darrein Preſentment*, *Brownlow* and *Goldsborough*, 1 *part.* 159. *Br. Abr. Baron and Feme Nu.* 28. So if a Feme Sole being an Infant Heir, be uſurped upon, and after ſhe being of Age, and Marryed, the Church doth void again, it is doubted whether the Husband alone in ſuch Caſe may bring the Action, but the Court ſeemed to think that he might, *Hill.* 5 *Car. C. B. Dixy* v. *the Bayliffs and Burgeſſes of Derby, Hetley* 159. The reaſon of the doubt in this Caſe was, the Remedy given to Infants by the Sta-

Stat. Weſtm. 2 *c.* 5. and the Wife had but a Right left in her by the Uſurpation in her Infancy before her Marriage, and ſo ought to join with her Husband to recover that Right, but if the Husband or Wife had by Preſentation reveſted the Poſſeſſion of the Advowſon in the Wife, then the Court was clear of Opinion the Husband upon any other Diſturbance might bring his Action alone without his Wife. However the Writ may be brought by Husband and Wife, when the Advowſon is the Husband's in the right of his Wife, by *Coke*, *Paſch.* 31 *Eliz. Hall's* Caſe, 7 *Coke* 26. *Trin.* 29 *Eliz. Specot* v. *Biſhop of Exeter*, *Gouldsborough* 35. *Marſh* Caſe 75.

As the Writ muſt be brought by proper Perſons, ſo that it may not abate, it muſt be brought againſt proper Perſons, and therefore when by the Judgment in a *Quare Impedit*, the Inheritance, Eſtate, or Intereſt of the Patron is to be deveſted; the Patron who preſented ought to be named in the *Quare Impedit*; Firſt, becauſe the Patronage ſhould be elſe recovered againſt him who hath nothing in the Patronage, *viz.* the Clerk, and it is not reaſon that he who is Patron ſhould be diſpoſſeſſed, and outed of his Patronage when he is a Stranger, and not party to the Action, eſpecially when he may be made a Party. Secondly, becauſe at the Common-Law (till altered by Statute 25 *Ed.* 3. *Chap.* 7.) the Incumbent could not plead the Patron's Title, or any Plea that did concern the Right of the Patronage, and therefore it is contrary to reaſon, that he ſhould be named only, that could neither defend his Patron's Right nor his own, upon which Reaſons, it is ſaid by *Coke*, that it was agreed by the Court, that the Patron in ſuch Caſe ſhall be named, *Paſch.* 31 Eliz. *C. B. Hall's* Caſe, 7 *Coke* 26. and *Savile* Caſe 184. But this Caſe reported by *Coke*, being afterwards moved, as appears, 2 *Leonard* 58. *Mich.* 32 Eliz. *C. B. Hall and the Biſhop of Bath's Caſe*. *Drew Serjeant* argued for the Plaintiff, that the Writ was well brought without naming the Patron, Firſt, becauſe the Writ ſhall not abate if the Patron Defendant die pendant the Writ. Secondly, becauſe the Plaintiff might not know who had preſented the Incumbent whom he found a Diſturber. Thirdly, becauſe if ſuch Patron muſt of neceſſity be named, ſuppoſing that he ſhould die before the Writ brought, he that hath cauſe of Action would be without Remedie, upon which reaſon, *Anderſon* and *Periam* Juſtices ſaid, that the Writ was good in ſuch Caſe without naming the Patron. And *Anderſon* put this Caſe, if one by Uſurpation preſent his Clerk who is received, and thereby having gained the Patronage, doth grant it to another, againſt whom is the Writ to be brought? *Walmſly* (who it ſeems was for the naming the Patron) ſaid againſt the Grantee. *Anderſon* doubted; but what Judgment was given is not ſaid, but the Law is commonly taken to be that the Patron ought to be named in the Writ, or it will abate. And ſo it is ſaid, *Brownlow* and *Goldsborough* 1 *part* 158. and in *Winchcomb* and *Pulleſton*'s Caſe, *Hob.* 193. And ſo it was reſolved, *Mich.* 20 *Jac. B. R.* in the caſe of Sir *George Savile*, v. *Richard Thornton*, 2 *Cro.* 651. *Palm.* 311. *Jon.* 12. *Rol.* 2 *Rep.* 239. And altho' the Patronage be gained by the Preſentation, Admiſſion and Inſtitution of a Clerk by Uſurpation, yet ſuch Patron ought to be named with the Incumbent in a *Quare Impedit*, *Jenkins Cent.* 5 *Caſe* 18. and delivered by *Frowick* for clear Law, *Trin.* 19 *H.* 7. *Kell.* 53.

But when the Inheritance, Eſtate, or Intereſt of the Patron in the Patronage ſhall not be deveſted by the Judgment, if any other be named in the Writ as a Diſturber, it is not needful to name the Rightful Patron, or he that preſented as ſuch, *Paſch.* 31 *Eliz. C. B. Hall's* Caſe, 7 *Coke* 26. Therefore where the Preſentation was only to be recovered, and not the Advowſon, nor the Patron put out of Poſſeſſion, the Writ was adjudged good without naming the Patron, 7 *H.* 4. 25. 37 *Savile's* Caſe 184: or if the King doth pre-

preſent, and his Clerk is Admitted and Inſtituted, the *Quare Impedit* muſt be brought for neceſſity againſt the Biſhop or Incumbent, for that it doth not lie againſt the King, nor did it againſt the Pope, 12 *H.* 8. 12. 4 *H.* 7. 15. &c. *Winchcomb* and *Pulleſton*'s Caſe, *Hob.* 193. and by *Frowick Trin.* 19 *H.* 7. *Kell.* 53. The ſame may be ſaid as to an Aſſiſe of *Darrein Preſentment*, 1 *Brownlow* and *Gouldsborough* 158. And as the King as Patron cannot be named in the Writ, ſo need not the King name any Patron when he ſues, but only the Incumbent; 17 *Ed.* 2. 11. *Paſch.* 31 *Eliz. C.* B. *Hall*'s Caſe, 7 *Coke* 26. *b.* yet it is ſaid that if the King claim to preſent by Laps or Simony the Patron ought to be named, altho' the Patron be only a Grantee of the next Avoidance, *The King* v. *Biſhop of Litchfield*, &c. *Noy* 151.

If the Biſhop hath collated by Laps, it is ſufficient to name the Incumbent only, 9 *H.* 6. 32. by *Babington* and *Noy* 151. So where the Defendant is Diſturber without any Preſentment, 7 *H.* 4. 26. or upon a void Preſentment, as when a Dean is preſented by the Dean and Chapter to a Living of their Gift, *Jenk. Cent.* 4 *Caſe* 18. *p.* 199. or if the Incumbent be deprived, and doth keep himſelf in. 4 Ed. 4. 18. which Caſes were cited by *Serjeant Fenner*, *Mich.* 28 & 29 Eliz. *C.* B. the *Queen* and *Middleton*'s Caſe, 1 *Leonard* 45.

When the Patron is not named in the Writ, the Incumbent may plead it in Abatement of the Writ, but the Ordinary cannot, for the Ordinary's Office and Acts are not joined with, nor do depend upon the Patron's Right, as the Incumbent's do, by *Hobart*, in Sir *William Elvis* Caſe v. *the Arch-biſhop of York*, &c. *Hobart* 317.

When ever the Patron is not named in the Writ when he ought to be, the Incumbent is to plead the ſame, if he will have any advantage of it; and if he doth not plead it, altho' the Jury doth find, that the Incumbent is of the Preſentation of one who is not party to the Writ, yet this finding of the Jury, will not avail the Incumbent, it being but of Office only, and the Incumbent not taking advantage of it by Plea hath waved it, but if ſuch Matter be pleaded, it doth not abate the Writ, but only makes it abateable, and ſuch Matter as makes a Writ abateable only, is not aſſignable for Error, *Mich.* 6 Ed. 6. *Dyer* 76. *Jenkins Cent.* 5 *Caſe* 36. So 'tis ſaid, if the Writ be brought againſt the Biſhop and Incumbent, without the Patron, the Writ is not *prima facie* void, but voidable by Plea, *viz.* of the Incumbent, and becauſe there be two Caſes, as 'tis ſaid, in which the Patron ſhall not be named, that is, if the Incumbent be preſented by the King, or by the Pope, the Incumbent ought to ſhew of whoſe Preſentation he is in, that it may appear to the Court that his Patron ought to be named, for it ſhall not be intended, but rather the contrary, and a Fault that abates the Writ *ipſo facto*, ought to be apparent to them as Judges; alſo the Party ought to conclude to the Writ, in all Caſes when he would have it to be abated, and if the Defendant ſhall ſay, that he is in *Ex Præſentatione*, *A. B.* who is in full Life, *&c.* this is not offered as any Plea in abatement, being he doth not conclude to the Writ, but pleads it as in Bar to the Action, (and by *Ley* Chief-Juſtice,) the averrment of the Life of the Patron in ſuch Caſe is ſuperfluous, and not traverſable, and by him, the naming of the Patron is not for the benefit of the Patron, but of the Incumbent, and ſo if he will not take advantage of his not being named, the Writ ſhall not be abated. And the Court agreed, that the Party having admitted the Writ to be good in the Court of Common-Pleas, by not pleading there in abatement of it, he ſhall be concluded to alledge it upon a Writ of Error brought. Alſo the Court reſolved, That the Court of Common-Pleas ought not to have abated the Writ *ex Officio* in ſuch Caſe, neither ought the King's-Bench *ex Officio* upon a Writ of Error, to reverſe the Judgment, upon an Alle-

gation of ſuch Omiſſion. And therefore they took a difference when the Writ is vitious in Subſtance, or when it appears to them thereby that the Party hath not cauſe of Action, there the Court ought to abate it *ex Officio*, but when it is abateable by collateral Matter of Fact out of the Writ, of which they cannot take notice as Judges, it ſhall be otherwiſe, if it be not pleaded, as here, if he be Patron, or if he be in Life, *Mich.* 20 *Jac.* B. *R. Thornton* v. Sir *George Savill*, *Palmer*, 311. 2 *Cro.* 651. *Jones* 12. *Rol.* 2 *Rep.* 239.

And note, That if doubt be who is Patron, a Bill may be in Chancery to diſcover him, whereby a *Quare Impedit* may be brought: Ordered, 2 *Car. Tothil* 230.

Not only the Patron, but alſo his Incumbent muſt be named in the Writ, for if an Incumbent at the time of the purchaſing the Original Writ be admitted, and Inſtituted at the Preſentation of any one, altho' the Ordinary and his Patron be named, yet ſuch Incumbent that is not mentioned ſhall not be removed, but only the Patronage recovered, by *Dodderidge* and *Coke*, *Trin.* 13 *Jac.* B. *R. Harris* v. *Auſtin Bulſtrode* 3 *part* 38. *Jenkins Cent.* 5 *Caſe.* 18 *Brownlow* and *Gouldsborough* 1 *part* 158. *Paſch.* 13 *Eliz. Hall* v. *the* Biſhop *of Bath and Wells*, *and Manton*, *Savill Caſe* 184. *Mich.* 3 *Jac.* Boſwell's *Caſe* 6 *Coke* 51. 9 *H.* 6. 32. & 56. 19 *H.* 6. 68. *b.* 5 Ed. 4. 115. and *by Hobart*, *Paſch.* 17 *Jac.* in Sir *William Elvis*'s Caſe, v. *the Arch-biſhop of York*, *Taylor* & Biſhop *Hobart* 316. And tho' a Clerk be received by the Ordinary upon a void Preſentment, in which Caſe he is in only as it were by wrongful Collation, and the Ordinary will not receive the true Patron's Clerk, ſo that he is driven to his *Quare Impedit*; yet if ſuch Incumbent be not named therein he cannot be removed, by the Opinion of the Chief-Juſtice *Hobart*, *Hill.* 17 *Jac. Gawdy* v. *the Arch-biſhop of Canterbury*, &c. *Hobart* 302. And as the Incumbent muſt be named, ſo he muſt be named with his proper Addition; therefore when the Dean of St. *Paul*'s was promoted to the Arch-biſhoprick of *Dublin*, and a *Quare Impedit* was brought againſt him as Dean, wherein he was not named Biſhop, altho' after Election, and before Conſecration, it was reſolved, that in all Caſes concerning the Lands of the Dean, he ſhall be called Dean, but in Actions as *Quare Impedit*, *&c.* he ſhall be named Biſhop Elect, 5 E. 2. *Fitz. Brief* 800.

In ſome Caſes it is neceſſary alſo to name the Ordinary in the Writ, for if the Patron be diſturbed in Preſenting, and the Church be not filled, the Ordinary is to be named in the Writ, or elſe he will Collate hanging the Suit by Laps, whereas if he be named, he muſt either diſclaim, and then Judgment may be had againſt him, or elſe he muſt plead, and ſo allow himſelf to be a Diſturber, and being made party to the Action, he is barred of the advantage of Laps, *Mic.* 3 *Jac. Lancaſter* v. *Love* 2 *Croke* 93. *Hill.* 9 *Car. Lort* v. *the Biſhop of St. David's*, *Jones* 332. *Paſch.* 17 *Jac. in Sir William Elvis's Caſe*, v. *the Arch-biſhop of York*, *Taylor and Biſhop*, *Hobart* 320. *Regiſt. fol.* 31. *and by Hobart*, *Mich.* 15 *Jac. Brickhead* v. *the Arch-biſhop of York*, *Hobart* 200. *and Jenkins Cent.* 1 *Caſe* 74. And note, that not always the Biſhop within whoſe Dioceſs the void Church is, but ſome other, may be the Ordinary that ought to be named, for in the time of the Vacancy of the Biſhop's See, or if the Biſhop be in *remotis* about the Affairs of the King, or State, then the Preſentation muſt be made to the Guardian of the Spiritualties, which commonly is the Dean and Chapter, or to the Vicar-General which ſupplyeth the Room and Place of the Biſhop, 17 *Ed.* 3. 23. *b. F. N. B.* 93. And it is ſaid, that if a Biſhop maketh a Guardian of the Spiritualties, and then go beyond the Sea for any of the Cauſes aforeſaid, and the Patron doth preſent his Clerk to the Guardian of the Spiritualties,

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in the abſence of the Biſhop, and he refuſeth to admit him into the Benefice or Church without ſufficient cauſe of ſuch his refuſal,that the Patron in ſuch Caſe may have and maintain a *Quare Impedit* againſt the Guardian of the Spiritualties, by *Paſton* and *Aſcough* Juſtices, 22 *H.* 6. 29. *b.* So if the Church be fill'd by the Biſhop upon the account of Laps, and the Patron will bring his *Quare Impedit*; the Patron muſt name the Biſhop with the Incumbent, for if the Writ be only againſt the Incumbent, altho' that he anſwer, that he doth not claim any thing in the Patronage, but that the Biſhop did preſent him by Laps, yet becauſe neither the Patron nor the Biſhop, who in this Caſe is in the place of the Patron are named, the Writ will abate, for if ſuch Writ was maintainable, every Patron by Covin between a Stranger and Incumbent, may be outed of his Advowſon, 42 *Ed.* 3. 7. and therewith agree, 9 *H.* 6. 30, 31. 3 *H.* 4. 2, 3. 13 *H.* 8. 13. vouched by *Coke*, *Paſch.* 31 *Eliz. C. B. Hall*'s Caſe, 7 *Coke* 26.

But if the Church be full, ſo that there is no danger of Laps, it is in vain to name the Ordinary, and ſo to arm him with a Plea who now can do no more hurt or good, but only to be anſwerable as to Damages, (if he be anſwerable or not, *Quære*, and ſee *Jenkins Cent.* 1. *Caſe* 19.) which the Patron and his Incumbent will be ſufficient to anſwer. And if the Biſhop be named, and doth diſclaim, it is beſt for the Plaintiff to take his Judgment, and not to maintain him a Diſturber, for if he doth, and it be found againſt the Plaintiff, *Hobart* holds, that the Biſhop's Collatee for Laps hanging the Suit, ſhall not be removed, by reaſon the Plaintiff can have no Judgment nor Writ, *non obſtante reclamatione Epiſcopi*, he being barred as againſt the Biſhop. And *Hobart* further adviſeth a Plaintiff, not to name more Diſturbers in his Writ than are likely to have reaſonable Titles, becauſe every Diſturber will make a ſeveral Title, and Traverſe, or Confeſs and avoid the Plaintiff's Title, whether he himſelf hath good Title or not, and ſo 'tis better not to name them, for they can but Preſent and get their Clerks in hanging the Suit, which will be removed by a Writ to the Biſhop, if their Titles be not good, but ſuch as have reaſonable Pretents of a Title are fit to be named, that their Titles may be diſcuſſed directly at the miſe of the Parties, and not left to an After-game, *viz.* the Title to be tryed between the Incumbent that comes in hanging the Writ, and the Clerk that is admitted upon the Writ to the Biſhop, whom the Biſhop may not refuſe upon account of the Churches being full of the other, (but *Quære* as to that) Sir *William Elvis*'s Caſe, v. *the Arch-biſhop of York, Tayler and Biſhop, Hobart* 320.

But as to the naming of the Biſhop in the Writ, to prevent his having the advantage of a Laps, it may be ſaid, that it is not, or at leaſt not generally true, that the bringing of the Writ againſt the Biſhop, ſhall prevent him from Collating, or prevent the Laps, for if a *Quare Impedit* be brought againſt a Biſhop for a Diſturbance, and the Plaintiff doth lay in his Count, the Diſturbance to be after the date of the Writ, he ſhall be barred, and the Biſhop may collate when his time by Laps comes, *Mich.* 15 *Jac. Brickhead* v. *the Arch-biſhop of York, Hobart* 199. And ſo I ſuppoſe he may in all Caſes, when the Plaintiff is barred by his Plea. And *Hobart* puts another Caſe, in which the Biſhop tho' named in the Writ may collate by Laps, *Pendente lite*, and his Clerk ſhall enjoy the Benefice,which I ſhall ſet down with his Reaſons in his own Words.

Suppoſe (ſaith he) that I have Right to preſent to an Advowſon, but I Preſent not, nor am any way diſturbed, but the Church remains void and open to me, but before the ſix Months incurred or before Collation made by the Ordinary, I bring a *Quare Impedit* againſt him, whether now the Or-

dinary be debarred of preſenting by Laps hanging the Writ; I am of Opinion that he is not debarred. And firſt, it were a Caſe full of Miſchief, that the Ordinary, bearing himſelf never ſo juſtly, and ſincerely, ſhould againſt Law and Reaſon be ſubject to cauſeleſs Actions, and Charges, and defrauded of his due Laps, and the Church kept void, *Eccleſia viduata*, by the Fraud of the Patron, by a fraudulent Action as long as he liſt. For if he brought no Action, the Laps ſhould run, and now by bringing of a feigned Action he ſhall ſtop the Laps in the Ordinary, and by conſequence, it will not come to the Metropolitan, nor to the King. But to examine the Reaſon and Authorities.

Can there be any thing more unreaſonable, than that a Man ſhould make Benefit of an unjuſt Suit, as in this Caſe, the Plaintiff ſhould, or be puniſhed doing nothing amiſs or againſt his Office, as the Defendant ſhould. But you will ſay to me, it is an effect of Law, and *Executio juris non habet injuriam*; for when the Biſhop comes in, he is charged by the Declaration with the Diſturbance, which if he doth not avoid, he ſhall be taken as a Diſturber, and then indeed he cannot Collate, or his Collatee ſhall be removed; therefore when he doth appear he doth but caſt an Eſſoine, and tho' that do not make him a Diſturber to maintain the Writ, becauſe it is after the Writ, yet it faſtneth upon him the charge of the Diſturbance laid in the Declaration, ſo that he ſhall not be received after that to plead, *ne diſturba pas*, or the ordinary Plea which amounts to as much, for that Plea pretending Innocency, muſt (as all other the like Pleas) be offered the firſt day upon the Appearance, for delay makes him *nocent*, and ſo is *oppoſitum in objecto*. Then again, if the Ordinary plead his own Plea of Acquittal, amounting to *Ne diſturba pas*, the Plaintiff may pray a Writ to the Biſhop, and ſo remove his Clerk, becauſe, he comes in hanging the Writ, and thus it is a *Dilemma* made by Law, and not by Fraud of the Party; and the Rule in the Regiſter *fol.* 31. is ſo, That if the Dioceſan be named Defendant in the *Quare Impedit*, he ſhall never preſent by Laps.

To this I anſwer ſays he, that if the Biſhop do not plead according to his Innocency, that the Proceedings ſhall be againſt him, and the Conſequence of it as againſt a Diſturber; but if he plead that he did not Diſturb, which is true, it ſhall be taken according to the Caſe, that he did not diſturb before the Action brought, neither unlawfully, nor by lawful Collation; but it can never be underſtood to deny or renounce any actual Collation ſince, for if he ſhould plead that, it were in vain, and to no purpoſe, as hath been ſaid. Now then if he did not diſturb before the Writ purchaſed, and therefore hath not deſpoiled himſelf of his Right of Collation in its due time, and then Collates by Laps lawfully when his time comes, when the Patron hath wilfully and without his Fault furceaſt his time, and then pleads that he claims nothing but as Ordinary, *&c.* without mentioning his Collation hanging the Writ, becauſe it is impertinent, (as it hath been ſaid) neither indeed (ſays he) do I ſee how he can be received to plead it, no not by the way of ſaving it by Proteſtation, as upon Attornment to ſave priviledge of Waſte. But certainly it is not neceſſary; tho' upon ſuch Plea the Plaintiff may have a Writ to the Biſhop, he may perhaps be compellable to admit the Clerk of the Plaintiff in Obedience to the Writ, but yet it ſhall not work a removal of the Biſhop's Clerk, but he ſhall retain the Benefice as having the better Right, like unto the Caſe and Reaſon where *A.* brings a *Quare Impedit* againſt *B.* and hanging the Suit a Stranger preſents, and his Clerk is Inſtituted, *&c.* And then *A.* hath a Judgment againſt *B.* and a Writ to the Biſhop, *Non obſtante Reclamatione B.* the Biſhop ſhall receive the Clerk of *A.* without diſputing of the Right of *A.* and the Stranger, but yet if the Stranger hath the better

Right

Right to the Patronage, his Clerk ſhall retain the Benefice, and ſo *e converſo.*

Note that the Writ to the Biſhop in this Caſe, ſhall not be with the Clauſe of *Non Obſtante Reclamatione Epiſcopi*, for he makes no claim, as in the Caſe of Diſturber, who ſets up a Title and pretence of Right. Beſides, the Ordinary's Plea neither makes the Patron's Title better, nor his own worſe than are proper to them both, and as they were before, neither doth he thereby diſclaim any Right he hath as Ordinary.

But now I put another Caſe (ſays he) if my Church become void, and I preſent to the Biſhop, and ſo alſo doth another Perſon that hath no Right, in which Caſe, the Biſhop, tho' he may receive at his Peril, yet doth (as he may lawfully do) refuſe to receive either till the Right be enquired, without doing himſelf any Act of Diſturbance. In this Caſe, if the true Patron do bring his *Quare Impedit* againſt the Diſturber only, then the Biſhop may Collate by Laps without queſtion; but in that Caſe, if the true Patron name the Biſhop a Defendant together with the Diſturber, and then the Biſhop comes in and Pleads, that he claims nothing but as Ordinary, *&c.* and the Plaintiff hath an award of a Writ to the Biſhop, with a *Ceſſet Executio*, &c. and then recovers againſt the Diſturber, and the Biſhop in the mean time Collates by Laps, in that Caſe, perhaps the Biſhop's Clerk may be removed, for it differs much from the former Caſe, for here was a true and not a feigned Diſturbance, whereunto the Ordinary gave way ſo far, that the Plaintiff could not get his Clerk received, but was driven to his *Quare Impedit*, for if he had proceeded to his *Jure Patronatus* without *Quare Impedit*, and the time had incurred, the Biſhop might have Preſented to Laps Remedileſs; and therefore ſince he did his Endeavour to Preſent, and was interrupted by a Stranger, and the Ordinary alſo refuſed his Clerk, for which he had rather have an Excuſe than a Juſtification, and now both being made Defendants, and the Plaintiff's Title is approved againſt them both, as if it had been ſo from the Beginning; it ſhould be hard that the Biſhop ſhould make advantage of his refuſal, which now appears to have been againſt Right, and the Party to the Suit, and there is alſo this Note made in the Margin of the Book, *viz.* that it is not ſo much the Preſentation of the Diſturber, as the Biſhop's refuſal of the Patron's Clerk that Preſents, which intitles him to his *Quare Impedit.* And therefore it is enough for a Biſhop to eſcape the charge of a Diſturber, and not alſo to make Advantage of a Laps cauſed by himſelf, *Mich.* 15 *Jac. Brickhead* v. *the Arch-biſhop of York*, *Hobart* 200, 201.

But as to this latter Caſe put by *Hobart*, I cannot but think that the Biſhop ought to have the Turn by Laps, altho' that he be named in the Writ, notwithſtanding he did Admit and Inſtitute the Clerk of the Plaintiff after the Church was become Litigious, that is, if he was not a Diſturber by any other Act.

For firſt it is granted, that in ſuch Caſe it is the Biſhop's Duty to refuſe both Clerks until the Right be determined: Alſo it is granted, that the Biſhop is not bound of Office to enquire of the Right by awarding a *Jure Patronatus*, but at the Prayer of the Party (which I ſuppoſe not to be made) ſo that the Biſhop before that he is named in the Writ is altogether as Innocent, as if no Preſentment had been made to him before the Writ was brought. Thirdly, it is granted, that if the Biſhop be no Diſturber he ſhall have the benefit of a Laps if it falls. Fourthly, it is granted, that in this Caſe, if the Biſhop be not named in the Writ, he may Collate at the end of ſix Months. And I cannot ſee why in this Caſe, the making of him a party in the Writ ſhould make him a Diſturber that was none before, more than the bringing the

Action

Action before any Preſentment was made ſhall faſten a wrong upon the Biſhop who is named therein And I ſuppoſe that the Biſhop's Plea, that he claims nothing but as Ordinary cannot be conſtrued to diſclaim his Right as Ordinary, *viz.* his Laps when it falls to him, ſo that his Collatee may not defend himſelf againſt him whom perhaps the Biſhop may be forced to admit upon him; and with this, *Hobart* accords in the former Caſe, and why then may it not be as well allowed in the latter?

But *Hobart* ſaith that the Caſes differ; Firſt, in that in the latter Caſe, there is not a feigned but a real Diſturbance, whereunto the Ordinary gave way ſo far that the Patron could not get his Clerk received. To which I anſwer, that 'tis true, here is a real Diſturbance, but the Biſhop makes it not, neither doth he further give way to it than by Law he is bound to do, neither doth the Biſhop by ſuſpending any Admiſſion hinder the Patron's Clerk from being Admitted; for the Biſhop may be required to award a *Jure Patronatus*, which if he doth refuſe he may be ſued, and maintained to be a Diſturber, and ſhall not have the Advantage of Laps. And tho' it be ſaid by *Hobart*, that if the Patron doth proceed to a *Jure Patronatus*, and the time doth incur, the Biſhop will Collate Remedyleſs. I Anſwer, if the time doth incur through the Biſhop's Fault by delaying, he ſeems to be a Diſturber, even as if he had refuſed to award the *Jure Patronatus*. And if the Patron (who hath ſix Months allowed him in which he may preſent) doth not preſent ſo ſeaſonably that he may have the advantage which the Law doth give him by the *Jure Patronatus*, it is his own Fault, and he is no more to be thought worthy of Relief by this device of naming the Biſhop in the Writ, than if he ſhould ſuſpend preſenting until ſuch time that the ſix Months are ſo near at an end that the Biſhop hath not time to examine his Clerk before they paſs, in which Caſe the Biſhop may juſtifie his Collating by Laps. So that the Patron is not without his Remedy whereby he may ſave his Intereſt, unleſs it be through his own Neglect, although he ſhould not bring his *Quare Impedit* firſt, for if he be not ſatisfy'd with the Verdict given upon an Enquiry by a *Jure Patronatus*, upon which his Adverſary's Clerk is admitted, which prevents a Laps, he may have afterwards a *Quare Impedit*, and remove ſuch Clerk and have his Preſentment. Beſides the Patron is in as good a Caſe now, if the naming of the Biſhop in the Writ will not hinder the Laps, as Patrons were before ſuch Courſe was in Practice: And *Jenkins* ſaith that at this time, *viz.* in *Edward* the Sixth's Time, Biſhops were rarely made Parties in *Quare Impedits*, in Reverence of their Perſons, *Cent.* 5 *Caſe* 36. *Page* 39 And that the practice of making them Parties is not ancient, appears by the Statute of *Weſt.* 2. *Ch.* 5. made the Thirteenth Year of *Edward* the Firſt; by which it is Enacted, **That in Writs of** Quare Impedit **and** Darrein Preſentment, **Damages ſhall be awarded; that is to wit, if the time of ſix Months paſs by the Diſturbance of any, ſo that the Biſhop do confer to the Church, and the very Patron loſeth his Preſentation for that time, Damages ſhall be awarded for two Years value of the Church. And if the ſix Months be not paſſed, but the Preſentment be deraigned within the ſaid time, then Damages ſhall be awarded to the half Years value of the Church.**

Now if ſuch Practice had been then known, or had been thought ſufficient to have prevented the Biſhop from having the Benefit of a Laps, in caſe the Preſentment was not recovered within the ſix Months, why ſhould two years value of the Church be given to recompence the loſs of the Turn by Laps, which would not be but only through the Patron's neglect to name the Biſhop, if that would ſerve to prevent him; for if that the putting the Biſhop's Name in the Writ would hinder the Biſhop of Laps, the Parliaments

ments giving of two Years value of the Church as Damages, was altogether uſeleſs and vain, and little Reaſon or Need could there be to inſert that Clauſe in the Statute that gives the two Years value in Damages, if this Practice was then known, or ſuppoſed to have that effect in Law that now it is taken, and ſuppoſed to have *viz.* that naming the Biſhop in the Writ will hinder the loſs of the Preſentment by Laps, and the Benefit of the double value of the Church is thereby waved, as it were by the Plaintiff. If it be ſaid that the Law was anciently ſo, but not the Practice in Reverence to the Perſons of Biſhops. I Reply, that this ſpeaks that all Patrons when their Church became Litigious, did in thoſe days, *viz.* before the Statute, and at that time loſe their Preſentments, and only becauſe they would not make Biſhops Parties in *Quare Impedits* out of Reverence to them, and that they ſhould ſo do, is as incredible as may be, eſpecially before this Statute for Damages was made, by which the Miſchief of loſing the Turn by Laps is repaired. And with this Opinion the Author of the Expoſition of the *Terms of Law* doth agree, where he ſaith upon the Term *Quare Impedit.* If the Plea be depending between two Parties, and be not diſcuſſed within ſix Months, then the Biſhop may preſent by Laps, and he that hath Right to preſent may recover his Damages, as appeareth by the Statute of *Weſt.* 2. *Ch.* 5. And the Arch-biſhop of *Canterbury* putting this Caſe to *Frowick* Chief-Juſtice in theſe Words, Whether he that hath nothing offended in the Law of the Land ſhall be puniſhed, or compelled to do a thing in Derogation of his own Right and Liberty, as he may that is party to a wrong. It is ſaid by the Reporter *Keilway*, it ſeems that he ought to be at his Liberty to make Collation, notwithſtanding the Iſſue be found for the Plaintiff; yet he ſets down no Reſolution by *Frowick*, but a *Quære*, *Mich.* 20 *H.* 7. *Keil.* 57. *b.*

And I ſee no reaſon why it ſhould be thought hard againſt the Patron, if the Biſhop may not be hindred from collating by being made a Party to the Writ, if the Preſentment be not recovered within the ſix Months, ſeeing that if he doth not recover within ſuch time by the Diſturbance of any, ſo that the Biſhop doth confer to the Church, and the very Patron loſeth his Preſentation; as the words of the Statute are, the Patron ſhall have two Years value of the Church. And in truth it is much better for Patrons, if the naming of the Biſhops in the Writs doth not hinder a Laps, or if it doth hinder, that they do not name them in the Caſe put, for thereby they loſe in Damages ſo much as would go far at leaſt in the repaying them the Expences of a tedious and coſtly Suit. And then alſo Diſturbers of Patrons and Law Suits thereupon would not be ſo frequently heard of, nor Churches be kept void, when the Right of Preſenting is queſtioned for ſome Years, as upon the ſuppoſition that the naming the Biſhop in the Writ will in ſuch Caſe ſtop him from Collating, they needs muſt do; to avoid which, by the Statute of *Weſt.* 2. *Ch.* 5. the Parliament did not take away, but ſeems to ſuppoſe the Biſhop's Power of Collating, if the Recovery was not within the ſix Months, but gave Damages to the Patron for the Loſs.

To all this I may add, that I never yet found any Caſe in which it hath been judicially Determined, that to make the Biſhop a Defendant in a *Quare Impedit* when the Church is Litigious, doth obſtruct his Title to Collate; yet becauſe ſome have been of that Opinion, as *Hobart* before, and 2 *Croke* 93. *Mich.* 3 *Jac. in Lancaſter and Lowes Caſe, and Jenkins Cent.* 1 *Caſe* 74. And becauſe Biſhops in ſuch Caſe having executed the Writs of them that have recovered, and their Incumbents have ſet down by it, ſo it is even commonly received, that the Biſhop's Collatee is actually removed by the Reception of the Patron's Clerk. and in the 49 E. 3. 15. *a.* 'tis there ſaid, where the Biſhop is found to be a Di-

Diſturber he ſhall never have advantage of Laps, which doth imply, that barely making him a Defendant without proving him guilty of ſome Diſturbance will not prevent it, for the Biſhop was a Defendant in that Caſe of 49 E. 3. And in the 17 E. 3. 71. there is an Opinion which is ſaid to be held by ſome, that if in a *Quare Impedit* the Plaintiff was Eſſoined, and did not after that recover till after the ſix Months were paſſed and the Biſhop had Preſented, that he ſhould recover only the Half Years value, by reaſon he had delayed his Recovery himſelf by being Eſſoined; but this Opinion is there denyed, and it is holden, that the Plaintiff ſhall not ſuffer for uſing an Eſſoin, but may recover his Two Years value notwithſtanding; this Caſe alſo ſhews that the Practice of making the Biſhop a Party was not then known, or at leaſt uſed, for 'tis taken for granted, that after ſix Months the Biſhop may preſent, but if making him Party would prevent his Preſentation according to the Opinion there recited, the Plaintiff in no Caſe ought to recover the two Years value, for it would be his Fault not to make the Biſhop a Party to prevent it.

That a Writ may not abate, not only proper Perſons muſt be named therein, but the Writ muſt be brought in a proper Place; for 'tis ſaid that Writs of *Quare Impedit* and *Quare Incumbravit* ſhall be always brought where the Church is, 38 *H.* 6. 14. *Vide*, 4 *Ed.* 3. 9. otherwiſe it is in the King's Caſe: And ſo for an Advowſon in *Wales* the Writ ſhall be brought in the next Engliſh County, for they cannot award a Writ to the Biſhop, 11 *H.* 6. 3. and Judgment in ſuch Caſe ſhall be given in the Action at the Aſſiſes where 'tis tryed, and Deceit lies as upon a Judgment had in this Action upon default if no Summons was made, *Brownlow* & *Gouldsborough* 1 *part* 160. And ſo 'tis ſaid that the Writ may not be brought before the Juſtices of the Grand Seſſions, *Hill.* 9 *Car. B.R. Cort* v. *the Biſhop of St. David's*, *Owen and Pritchard*, 1 *Croke* 341. and 348. But *Vaughan* Chief-Juſtice makes a difference between Churches in Lordſhips Marchers of *Wales*, and Churches within the ancient Shires, or of the Principality of *Wales*. In the firſt Caſe he agrees the Law to be, that for ſuch Churches the *Quare Impedit* was to be brought in the next Engliſh County, but of Churches of the ancient Shires or of the Principality, they were to be brought in *Wales*, and that the King's Juſticiar there had Power within the County where he was Juſticiar, to write to the Biſhops, which the Lords Marchers could not do, *Vaughan* 410, 411.

But a *Quare non admiſit* ſhall be brought in the County where the refuſal was, and not in the County where the Church is, becauſe Damages are only to be recovered, and the refuſal is the beginning of the wrong, and the ground of the Action, 38 *H.* 6. 14. *F. N. B.* 47. *f.* And a *Quare Impedit* of a Prebend ſhall be brought in the County where the Cathedral Church is, and not in the County where the Body of the Prebend is, becauſe the Plaintiff's Clerk is to be Inſtituted and Inſtalled in the Cathedral, 21 *Ed.* 3. 5. 2 *Eliz. Dyer* 194. but 43 *Ed.* 3. *fol.* 1. 34. 15 *Ed.* 3. *Br.* 325. ſeem contrary, *Vide* 27 *Ed.* 3. 37. And ſo the Law is well explained in a Caſe in which there were different Opinions in our Books, ſaith (*Coke*) *Mich.* 26 & 27 Eliz *Bulwer*'s Caſe, 7 *Croke* 3. And if a Grant be made of a next Avoidance in one County, and the Church doth lie in another County, by (*Fenner*) the Tryal may be either where the Grant was made, or where the Church is. *Williams*, *Fenner* & *Coke* clear of Opinion that the Tryal where the Church lay was good, and the Iſſue well tryed, to which *Yelverton* at length aſſented, and ſo the former Judgment was affirmed, *Mich.* 8 *Jac. B. R. Biſhop of London and Baldwin's Caſe*, v. *Drew* 1 *Bulſtr.* 47. And note that ſuch Writs cannot be brought within any Liberty, becauſe they that

that hold Plea in a Franchiſe cannot award a Writ to the Biſhop, 11 *H.* 6. 3.

Tho' the Writ be well brought, yet it may abate upon other Accounts; for if the Plaintiff be made a Knight hanging the Writ, it is an abatement of the Writ, *Paſch.* 40 Eliz. Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. and 6 *Coke* 10. *b.* becauſe he is at his Election, whether he will take this Degree or not, *Jenkins Cent.* 2. *Caſe* 85. But if the Son and Heir apparent of an Earl bring any Writ, and his Father dies *pendent* the ſame, the Writ ſhall not abate, becauſe 'tis by the Act of God, 31 *H.* 6. 29. So if one hath Right to Preſent, and being diſturbed doth Die, and then his Executor doth bring his Writ againſt the Diſturber, *Quod permittat ipſum Præſentare ad Eccleſiam jam Vacantem, & ad Præſentationem teſtatoris in vita ſua, & nunc in retardationem Executionis teſtamenti*, the Writ will abate, becauſe a Diſturbance to the Teſtator cannot be ſuppoſed as a new Matter in *retardationem executionis Teſtamenti*, as where Goods were taken out of the Poſſeſſion of the Teſtator, upon which the Executors brought Treſpaſs, *in retardationem Executionis Teſtamenti*, the Writ abated. But if the Executors be diſturbed in preſenting to a void Turn, they may well ſay *in retardationem Executionis Teſtamenti*; and the Damages they recover ſhall be Aſſets in their Hands, *Trin.* 31 Eliz. *C. B. Smallwood*, &c. v. *the Biſhop of Litchfield*, 1 *Leonard* 205.

So when a Writ of Right of Advowſon was brought againſt Coparceners, one of them dying, it was adjudged without Argument, that the Writ ſhould abate being a real Action; and the like Law is if they had been Joint-Tenants, *&c. Hill.* 15 *Car. B. R. the King* v. *Sir John Dridon*, &c. 1 *Croke* 511. 574. Yet *Coke* ſaith, that a *Quare Impedit* well brought by Divers as Coparceners, or Joint-Tenants, *&c.* ſhall not abate by the Death of one of them, nor a *Quare Impedit* brought by the Husband and Wife, ſhall not abate by the Death of the Wife, becauſe that otherwiſe the Plaintiff (if the ſix Months be paſt) ſhall be without Remedy; for which he Cites *F. N. B.* 35. *b.* 38 Ed. 3. 43. 37 *H.* 6. 11. 7 *H.* 4. 19. 14 *H.* 4. 12. 9 *H.* 6. 30. 37. 1 *H.* 5. 1. 13. 17 Ed. 3. 11. 17 Ed. 3. 304. *Hall*'s Caſe, *Paſch.* 31 Eliz. *C. B.* 7 *Coke* 26. and ſo by *Brownlow* & *Gouldsborough*, 1 *part* 158. The ſame Law if one of the Defendants doth die *pendent* the Writ, for it abates not thereby *Brownlow* and *Goldsborough* 1 *part* 158. So if divers Coparceners do join in a *Quare Impedit*, and one of them after the laſt Continuance doth releaſe all Actions, Wrongs, *&c.* to the Incumbent concerning the Preſentment, this is no abatement of the Writ, but Summons and Severance ſhall be awarded upon the Default of him that releaſes, and the other ſhall be admitted to proceed alone, and the Defendants adjudged to anſwer, *Trin.* 38 Eliz. *Counteſs of Northumberland's Caſe*, *Moor* 455. *Rolls Abr.* 2. 411. for it is not reaſon that the Releaſe of one of them (tho' it bars him that makes it) ſhould bar the reſt, no more then his non-appearance, in which Caſe he ſhall be alſo Summoned, and Severed, and the other ſhall proceed, *Hill.* 38 Eliz. *Thomas Cecill, William Cornwallis* and *Elizabeth Danvers*, v. *Hall* &c. *C. B. Anderſon*, 2 *part* 48. the ſame Caſe, 5 *Coke* 97. and in *Moor* 455. by the Name of the Counteſs of *Northumberland's Caſe. b. Vide*, 45 Ed. 3. 10.

In like manner if a *Quare Impedit* be brought againſt the Patron and Incumbent, and the Patron doth die *Pendent* the Writ, the Death of the Patron ſhall not abate the Writ, 9 *H.* 6. 31. For there are two Miſchiefs, one if the Writ ſhall abate, the Diſturbance ſhall be unpuniſhed; and altho' the Writ was well brought, yet the Plaintiff, and only by the Act of God ſhall be without Remedy, becauſe there wanteth a Diſturber; and the Miſchief on the other part is, if the Writ ſhall not abate, but the Plaintiff ſhall proceed to

Judgment, and Execution, the very Patron ſhall be put out of Poſſeſſion; and foraſmuch as in the one Caſe, if the Rightful Patron ſhall be out of Poſſeſſion, he hath Remedy by a Writ of Right to recontinue the Advowſon; and in the other Caſe, if the Writ ſhall abate, the Plaintiff ſhall be without Remedy, which is the greater Miſchief, wherefore the Writ ſhall ſtand good, and therewith agree, 7 *H.* 4. 26. *b.* 13 *H.* 8. 13. 9 H. 6. 57. 9 H. 6. 31. Cited by *Coke*, *Paſch.* 1 Eliz. *C. B.* 7 *Coke* 26. *b.*

But altho' it be granted that the Writ doth not abate by the Death of the Patron *Pendent* the Writ, yet when Judgment was given againſt ſuch Patron after his Death; upon a Writ of Error brought by his Son, as Heir, and Executor, with the Biſhop, and Incumbent, who were Severed, it is clearly held that this was a manifeſt Error, *viz.* the giving of Judgment againſt the Patron after his Death, and ſhall cauſe the Judgment to be reverſed in all, for it cannot be reverſed by Parcels, *Paſch.* 36 Eliz. B. R. *Pipe* v. *the Queen*, 3 *Croke* 324. I ſuppoſe the reaſon of this Caſe to be, that altho' the Writ did not abate by the Death of one Defendant in the Action, yet the Judgment is to be given againſt thoſe that are living only, and not againſt a dead Perſon.

So if the Incumbent hanging the Writ doth die, and the Diſturber doth preſent again and then dies, a *Quare Impedit* or an Aſſiſe of *Darrein Preſentment*, according as the Caſe is, lies by *Journies* Accounts upon the firſt Diſturbance, *Brownlow* & *Gouldsborough* 1 *part* 160. *F. N. B.* 32. That is, the firſt Writ being abated without the default of the Plaintiff; if he purchaſe a new Writ within a convenient time after the abatement of the firſt Writ, it is ſaid to be by *Journies* Accounts, and then the ſecond Writ ſhall be as a Continuance of the firſt, and ſhall out the Defendant of any Plea which ariſes upon matter happening after the date of the firſt Writ; and fifteen Days have been held a convenient time for the Purchaſe of the new Writ, *Terms of Law*, *Journies Accounts*, *fol.* 191. 6 *Coke*. 10 *Spencer*'s Caſe. But if the Plaintiff be Non-ſuit in a *Quare Impedit* after Title made, this is a good Barr in another *Quare Impedit*, 22 *H.* 6. 45. 7 *Coke* 27. *b.* Alſo if a Writ be well brought againſt a Biſhop for refuſing a Clerk (for ſo the Caſe ſeems to be) and *Pendant* the ſame, the Arch-biſhop after Admonition to the Biſhop to receive the Clerk, or to appear, who doth neither, doth Inſtitute the Clerk, and cauſe him to be Inducted, if upon an Endeavour in the Eccleſiaſtical Court to void the Inſtitution, and Induction, a Prohibition be prayed; if in the Surmiſe that the Church is full of his Preſentment, mention be made of the *Quare Impedit*, it muſt abate by the Patron's own ſhewing, and therefore the Surmiſe in ſuch Caſe muſt be, that the Church is full of his Preſentment, without mention of the *Quare Impedit*, *Hutton's Caſe*, *Hobart* 15. But *Quære*, how this Caſe is to be underſtood, *viz.* how a Surmiſe to have a Prohibition can abate a *Quare Impedit* depending. And *Quære*, whether in this Caſe the Clerk was admitted *Pendente* the *Quare Impedit*, or before the Writ was brought, for tho' it be granted, that he whoſe Clerk is in the Church, cannot afterwards bring his *Quare Impedit*, but it will be abateable if he do, 12 *H.* 4. 11 & 13 *H.* 4. 7. See 7 *H.* 6. 4. 34, 36. Yet if the Defendant doth plead, that the Plaintiff hath filled the Church *Pendent* the Writ, and the Plaintiff doth demur, which is a Confeſſion thereof, yet the Writ ſhall not abate, but the Plaintiff ſhall have Judgment, becauſe the Defendant doth neither gainſay the Diſturbance nor Right of the Patron, 11 *R.* 2. *Quare Impedit* 144. *F. N. B.* 35. 7 *H.* 4. 34. 36. *Hobart* 194. But 4 E. 4. 18. is to the contrary.

CHAP.

CHAP. XXV.

Declarations in Quare Impedit, *&c. in what manner to be Framed and what ought to be alledged therein.*

THE Plaintiff having duly brought his Writ, muſt in the next place be careful that he doth ſufficiently Entitle himſelf in his Declaration, otherwiſe he will be barred, 31 *H.* 6. 15. For if the Declaration be not good, altho' that the Plea in Bar be bad, the Plaintiff ſhall be barred, by *Jones* in *Standen's Caſe, and the Univerſity of Oxon*, &c. *Hill.* 20 *Jac. C. B. Jones* 18.

Firſt, therefore he muſt in his Declaration Entitle himſelf to the Advowſon, by alledging ſome Preſentment in himſelf, or ſome other whoſe Eſtate he hath, *Brownlow* & *Gouldsborough*, 1 *part* 160. For if a Plaintiff doth only Entitle himſelf to Preſent by the Grant of a next Avoidance, without alledging any Preſentment in himſelf, or any other under whom he claims, by *Winch*, *Hutton* and *Hobart* he ſhall be barred, *Mich.* 22 *Jac. B. R. Woodly* v. *the Biſhop of Exeter*, *Manwaring* & *Edwards*, 2 *Croke* 691. *Trin*, 21 *Car.* 2. *C. B. The King* v. *Robert*, *Biſhop of Worceſter*, *Vaughan* 57. But what Preſentment is to be alledged as ſufficient to Entitle the Plaintiff, is declared before, *Chap.* 22 & 23.

If a common Perſon doth bring a *Quare Impedit*, and counts upon a Title to preſent, and that he is diſturbed, and the Defendant to counterplead the Plaintiff's Title, makes as he muſt, a Title to himſelf, and Confeſſes and Avoids, or Traverſeth the Plaintiff's Title; after this, the Plaintiff ſhall never deſert his own Title, and by falling upon, and controverting the weakneſs only of the Defendant's Title, ever recover or obtain a Writ to the Biſhop, tho' the Defendant's Title doth not appear to the Court to be ſufficient, for it by no means follows, that the Plaintiff hath a good Title, becauſe it appears that the Defendant hath not, *Trin.* 21 *Car.* 2. *C. B. The King* v. *Robert*, *Biſhop of Worceſter*, *Vaughan* 58. *and by Hobart in Colt and Glover's Caſe*, *Hobart* 162. And if the King hath preſented by reaſon of Laps, or the Temporalties of a Biſhop in his Hands, Out-lawry, *&c.* And when the Church ſhall void again, brings a *Quare Impedit*, and counts that he was ſeiſed of the Advowſon as in Groſs, and Preſented, and then the true Patron ſhall confeſs his Preſentation, and avoid it by ſhewing upon what Account he Preſented at a former Avoidance, as only upon the Title of Laps, *&c.* The King ſhall not deſert his Title, and by ſhewing the weakneſs of the Defendant's Title obtain Judgment for him; yet it is agreed that there are Caſes in which the King may deſert his own Title, and not join Iſſue upon the Defendant's traverſing of his Title, or avoiding it, but traverſe the Title made by the Defendant in his Bar, which is directly taking a Traverſe upon a Traverſe, which regularly a common Perſon cannot do, nor I think (ſaith *Vaughan*) in any Caſe, but where the firſt Traverſe tendred by the Defendant is not material to the Action brought, *The King* v. *Robert*, *Biſhop of Worceſter*, *Vaughan* 61.

But this Rule, that the Plaintiff muſt alledge ſome Preſentment in himſelf, or ſome other from whom he claims, holds not always; for if a Man at this day doth by the King's Licenſe found a Parochial Church which ſhall be preſentable, and be diſturbed to preſent to it, he ſhall have a *Quare Impedit* without alledging any Preſentment in any other, and ſhall count upon the ſpecial matter, *Trin.* 21 *Car.* 2 *C. B. The King* v. *Robert*, *Biſhop of Worceſter*, *Vaughan* 57. And when the Patron doth lay a Preſentment in his Count, it is not ſufficient for him to ſay that he did preſent the laſt Incumbent without more, but that he was ſeiſed in Fee and Preſented, or elſe lay the Fee

Simple in ſome other, and then bring down the Advowſon to himſelf, either in Fee or ſome other Eſtate, *The Caſe of the King*, v. *the Biſhop of Worceſter*, *Vaughan* 57. For the Plaintiff ought neceſſarily in his Declaration to make mention what Eſtate he hath when he Preſents, 8 *H.* 5. 4. 18 *H.* 6. 24. Alſo where the Preſentation makes a Right, there the Plaintiff ought to declare that the Preſentation was made *tempore pacis*; but if the Plaintiff doth alledge another Right Precedent to the Preſentation, and the Preſentation be alledged only in purſuance of that Right, as that the Advowſon is appendant to a Mannor of which he is ſeiſed, *&c.* there the Declaration is good, altho' the Preſentation be not laid *Tempore pacis*, *Hill.* 28, & 29 *Car.* 2. *C. B. Strode vers. Biſhop of Bath and Wells*, Sir *George Horner*, &c. 1 *Mod. Rep.* 230 & 2 *Mod. Rep.* 185.

And altho' the Plaintiff hath formerly by the Preſentment which he lays in himſelf or others, for his Title, gained the Fee by Uſurpation, yet he ſhall not be compelled to mention the Wrong, or that he hath the Advowſon by wrong, neither can he in this Caſe of an Uſurper declare of any other Eſtate than of Fee, by *Barkly* and *Jones Contra Bramſtone* and *Croke*; who held, that if a Man having no Right to an Advowſon, doth preſent by Uſurpation, and his Clerk be Admitted, Inſtituted, and Inducted, and after Plenarty by ſix Months dies; upon a Diſturbance he cannot declare that he was ſeiſed of the Advowſon, as of an Advowſon in Groſs, and Preſented, becauſe by the Preſentment alone without Inſtitution, and Induction, no Right is gained, nor the Patron put out of Poſſeſſion; but it is the Ordinaries Act that makes the Uſurpation; and ſo if the Uſurpation be gained by the Inſtitution, which is ſubſequent to the Preſentation, the Uſurper in his Declaration cannot ſay that he was ſeiſed in Fee, and preſented, which is a Precedent Act to the Uſurpation, which was by the Inſtitution, and the Fee only gained by Relation, which is a Fiction in Law, and ſhall not be reſpected to do wrong, as would be in this Caſe, *Hill.* 14 *Car. B. R. Harper* v. *the Bayliff and Burgeſſes of Derby* *Jones* 427. *Quære*, for no Judgment was given, and ſee there *Berkly*'s and *Jones*'s Reaſons for their Opinion which ſeem good.

Alſo the Plaintiff muſt take care that his Plaint be not double, for if the Plaintiff doth alledge a Preſentment in himſelf only, or in Caſe he hath not preſented in him whoſe Eſtate he hath, this is a ſufficient Title in a *Quare Impedit*; but if he doth alledge a Preſentment in both, his Count is double, as appears by this Caſe. *B.* Plaintiff in a *Quare Impedit* counts that *A.* was ſeiſed in Fee of a Mannor to which an Advowſon was Appendant, and the Church voiding he Preſented, and that his Clerk was Admitted, and Inſtituted, and after that this Mannor. *&c.* was given to the King by Act of Parliament, and after that the King granted it to the Plaintiff, and that the Church voided by the death of the Clerk of *A.* who dies, that the Plaintiff preſented another Clerk, who was Admitted, Inſtituted, and Inducted, and dies, that the Church is now void; that the Plaintiff Preſented, and that the Defendant diſturbed him, and by all the Juſtices, this Count is not double, for the Preſentment of *A.* is ſuperfluous, as being deſtroyed by the ſaid Act of Parliament, and the Preſentment of the Plaintiff, is but the Execution of the Act of Parliament, and the Act of Parliament without any Preſentment is a good Title in a *Quare Impedit*; but if the Act of Parliament had not been in the Caſe, the Count had been double, by alledging the Preſentment, Admiſſion, and Inſtitution of the Clerk of *A.* and of the Plaintiffs alſo, becauſe to alledge one of them is ſufficient, 16 *H.* 7. 8 *Jenkins Cent.* 4 *Caſe* 86. See for this the Counteſs of *Northumberland*'s Caſe, 5 *Co.* 98. *a.* 33 *H.* 6. 12. 4 *E.* 4. 3. 11 *E.* 4. 10. 19 *E.* 4. 4. Where there appears a Difference in Opinion concerning this matter. Yet note, that tho' a common Perſon counting upon

two

two Preſentments, the Count ſhall be ſaid double, and by Conſequence vicious, yet otherwiſe it is in the Caſe of the King, 43 *Ed.* 3. 14. *Br.* Count.

If a Church hath by Laps come to the Biſhop, who hath collated by ſuch Title, a common Perſon ought to make mention of it in his Count, for that is his Title to the Preſentment, *Mich.* 14 *Eliz.* 3. *Leonard* 18. becauſe the Collation by Laps is in the Right of the Patron, and for his Turn; the Ordinary in this Caſe being a kind of Attorney made by Law, to do that for the Patron which is ſuppoſed he would do himſelf, if there was not ſome Let, by *Hobart*, *in Colt* & *Glover's Caſe*, *Hobart* 154. Alſo if the Ordinary hath collated by Laps, becauſe the Patron having preſented one unſufficient Clerk, and upon notice of his unſufficiency, and the refuſal, did not preſent another, and the Patron thereupon doth bring his Action, the Patron muſt ſet forth in his Declaration the Day in which the Preſentment was made to the Ordinary, *Mich.* 15 *Eliz. C. B.* 3 *Leonard* 47.

One Perſon hath the Right of Preſenting to two avoidances of a Church, another to a third Avoidance, and upon a Diſturbance, the Declaration ſets forth, that one hath the Advowſon of two Parts of the Church, *viz.* to preſent to the ſaid Church at two Turns together, and that another hath the Advowſon of a third part of the Church; to wit, to preſent to every third Turn, the Declaration is not good, *per curiam*; for that it appears that one hath the entire Church for the time when he is to preſent Sole, and then, when he declares that one had the entire Advowſon of two Parts of the Church, *viz.* to preſent to two Turns, it is repugnant in it ſelf, for by his own ſhewing it is to two parts of the Advowſon, and not to two parts of the Church, for the Moiety or third part of the Church is, where Parceners, or Joint-Tenants preſent jointly, and every one hath a part of the Church, *Trin.* 41 *Eliz. Windſor* v. *Arch-biſhop of Canterbury* & *Loveday*, &c. 3 *Croke* 686. or where there are two Advowſons in one Church, for there every one hath a part of the Church, and the Count muſt be to the Moiety, or third part of the Church, *Mich.* 13 *Jac. Windham*, v. *Biſhop of Norwich* & *al.* 1 *Brownlow* 165. But where two Churches are United, and the Patrons agree to preſent, the one to two Turns, the other to a third Turn (as this Caſe was) there either of them hath the entire Church the time he preſents, *Trin.* 41 *Eliz. C. B. Windſor* v. *the Arch-biſhop of Canterbury*, *Loveday* & *Fletcher*, 3 *Croke* 687, 688.

So if a *Quare Impedit* be brought, that the Biſhop permit the Plaintiff to preſent to the Church of *A.* and the Declaration according to the Caſe, is, That whereas B. was ſeiſed of a Mannor, to which the Advowſon of the ſaid Church, *viz.* to preſent to the ſame every firſt Turn was Appendant, and that C. was ſeized of the Advowſon of the ſaid Church, *viz.* to preſent to the ſame every ſecond Turn; tho' by the Writ the entire Advowſon is claimed, and by the Count, only every firſt Turn; and altho' it be not alledged by the Plaintiff that he ought to have the firſt Turn, yet it is good; *per Cur.* becauſe when the Church is void, and it appertains to him to Preſent, he hath the entire Advowſon; but otherwiſe it is if there be two ſeveral Patrons, and two ſeveral Incumbents of one Church, ſo that one Patron hath a diſtinct and ſeparate part of the Tythes for his Incumbent from the other Patron, and his Incumbent, in which Caſe there are two Advowſons in one Church; for there the Count muſt be to the Moiety of the Church, or the third part thereof, as the Caſe requires, *Mich.* 13 *Jac. Windham* v. *the Biſhop of Norwich*, *Brownlow* & *Goldsborough* 1 *part* 165. And if in this laſt Caſe one of the Patrons being diſturbed, doth ſay in his Count, that he is ſeiſed *de Advocatione Medietatis Eccleſiæ*, &c. It is ſufficient without ſetting forth the ſpecial Matter in the Count, *Trin.* 10 *Jac.* *Richard Smith's* Caſe, 10 *Coke* 135.

CHAP.

CHAP. XXVI.

Of Proceſs and Pleas in Quare Impedit *and* Darrein Preſentment, *and what Pleas are Proper and Ought, or may be pleaded by the Ordinary, Patron and Incumbent reſpectively; and of what Matters a Jury in* Quare Impedit *ought to Inquire.*

HAving ſhewed how theſe Writs are to be brought, and how the Patron is to entitle himſelf in his Declaration, I am next to ſpeak of the Proceſs thereupon.

The Proceſs in this Action of *Quare Impedit*, are Summons, Attachment, and Diſtreſs Peremptory. And the Sheriff muſt Summon the Defendant by good Summoners, and return their Names upon the Original Writ, and not return common Summoners, as *John Doe* and, *Richard Roe*; for a Writ of Deceit lieth if the Summons were not made indeed: But if the King be Plaintiff, and the Defendant be not Summoned, nor Attached, nor Diſtrained, and the King hath Judgment by Default, no Writ of Deceit lieth, *Brownlow & Gouldsborough* 1 *part* 158, 159, 160.

The Writs thereupon are returnable, from Fifteen Days to Fifteen Days, according as it is Enacted, **In Aſſiſes of** Darrein Preſentment, **and in a Plea of** Quare Impedit **of Churches Vacant, days ſhall be given from Fifteen to Fifteen, or from Three Weeks to Three Weeks, as the Place ſhall happen to be near or far. And in a Plea of** Quare Impedit, **if the Diſturber come not at the firſt Day that he is Summoned, nor caſt no Eſſoin,** then **he ſhall be attached at another day, at which day if he come not, nor caſt no Eſſoin, he ſhall be Diſtrained by the great Diſtreſs above given, and if he come not then, by his Default, a Writ ſhall go to the Biſhop of the ſame Place that the Claim of the Diſturber for that time ſhall not be prejudicial to the Plaintiff, ſaving to the Diſturber his Right at another time** when he **will Sue therefore,** Stat. 52 H. 3. Chap. 12.

If a *Quare Impedit* be brought againſt divers, they ſhall have ſeveral Eſſoins before Appearance; if the firſt Man be Eſſoined, it muſt be adjourned for Fifteen Days, and *idem dies*, ſhall be given to the reſt, and at that day another of the Defendants may be Eſſoined for Fifteen Days, and an *idem dies* given to the reſt, and ſo of all the reſt of the Defendants. And if the Defendant take not his Eſſoin upon the Summons, he may take it upon the Attachment, and if the Plaintiff doth not Adjourn the Eſſoin, he ſhall be Nonſuit. And note, that the Defendants are not bound to appear after that they have had their Eſſoins, until the return of their Diſtreſs, for an Eſſoin is no Appearance, becauſe it may be caſt by a Stranger. If the Defendant doth come at the Grand Diſtreſs returned, and pleads to Iſſue, and after doth make Default, the Writ ſhall be awarded to the Biſhop without taking the Inqueſt, *Rolls Abr.* 1 *part* 587.

If the Original Writ be brought againſt Three, one may appear before his Companions, and Proceſs ſhall be continued until Diſtreſs be made againſt the reſt, and the Plaintiff in the mean time ſhall declare againſt him that appears with a *ſimul cum*, and if he that appears doth plead *non impediit*,

pedivit, the Writ ſhall be awarded to the Biſhop; but there ſhall be a *Ceſſet Executio* until the Plea between the Plaintiff and the other Defendants be determined, *Brownlow* & *Gouldsborough*, 1 *part* 158, 159.

If a *Quare Impedit* be brought againſt two, and one of them doth make default at the Grand Diſtreſs, and the other doth plead in Bar, a Writ to the Biſhop ſhall be awarded for the Plaintiff by the Statute of *Malbridge* without Title made; and if the Bar pleaded by the other Defendant be found for him, he alſo ſhall have a Writ to the Biſhop, and the Clerks of theſe two, upon theſe two Writs being Admitted, Inſtituted, and Inducted, ſhall try their Right in an Aſſiſe, or Treſpaſs, *Jenkins Cent.* 2. *Caſe* 85. 2 *Inſtit.* 124, 125.

In this Writ the Defendant ſhall neither have his Age, nor a Protection, nor an Eſſoin as in the King's Service to avoid a Laps.

In an Aſſiſe of *Darrein Preſentment*, if the Writ be brought in *Middleſex*, at the return of the Writ the Aſſiſe ſhall be there arraigned by the Serjeants at the Bar in *French*, and the Tenant ſhall be demanded, and if the Tenant doth not appear when he is demanded, a Re-ſummons ſhall be awarded, and if upon the Re-ſummons the Tenant ſhall not appear, the Aſſiſe ſhall be taken againſt him by Default, and if the Tenant doth appear, he may demand Oyer of the Writ and the Return, and the Writ ſhall be read to him and the Return thereof, and the Jury ſhall have the view, and the Tenant may take Exception either to the Writ, or to the Return if there be Cauſe, and if there be no Cauſe, he may pray a day to plead, and if the Court doth give a day, the Jurors that appeared ſhall be diſcharged of their Attendance, and ought to appear upon a new Proceſs to be awarded againſt them, and ſix of the Jury ought to have the view of the Church, to the intent that they may put the Plaintiff into Poſſeſſion if he doth recover, and the Judgment in this Aſſiſe is to recover the Preſentation, and Damages. The Proceſs in this Writ is Summons, and Re-ſummons againſt the Tenant, and Summons, *Habeas Corpus*, and Diſtreſs againſt the Jury, and the Proceſs ſhall be returned from Fifteen days to Fifteen days, and no Eſſoin, or Voucher lieth after a Re-ſummons, *Brownlow* & *Gouldsborough* 1 *part* 160.

The Defendants, *viz.* the Biſhop, Patron, and Incumbent appearing, they are to put in their Plea or Anſwer to the Declaration of the Plaintiff, which if their Plea be ſufficient, the Plaintiff ſhall be barr'd, altho' his Declaration be alſo good, by *Jones* in *Standen's Caſe*, &c. *Jones* 18. And firſt, if the Biſhop be made a Defendant upon any good Reaſon, it is becauſe he is a real Diſturber, altho' he is for the moſt part put into the Writ upon the Opinion, that thereby he is hindered from collating *pendente lite*, (the Church being void and litigious) upon the account of Laps: But ſee as to this, *Chap.* 24. But whether the Biſhop be a Diſturber or not, if he be made a Defendant, and hath no Right to Collate when the Writ was brought, it is uſual for him to plead--- that he claims nothing but as Ordinary, and to demand Judgment if without ſpecial Diſturbance, *&c.* And if the See be void, ſo that the Arch-biſhop, or other Guardian of the Spiritualties, hath for the time the Right of Admiſſion, *&c.* the Right of Collating not being in him, he is wont in ſuch Caſe to plead, that he claims nothing but as Metropolitan, and to demand Judgment if, *&c.* And thereupon the Patron is wont to pray a Writ to the Biſhop againſt the Ordinary, with a *Ceſſet Executio quouſq*; the Plea between the Plaintiff, and the other Defendant is determined, *Mich.* 3 *Jac. B. R. Boſwell's Caſe*, 6 *Coke* 48. *Jenkins Cent* 1. *Caſe* 99. And if Judgment be given for the Plaintiff, that a Writ ſhall go for the Plaintiff, againſt the Biſhop, or Guardian of the Spiritualties, or againſt Biſhop, and Arch-biſhop, if both be made Parties in the Writ, without a *Ceſſet Executio* entred, until other Matters had been tryed, it is no Error, nor will

will it abate the Writ, unleſs that Execution had been ſued out before Judgment had been given againſt the reſt, *Paſch.* 14 *Jac. B. R. Grange* v. *Dering* 3 *Bulſtrod.* 175. See *Jenkins Cent.* 8 *Caſe* 36. and in *Rolls* 1 *Rep.* 363 and 397. *Rolls Abr.* 1. 772. When the Biſhop pleading that he claims nothing but as Ordinary, the Patron hath Judgment againſt him, and this doth continue divers Terms without any Continuances entred; yet as *Glin* ſaid, in the Caſe of *Lee* and *Lancaſter*, it was ruled, that it was good in *Cobb*'s Caſe, v. Sir *John Heyden*, *Rolls* 1. *Rep. p.* 31. But the Plaintiff if he pleaſeth, need not pray a Writ to the Biſhop, but may maintain him to be a Diſturber, and proſecute his Action againſt him to a final Judgment, notwithſtanding the Biſhop doth claim nothing but as Ordinary in his Plea. If he doth take his Writ as aforeſaid to the Biſhop, it ſhall be to the ſame Biſhop, for it doth not appear to the Court that he was a Diſturber, neither ſhall the Biſhop be amerced, but the Plaintiff *Pro falſo Clamore*; If the Plaintiff doth not accept the Biſhop's Reddition, but will chooſe to make a full and final Recovery againſt him, (which is not adviſable in any Caſe) then doth he (as in all other Caſes of Election) forſake, and loſe the benefit of the former, and ſtands to the hazard either of a total Recovery, or a total Bar; ſo that if he doth aſſign a ſpecial Diſturbance, and it be tryed againſt him, he is to be barred, by *Hobart*, *Mich.* 15 *Jac. Brickhead* v. *the Arch-biſhop of York*, *Hobart* 198. And if the Plaintiff be at Iſſue with any of the other Diſturbers, and the Title is found for the Plaintiff, the Enqueſt ſhall not paſs betwixt the Plaintiff, and the Biſhop who refuſed, becauſe the Church was Litigious, altho' that the Iſſue upon the Diſturbance be joyned betwixt them, for the Diſturbance is found in another, and the Church being Litigious ſhall excuſe the Biſhop, *Jenkins Cent* 1. *Caſe* 99.

If the Biſhop be ſued as a Diſturber, for that he hath Admitted, and Inſtituted a Clerk upon the Preſentment of another Patron, (which is not adviſable for him to do) he may plead the general Plea, that he claims nothing but as Ordinary, *&c.* and demand Judgment if, *&c.* and indeed, in ſuch Caſe the Biſhop cannot well plead any other Plea, for having given Inſtitution upon anothers Preſentment, he cannot plead the Patron's Title upon whoſe Preſentment he hath given Inſtitution, to counterplead the Title of the Plaintiff to the Patronage, altho' the Incumbent may, by *Hobart*, and that upon theſe Reaſons.

Firſt, becauſe the Ordinary hath nothing to do with the Patronage, neither in Intereſt nor Dependency. Secondly, becauſe he hath nothing to do with the Church as to the Fruits of it, and if he having Collated by Laps before the Statute of 25 *Ed.* 3. 7. could not by the Common Law have pleaded the Title of the Patronage to maintain it, as by the ſaid Statute appears, much leſs could he do it before the Laps incurred. Thirdly, becauſe the Law hath provided for him (if he doth contain himſelf within the bounds of an Ordinary) ſufficient means to ſave himſelf from making himſelf a Diſturber, and hath Pleas to expreſs and deduce the ſame, Sir *William Elvis* v. *the Arch-biſhop of York*, &c. *Paſch.* 17 *Jac. Hobart* 317. *Jenkins Cent.* 1. *Caſe* 47.

If the Ordinary doth plead that he claims nothing but as Ordinary, the Patron had beſt pray a Writ to the Biſhop with a *Ceſſet Executio quouſque*, &c. Eſpecially if the Biſhop had not refuſed his Clerk before the Church was Litigious. or admitted his Adverſary's Clerk after a *Jure Patronatus* prayed, or contrary to the Verdict given thereupon; for if he will maintain him a Diſturber when the Church is full, it concerns him to make it appear that he was ſo, or he will be barred, as hath been ſaid before in this Chapter. If the Biſhop be ſued as a Diſturber for refuſing to admit a Perſon preſented to him, he may in his Anſwer either plead as before that he claims nothing but as Ordinary,

and

and ſo the Patron may take Judgment againſt him, or maintain him a Diſturber as aforeſaid, or elſe the Biſhop in his Anſwer may juſtifie the refuſal of a Clerk preſented to him; but then the Biſhop muſt be very careful that his Plea be ſufficient, for tho' he hath juſtly refuſed, he may make himſelf a Diſturber by his ill Plea, for which are cited, 14 *H.* 7. 21. *b.* 5 *H.* 7. 20. in *Specoti's* Caſe, v. *the Biſhop of Exeter*, *Gouldsbrrough* 35.

That the Biſhop's Plea may be ſufficient to bar the Plaintiff, he muſt therein ſpecifie the Cauſe of his Refuſal particularly, ſo that the Party may anſwer to it, 5 *H.* 7. 19. 11 *H.* 7. 17. And therefore when the Biſhop in his Plea did ſpecifie one cauſe of Refuſal which was not good, and ſaid moreover, *quod propter diverſa alia Crimina*, the Clerk was *Criminoſus*, *& non Idoneus*, it was held that the latter Words were too general and uncertain, *Dyer* 254. for he might as well have ſaid that he was *Criminoſus* generally, or *non Idoneus* generally; and if the Fault or Defect of the Clerk be not alledged particularly, how can the Party anſwer to it? So when a Biſhop ſhewed for cauſe of his Refuſal of a Clerk, that the Clerk was *Schiſmaticus inveteratus*, it was Adjudged and Affirmed in Error that the Plea was too general, and therefore uncertain, and ſo inſufficient, for he ought to have ſhewed in what he was a Schiſmatick; altho' whether he be a Schiſmatick or not, be tryable by the Ordinary according to the Statute of *Articuli Cleri*; but by that Statute it appears that the Biſhop may refuſe only for reaſonable Cauſe, and a general and uncertain Cauſe is not a reaſonable one; and tho' that the Biſhop is Judge in examining, yet for as much as the Proceedings of the Biſhop are not of Record, the cauſe of a Refuſal is traverſable, and if it be traverſed, and the Party refuſed be in Life, it ſhall be try'd by the Metropolitan, and if he be dead, by the Countrey. And therefore altho' it doth not appertain to the King's Courts to determine Schiſms, and Hereſies, yet the Original Cauſe of the Suit being matter whereof the King's Court hath Conuſance; the cauſe of the Ordinaries judging a Preſentee an Heretick, or Schiſmatick, ought to be alledged in certain, that the Judges may conſult with Divines to know if it be Hereſie or not, and if the Party be dead, direct the Jury to try it, *Hill.* 32 *Eliz. B. R. Specott's Caſe*, 5 *Coke* 57. Same Caſe 3 *Leonard* 199. *Goldsborough* 351. and 1 *Anderſon* 189 And it was alſo in this Caſe urged, that by the Plaintiff's Demurrer to the Biſhop's Plea---That the Clerk was a Schiſmatick, it was confeſſed; To which *Anderſon* ſaid, that if a thing be ſufficiently alledged, it is confeſs'd by the Demurrer, otherwiſe not, *Gouldsborough* 35. Nor doth the Statute of Demurers 27 *Eliz.* help the incertainty in this Caſe, becauſe the Court neither doth, nor can know how this Plea may be amended, as that Statute doth require, and therefore it is out of the Compaſs of the Statute, 1 *Anderſon* 191.

Alſo if a Biſhop doth refuſe a Clerk for Perjury, he ought in his Plea to ſhew how, and in what, a Clerk is *Perjurus*, and before what Judge he was Perjured, that the Perjury may appear to be ſuch, for it is as none, if not before a lawful Judge, 38 *Ed.* 3. *fo.* 2. 2 *Inſtit.* 632. In a late Caſe between the Biſhop of *Exeter & alios* v. *Sampſon Hele*, in a *Quare Impedit* brought by *Hele*, the Biſhop pleads in Bar that the Church is within his Dioceſs, and that he claims nothing but as Ordinary, *&c.* And that the Plaintiff preſented to him one *Francis Hodder* as his Clerk; that as Ordinary of the Church aforeſaid, he did examine him of his Ability and Fitneſs in that behalf, and upon ſuch Examination, found him to be a Perſon *in literatura inſufficien', ac ea ratione fore perſonam inhabil' & minime idoneam ad habend.* the ſaid Benefice, for which Reaſon he refuſed him, and gave notice thereof to the Plaintiff, *&c.* but that the Plaintiff did not preſent any other within the ſix Months, *per quod* he did collate, *G. H.* who was Inſtituted, *&c.* The Plaintiff replies, that *Hodder* at the time of the Preſentation

was Vicar of *U.* that he was *Homo literatus & infra ſacros Ordines Conſtitut.* &c. *& poſt Doctrin' & literatur' examen, Ordines Sacerdotales per Ordinationem adept' fuit*, and licens'd to preach by a late Biſhop of *Exon.* &c. After a rejoynder by the Defendants, and ſur-rejoynder by the Plaintiff, the Defendants demur, and adjudged by the Court of Common-Pleas, that this Plea of the Biſhops was incertain and inſufficient, which Judgment was affirmed upon a Writ of Error in *B. R.* but upon a Writ of Error brought in Parliament, both ſaid Judgments were reverſed. *Caſes in Parliament.* 88.

If the Biſhop hath collated by Laps to the Church of another Patron than the King, whether it be, that the Patron having Preſented a Clerk who was refuſed, and upon the Biſhop's Notice thereof did not Preſent another in time, or becauſe no Preſentment was made within the Patron's ſix Months; and the Biſhop be therefore ſued, he may ſet up his Title of Laps, yea, and againſt the King, if he ſhould afterwards pretend Title to the Church, whereas a common Perſon is the true Patron; For it hath been Enacted, **Item, becauſe that many Preſentments to divers Benefices of Holy Church, as well of the Patronage of Lay People as of the People of Holy Church which were void by ſix Months, whereof the Collation of ſuch Benefices by Laps of time was devolute, and of right pertaining to the Ordinaries of the Place were recovered by the King by Judgments thereof given of the Aſſent of the ſaid Patrons, in Deceit of the ſaid Collations ſo made reaſonably by the ſaid Ordinaries, in which Pleas the Ordinaries nor their Clerks to whom they did give ſuch Benefices, were not received to ſhew nor defend their Right in this Behalf, nor to Counter-plead the King's Right ſo claimed, which is not reaſonable. Wherefore the King by Aſſent of the ſaid Parliament Will and Grauteth for him and his Heirs, that when Arch biſhops, Biſhops, or other Ordinaries have given a Benefice of Right devolute to him by Laps of time, and after the King Preſenteth and taketh the Suit againſt the Patron which per Caſe will ſuffer that the King ſhall recover without Action tryed in Deceit of the Ordinary, or the poſſeſſor of the ſaid Benefices, that in ſuch Caſe, and all other Caſes like where the King's Right is not tryed, the Arch-biſhop or Biſhop, Ordinary or Poſſeſſor ſhall be received to Counter-plead the Title taken for the King, and to have his Anſwer, and to ſhew and defend his Right upon the Matter, altho' that he claim nothing in the Patronage in the Caſe aforeſaid,** Stat. 25 Ed. 3. Chap. 7.

The reaſon of which Law was this, that the King not being bound by Laps of time, when the Common Patron had ſuffered a Laps, and the Ordinary had collated lawfully; if the King pretending himſelf Patron had brought a *Quare Impedit* againſt the Ordinary and his Incumbent, they could not ſave themſelves, ſeeing that they could not deny the King's Title and maintain the Patron's, in whoſe default the Laps took place.

This Statute alſo gives Remedy in like Caſes by expreſs Words, ſo that Caſes of like nature are rather remedied by the letter of the Statute than the Equity thereof; therefore, if a common Perſon no true Patron had preſented within the ſix Months, and the true Patron had not preſented in his time, whereupon the Ordinary had collated for Laps, and the Pretender had brought a *Quare Impedit* againſt the Ordinary, becauſe the Clerk was refuſed, the Pretender muſt neceſſarily have prevailed before this Statute, becauſe his Title muſt needs be taken for good, when neither Ordinary, nor Incumbent was ſuffered to deny it; but now by this Statute they are relieved, for this is one of the like Caſes, by *Hobart*, in Sir *William Elvis*'s Caſe, v. *the Arch-biſhop of York, Tayler*, &c. *Hobart* 318, 319.

If

If the Patron doth bring a *Quare Impedit* againſt the Biſhop for a Diſturbance, and the Biſhop doth plead that he claims nothing but as Ordinary, and confeſſeth the Plaintiff's Title to preſent; and further ſaith, that the Church voided ſuch a day, after which the Church remained void by the ſpace of ſix Months, and for that the Plaintiff preſented no fit Perſon within the *Tempus Semeſtre*, he collated as Ordinary after the Laps of ſix Months, as it was lawful for him to do; this is an inſufficient Barr, for that thereby the Defendant doth neither deny, nor confeſs and avoid the Diſturbance laid, and if the Plaintiff doth reſt upon the Bar, and demur upon it, Judgment ſhall be given againſt the Defendant, altho' it be after diſcovered that the Plaintiff hath laid in his Declaration the Preſentation and Diſturbance to be after the date of the Writ. But if to ſuch inſufficient Plea, the Plaintiff doth reply, and confeſs that the Church did void as the Biſhop ſaid on ſuch a day, and that within the ſix Months, *viz.* on ſuch a certain day he preſented *A. B.* praying the Biſhop to admit him, which he refuſed to do, and that the Biſhop on another day, and within the ſix Months collated his Clerk, and then the Biſhop doth demur, for that the Replication to his Plea doth contain double matter, and is uncertain, and after it is diſcovered that the Plaintiff hath in his Count laid the Preſentment and Diſturbance to be after the teſte of the Writ, altho' the Court held, that the Replication was not double or doubtful, becauſe the Defendant's Plea was, that the Plaintiff had not preſented a Clerk to him within the ſix Months, and the Replication is, that he did preſent within the ſix Months, ſo there was a perfect Negative and Affirmative, which makes the Iſſue, and the Plaintiff did but add a refuſal to make good the Diſturbance laid in the Declaration, and then the Plea is compleat; and tho' the Plaintiff hath laid a general Diſturbance in his Count, which is ſuppoſed true by the Defendant's Plea, and to be made before the Action brought; yet this ſhall not ſave the Plaintiff, but that he ſhall be barred for the Fault in his Declaration appearing to the Court, *viz.* that there was no real Diſturbance made, nor cauſe of Action given to the Plaintiff at the time of his Writ brought, and this of his own ſhewing, *Mich.* 15 *Jac. Brickhead*, v. *the Arch-biſhop of York*, *Hobart* 198.

Alſo in ſuch Caſe of the Biſhop's being ſued as a Diſturber, for that he hath refuſed the Patron's Clerk, and upon default of Preſenting another, hath collated upon the account of Laps, he muſt in his Plea alledge the time of his Notice given to the Patron, becauſe if the Patron ſends his Clerk within a Month after the Avoidance, and the Ordinary will not give Notice to the Patron of his refuſing him, the ſame ſhall not be any Default in the Patron, by *Manwood*; but if in ſuch Caſe the Ordinary doth ſay in his Plea, that the Clerk was inſufficient, and that he gave Notice to the Plaintiff, and that *nullam idoneam perſonam preſentavit*. *Manwood* ſaid that as to the Notice given to the Patron, it is well pleaded by ſuch Words, and it ſhall be intended that it was given to the Perſon of the Patron; but the Court ſaid, that to ſay that *nullam idoneam perſonam præſentavit* was no good manner of Pleading, but that it had been better if it had been *nullam etiam perſonam idoneam præſentavit*, and that the firſt form would be a *Jeofail Mich.* 15 *Eliz. C. B.* 3 *Leonard* 47.

As the Biſhop, ſo the Patron that is made a Defendant, is to put in his Plea according to his Caſe, and with reſpect to the Plaintiff's Declaration; as to whom if he pleads *non impedivit*, or any inſufficient Plea the Writ ſhall be awarded to the Biſhop, 21 *Ed.* 4. 65. 9 *H.* 6. 16, 17. 7 *H.* 4. 32. 21 *H.* 6. 45. 22 *H.* 6. 28, 29. 10 *H.* 6. 4. 5 *H.* 5. 10. but there ſhall be a *Ceſſet Executio* until the Plea between the Plaintiff's and the other Defendants be determined, *Brownlow* & *Gouldsborough* 1 *part* 159.

If the Clerk of a Stranger be Incumbent of a Church by the ſpace of ſix Months by Admiſſion and Inſtitution only upon his Preſentment, this makes a Plenarty without Induction, *Hill.* 22 *H.* 7. *Keilway* 88. And the Patron may plead Plenarty againſt all common Perſons ; for it is Enacted, **That one Form of pleading ſhall be obſerved among Juſtices in Writs of** Darrein Preſentment **and** Quare Impedit **in this Reſpect ; if the Defendant alledgeth Plenarty of the Church of his own Preſentation, the Plea ſhall not fail by reaſon of the Plenarty, ſo that the Writ be purchaſed within the ſix Months,** *Weſt.* 2. *Chap.* 5. viz. *Stat.* 13. *Ed.* 1. *Chap.* 5. But if a Writ be brought after a Plenarty by ſix Months, and Judgment be given by *Nihil Dicit*, and the Biſhop claims nothing, the Plaintiff tho' a purchaſer ſhall have Judgment, and be remitted to his Right, by *Coke Trin.* 15 *Jac. B. R. Harris* v. *Auſtin* 3 *Bulſtrode* 38. 46. Therefore *Quære*, Whether the Incumbent of ſuch Uſurper ſhall not be outed by ſuch Recovery. However, if any Perſon doth preſent to an Advowſon, the Right of preſenting to which is in the King, upon a Writ brought by the King, Plenarty cannot be pleaded to bar the King, and to Eſtabliſh the Incumbent in his Poſſeſſion, altho' he hath been Inducted by ſix Months before the Writ purchaſed ; by *Anderſon*, Chief-Juſtice againſt *Wamſly*, *Kingſmill*, *Warburton* and *Daniel*, who held, that by Uſurpation the King might be put out of Poſſeſſion, but the Law is now taken to be otherwiſe, *viz.* that the King cannot be put out of Poſſeſſion by any Uſurpation, (that is) his Inheritance in his Advowſon, cannot by any Uſurpation be diveſted out of him, but the King by a Plenarty is ſo far out of Poſſeſſion, that he cannot preſent, but muſt firſt remove the Incumbent, who hath by Preſentation, Inſtitution and Induction got the poſſeſſion of the Church, 2 *Inſtit.* 358. *Boſwell's* Caſe, 6 *Coke* 49, 50. And ſo is the Law alſo taken to be, that Plenarty is not pleadable againſt the King, *Mich.* 28, 29 *Eliz. C. B.* 1 *Leonard* 226 and in *Boſwell's Caſe*, 6 *Coke* 49. See *Chap.* 13. But Plenarty by ſix Months upon an Inſtitution, where the Inſtitution is made upon a Preſentment, is pleadable by all Perſons againſt a common Patron, yet a Plenarty by meer Collation is not pleadable, but the Patron may bring his Writ and remove the Collatee at any time, *Stat. Weſt.* 2. *Chap.* 5. *Mich.* 32, 33 *Eliz. C. B. Smallwood*, *Cole* & *Sale*, v. *the Biſhop of Coventry and Marſh*, 3 *Croke* 207. *Jenkins Cent.* 7. *Caſe* 7. *Mich.* 3 *Jac. Boſwell's* Cake, 6 *Coke* 49. And ſo I ſuppoſe Plenarty upon a void Preſentment is not pleadable, for then the Clerk is Incumbent as it were by Collation only ; but when 'tis ſaid that Plenarty by Collation is not pleadable, it is to be limited, as to ſuch who have Right to Preſent, but not to ſuch who have Right to Collate, for Plenarty by Collation doth put him that hath Right to Collate to his Writ of Right, and is pleadable againſt him that hath the Right of Collating, 17 *Ed.* 3. 64. *b. Dean of Lincoln's Caſe*, *Mich.* 3 *Jac. in Boſwell's Caſe*, 6 *Coke* 49, 50. 2 *Inſtit.* 357.

And it is to be noted, that both Plaintiff, and Defendant in a *Quare Impedit* may be Actors, and either of them have a Writ to the Biſhop, as the Right falls out to be. But if the Defendant hath Preſented his Clerk and he be Admitted, Inſtituted and Inducted before the *Quare Impedit* brought, the Defendant then hath no Cauſe to have a Writ to the Biſhop, and conſequently the Defendant is no Actor, but a bare Defendant, and the poſſeſſion of his Clerk is Title ſufficient if the Plaintiff doth not ſhew a better ; for the Plaintiff cannot in Law or Reaſon ſay, that the Defendant hath no good Title, and from thence conclude that he hath. And therefore if the Defendant doth alledge in his Plea a Title *pro forma*, and that he hath Preſented by reaſon thereof, and that his Clerk is Inſtituted and Inducted, this is ſufficient for the preſent and future time, if no better Title be oppoſed to it, without alledging any other Preſentation

ſentation in himſelf, or any other from whom he claims; but if the Defendant was out of Poſſeſſion as well as the Plaintiff, he muſt then make out a good Title, or elſe he ſhall never have a Writ to the Biſhop to admit his Clerk; and in this Caſe only it is that the Defendant is Actor as well as the Plaintiff, and in ſuch Caſe he is to alledge a Seiſin of the Advowſon as the Plaintiff muſt, either in himſelf, or thoſe from whom he claims, which is to be done by alledging a former Preſentation, that being the only actual Seiſin of an Advowſon, and the Ground why he ſhould preſent to any voidance, *Hill.* 19 *Car.* 2. Sir *John Tufton* v. Sir *Richard Temple*, *Vaughan* 7. 9 *H.* 6. 56. *b.* 43 *Ed.* 3. 25. 12 *H.* 4. 11. 1 *H.* 7. 13. And tho' the Plaintiff be Nonſuit, yet no Writ to the Biſhop without Title made, 11 *H.* 6. 8.

As the Biſhop and Patron, ſo the Incumbent (if there be one) muſt put in his Plea to the Declaration of the Plaintiff, that is, if he be made a Party, 9 *H.* 6. *fol.* 56.

Before the aforeſaid Statute of, 25 *Ed.* 3. *C.* 7. If an Incumbent had been collated by a Biſhop to a Church, the Title of Collating to which came to him by Laps, and the King who is not bound by Laps of time, pretending Title to the Lapſed Benefice, had ſued the Biſhop and Incumbent, the Incumbent muſt have been outed, becauſe neither Biſhop nor Incumbent, could either have denyed the King's Title, or maintain the Patrons in whoſe Default the Collation was made, or if a Clerk had been a Compleat Incumbent upon the Preſentment of any other Patron, he could not have pleaded his Patron's Title, or defended himſelf in the poſſeſſion of his Church. So if the Patron would have colluded, and made a faint or falſe Defence, he muſt have ſuffered by it. But now by the ſaid Statute, the Incumbent is allowed to Counterplead the King's Title, and by the Equity of the ſaid Statute, the Title of any other Perſon that ſhall pretend to have the Right of Preſenting to that Turn to which he hath been Preſented, or Collated, altho' he doth claim nothing in the Patronage, *Paſch.* 31 *Eliz. C. B. Hall*'s Caſe, 7 *Coke* 26. Therefore, if the Biſhop having Collated an Incumbent upon the Title of Laps, doth in his Plea (to a *Quare Impedit* brought againſt them) claim nothing but as Ordinary, altho' a Writ to the Biſhop ſhall be awarded againſt him, yet the Incumbent may plead the Collation, and ſo bar the Plaintiff, *Paſch.* 32 *Eliz.* *Stanley* v. *Thomas Chaffin C. B.* 1 *Anderſon* 238, 239. But then by the words of the Statute, he muſt be a poſſeſſor of the Benefice, that is, ſuch an Incumbent that is not only Preſented, Admitted and Inſtituted, but alſo Inducted, by which he is ſaid to be *parſon imperſonee*, ſo that until ſuch time that he hath Induction, he is under the miſchief of the Common Law before declared, 4 *H.* 8. *Bataile* v. *Cook Dyer* 1. *b.* and by *Dyer Mich.* 15 *Eliz. C. B.* 3 *Leonard* 47. therefore if the Caſe be ſuch, that the King's Clerk (being Admitted and Inſtituted only) be ſued as a Diſturber; before he is Inducted, it is neceſſary for him to plead, tho' untruly that the King preſented him, and that he was Admitted Inſtituted, and Inducted, before the Writ brought, upon the King's Preſentation, for by being Preſented, Admitted and Inſtituted he is a Diſturber, and may be ſued as ſuch before Induction, and being preſented by the King, he muſt be ſued without the King his Patron, which is not the Caſe of the Preſentee of a common Patron, becauſe he may abate the Writ, for that his Patron is not named with him, who may defend his Title when himſelf cannot, for want of Induction. And if he doth not at leaſt plead himſelf Inducted, he cannot plead the King's Title to the ſaving of himſelf, and ſo the Action without ſuch Plea of Induction muſt unavoidably go againſt him. But by this Courſe he may ſave his Intereſt, *Mich.* 15 *Jac. Winchcombe* v. *Biſhop of Wincheſter* and *Pulleſton*, *Hobart* 168. 193.

But

But *Coke* ſeems to ſay, that a Clerk is *parſon imperſonee*, only by Inſtitution, and may plead himſelf *perſona imperſonata* of the Church for which the Writ is brought, that is, if it be brought by a common Perſon, becauſe the Church is *Plena & Conſulta*, only by Inſtitution, againſt all but the King; but if the Writ be brought by the King againſt a Patron and his Clerk, the Clerk cannot (he grants) plead without Induction, becauſe without Induction the Church is not *Plena & Conſulta* againſt him, in *Hall*'s Caſe *Paſch.* 31 *Eliz. C. B.* 7 *Coke* 26. But the former Opinion I conceive is taken to be Law, *viz.* that he is not Complete Incumbent to plead his Patron's Title until Induction.

However, by *Hutton*, if one be Preſented, Admitted, and Inſtituted before the Writ brought, and be Inducted after and before he plead, he may well plead the Patron's Title, and *per Curiam*; when he is capable by his Incumbency to plead his Patron's Title, it is ſufficient for him to ſay that he is *perſona imperſonata, ex Præſentatione A. viz.* his Patron, altho' he doth not add *ante Diem impetrationis Brevis, Paſch.* 3 *Car. C. B. Dame Chichely*, v. *the Biſhop of Ely, Hetly* 17, 18. And altho' the Patron of the *parſon imperſonee* ſhould confeſs in his Plea the Title of the Plaintiff, yet ſuch Parſon may deny it, and ſet forth in his Plea his Patrons Right of Preſenting; therefore, if the Biſhop or other Patron doth plead inſufficiently, that ſhall be no prejudice to the Clerk's Title, *Paſch.* 14 *Jac. Brickhead*, v. *the Arch-biſhop of York*, *Brownlow* & *Gouldsborough* 1 *part* 164. 31 *Ed.* 3. *Fitz. Incumbent* 6. Cited by *Hobart* in *Colt* & *Glover*'s Caſe, *Hobart* 162. For tho' the Patron may thereupon pray Judgment and recover the Preſentment, yet no Writ ſhall go to remove the Clerk, *Br. Ab. Breve al Eveſque* 14. Or if the Patron doth make Default, and the Incumbent doth plead to the Writ, which is found for him, and then the Incumbent doth pray that the Writ may abate, and the Plaintiff doth pray a Writ to the Biſhop for Default of the Patron, in this Caſe the Writ is to be abated, and no Writ to iſſue to the Biſhop; By Advice of the Juſtices of both Benches, 7 *H.* 6. 15. 10 *H.* 6. 4.

As the Plea of the Patron doth not prejudice the Clerk, ſo the Plea of the Clerk will not prejudice the Patron, and therefore if the Clerk doth plead that he is *parſon imperſonee*, and a good Bar, and the Patron alſo doth plead his Title, but doth not acknowledge any Plenarty of his Preſentment, and Judgment is given againſt the Plaintiff, the Patron ſhall have a Writ to the Biſhop, for that the falſe Plea of the Incumbent ſhall not conclude the Patron, who could not contradict it in this Point, if it did, the Patron could not have a Writ to the Biſhop, becauſe the Church was pleaded full of his Preſentment, and ſo no Benefit of his Suit, *Rolls Abr.* 2 *p.* 389. *Hob.* 196.

So if a *Quare Impedit* be brought againſt the Incumbent of the King, and he pleads that he is *parſon imperſonee*, that is, as well Inducted as Inſtituted, and a good Bar againſt the Plaintiff, ſo that it is adjudged againſt him, altho' in this Caſe the Defendant pleaded that he was Inducted falſly, yet the King ſhall not be bound thereby, but that contrary to the Record he may have a Writ to the Biſhop, becauſe, the King was no party to the Confeſſion, but is as a third Perſon always preſent in Court, and therefore upon ſuggeſtion that his Clerk is not Inducted, he ſhall have his Writ to the Biſhop, but peradventure not without ſuch Suggeſtion, and if in ſuch Caſe no Writ ſhould be awarded, the King would have no advantage by the Recovery, nor could his Clerk be ever made full Incumbent of the Church, but both the King and his Clerk loſe the Benefit of the Suit, *Mich.* 15 *Jac. Winchcomb* & *Pulleſton*'s Caſe, *Hobart* 193.

However, altho' the Clerk being Complete Incumbent may plead by the Statute, and alſo hath a good Title if well pleaded, yet he may deſtroy it by his own ill Pleading, and thereby loſe his Incumbency; it behoves him therefore to

to be very careful that there be no miſtake in his Plea, for the miſtake of a Name, as *Peter* for *Thomas*, *&c.* may be fatal to him, as was adjudged, *Hill.* 14 *Car. B. R. Harpur* v. *the Bayliff and Burgeſſes of Derby*, *Jones* 427.

A *Quare Impedit* was brought, and the Plaintiff counted upon a Diſturbance on the Firſt of *November*, and the Incumbent pleaded, that on the Firſt of *May* next after the ſaid Firſt of *November*, he himſelf was preſented to the Church by the Queen, the Right of Preſenting to the ſaid Church being devolved to her by Laps; upon which the Plaintiff demurring in Law, the Plea was holden inſufficient, (*per Curiam*) for the Plaintiff counted upon a Diſturbance to him on the firſt of *November*, and the Defendant entitleth himſelf to an Incumbency on the firſt of *May* after, in which Caſe the Diſturbance ſet forth in the Count is not anſwered by Traverſe, nor confeſſed nor avoided, which it ought always to be but the Diſturbance acknowledged; and altho' in this Caſe, in order to have a Writ to the Biſhop for the Queen, it was urged that the Title of the Queen did appear to be by Laps, which is confeſſed (I ſuppoſe by the Plaintiff's Demurrer to the Incumbent's Plea.) Yet by the whole Court, the Writ was denyed; for tho' it appeareth that the Incumbent was lawfully preſented to the ſaid Church, and ſo once lawful Incumbent; yet it appeareth alſo that the Title of the Queen is once executed by preſenting the ſaid Incumbent, and ſo gone. And when the Incumbent as here hath loſt his Incumbency by ill pleading, which he may do as well as by Reſignation, or other means, the Queens turn is ſerved. But if in the like Caſe the Queen had been Patron, ſhe ſhould have had a Writ to the Biſhop to admit ſuch Perſon as ſhe ſhould afterwards have Preſented, *Mich.* 31, 32 *Eliz. C. B. Arundel* v. *the Biſhop of Glouceſter* & *Chaffin*, 1 *Leonard* 194. and *Paſch.* 32 *Eliz. Stanley* v. *Chaffin C. B.* 1 *Anderſon* 238.

That the Incumbent may make a ſufficient Plea, he muſt remember, that by the Letter and meaning of the Law that enables him to Plead, *viz. Stat.* 25 *Ed.* 3. *Chap.* 7. He cannot plead that he is Parſon generally, but muſt neceſſarily ſhew of whoſe Preſentment, whereby it may appear to the Court, that the Title he defends is his Patrons, for he muſt as well ſhew, and defend his own and Patron's Right, as Counter-plead his Adverſaries; and therefore he cannot make himſelf *parſon imperſonee* of the preſentation of one, and make Title to another as Patron, *Hellweys and the Arch-biſhop of York's Caſe*, *Jones* 5. & *Hob.* 321. *Jenkins Cent.* 5 *Caſe* 18. and ſo defend himſelf by the Title of a Stranger, under whom he claims not, tho' that were ſufficient to deſtroy the Plaintiff's Title, by Confeſſing and Avoiding it or the like, therefore when he ſays of whoſe Preſentment he is Parſon, that is Traverſable, 16 *Car. B. R.* Sir *John Dreyden* &c. v. *Yates* 1 *Cro.* 591. Neither can he Counter-plead the Plaintiff's Title, but muſt alſo make a Title to himſelf, by the Words and meaning of this Law, that is, his Patron's Title whereupon his own depends; and albeit the Incumbent is Inducted, yet if he (being made a Defendant in a *Quare Impedit*) doth reſign hanging the Writ, he hath loſt his Priviledge by the Statute of pleading to the Title of the Patron; for it was granted him to defend his Poſſeſſion, ſo when his Poſſeſſion is gone, there is no cauſe for him to uſe it, 31 *Ed.* 1. *Fitz. Incumbent* 6. And therefore it is not good for him to ſay that he was *parſon imperſonee*, unleſs he may ſay that he is ſo, *Hill.* 17 *Car. Palmer* v. *Hudde March* 158. And yet the Incumbent that hath reſigned, may plead as he might have pleaded at the Common Law, and if he doth plead otherwiſe, *viz.* according to the Statute, the Plaintiff may reply his Reſigning hanging the Writ, and by that, will defeat him of his Plea, *Paſch.* 17 *Jac*, Sir *William Elvis* v. *the Arch-biſhop of York*, *Taylor* & *Biſhop*, *Hobart* 321. But tho' the Incumbent may plead as before, the Title

Title of his Patron by this Statute, yet as is ſaid, the Biſhop cannot otherwiſe plead thereby, then he could have done before at the Common Law, but only where he hath Collated actually by Laps, for tho', the Incumbent by Preſentation be alſo Admitted to plead by the meaning of this Law under the Words----*Like Caſe*---Becauſe the Caſe of being Incumbent upon a Preſentation, is like the Caſe of being Incumbent by Collation only; yet the Ordinary's Caſe, before actual Collation is no ways like in Caſe, for he hath gotten no Intereſt for himſelf, or his Clerk in the Church, and therefore, if the Incumbent Inſtituted only, be not within the relief of this Law, much leſs ſhall the Ordinary who hath no Intereſt, but only an Office, by which he ought to be indifferent to all Parties, and maintain no ſides, *Paſch.* 17 *Jac.* Sir *William Elvis* v. *the Arch-biſhop of York*, *Taylor* & *Biſhop*, *Hobart* 321. The ſame Caſe *Joncs p.* 4,

Tho' it be ſaid before, that the Incumbent who may plead, muſt not only Counter-plead the Plaintiff's Title, but muſt alſo make a Title to himſelf, by the meaning of the aforeſaid Statute; yet when the Queen brought a *Quare Impedit* againſt the Incumbent alone, who did only Counter-plead the King's Title, by ſetting forth that the Queen's Aunceſter had made a Leaſe of the ſaid Advowſon to *J. S.* who had the Right of Preſenting, and that the Church being void, he was preſented by *J. D.* upon whoſe Preſentment he was Inſtituted, and Inducted; upon a Demurrer thereto, altho' the Court at firſt was of Opinion againſt the Defendant, becauſe that he had not in his Plea ſhewed any Title in his own Patron, but only Counter-pleaded the Title of the Queen, and by (*Periam*) the Patron himſelf could not have had ſuch Plea if he had been party to the Writ, and therefore not the Incumbent, and it is no good pleading in any Action to diſcover in pleading any Wrong, as Force, Diſſeiſin, Uſurpation, *&c.* yet at length Judgment was given againſt the Queen, becauſe there was not a bare Uſurpation only pleaded againſt the Queen, but alſo an Eſtate, *viz.* a Leaſe of the Advowſon made to him upon whom the Uſurpation was made, ſo that the Queen was encountered with a Leaſe of her Aunceſter, againſt which ſhe could not make Title to preſent without ſpecial Matter, *Mich.* 28, 29 *Eliz. C. B. Queen and Middleton's Caſe*, 1 *Leonard* 45, 46.

Tho' (as before) an Incumbent of a Church may by the Statute of 25 *Ed.* 3. *Chap.* 7. plead his Patron's Title, *&c.* yet if he be ſuch a Clerk as is in only by Prayer to be Admitted, or otherwiſe without Preſentment, or upon a void Preſentment, which is as none, he is not aided by this Statute to plead in Bar, becauſe the Statute doth require an Incumbent preſented; neither need the Plaintiff name him in his Writ that made ſuch a void Preſentment, *Fenkins Cent*, 5. *Caſe* 18. and ſo ſuch Clerk hath no way to defend his Title, which was the Caſe of all Incumbents before the Statute, as appears by 18 *Ed.* 3. 23. where the King brought a *Quare Impedit* againſt the Patron and his Incumbent, and claimed by the Grant of the next Avoidance from the ſame Patron to him, which was no Plea without ſhewing it, but the Patron confeſſed it, and the Incumbent demanded Judgment, becauſe the King ſhewed no Deed of the Grant; which Exception was diſallowed; then he pleaded, that the Patron made no ſuch Grant, which the Prior whom it concerned had confeſſed, and both were adjudged againſt him, becauſe he claimed nothing in the patronage, and ſo could not plead; from which Caſe it ſeems to be, that if a Dean and Chapter, or Maſter and Brothers of an Hoſpital, *&c.* have preſented their Dean, or Maſter to a Church of their own Gift, the Preſentment being void, any Stranger may ſue the Dean or Maſter, and recover againſt them, and ſo it is in the like Caſes. *Quære*, And it hath been held, that

that when the Maſter and Brothers of an Hoſpital did preſent the Maſter, and the Maſter and Brothers did bring a *Quare Impedit* againſt the Maſter by a ſtrange Name, that the Writ did well lie, and that they ſhould recover, the Preſentment being void, 12 *H.* 8. 12.

However ſuch Incumbents, as are not aided by the Statute, as in the Caſe of a void Preſentment, and all others before Incumbency (if made Defendants) may excuſe the Wrong with which they are charged, by pleading the general Iſſue *Ne diſturba pas.* And without making Title to the Patronage, a Man may ſhew as *amicus curiæ*, falſe Latin, or other matter appearing within the Writ, for that is no pleading, but rather a remembring the Court of that of which they ſhould take notice of Office by *Hobart*, in *Colt* & *Glover*'s Caſe, *Hobart* 162.

Tho a Clerk being Inducted may plead his Patron's Title as aforeſaid, and being Inſtituted only by the ſpace of ſix Months, his Patron may plead Plenarty againſt all but the King, and thereby, tho' he hath no Title to the Patronage, bar the Plaintiff, yet a *parſon imparſonee* cannot in a *Quare Impedit* brought againſt him, plead plenarty, as *Manwood* ſaid; for that the Statute of *Weſt.* 2. *Chap.* 4. gave ſuch plea to the Patron, *viz.* that the Church is full of his Preſentment by ſix Months before the Writ purchaſed, and did deſtroy the pleading of Plenarty at the Common-Law, which was that the Church was full at the day that the Writ was purchaſed, *Grendon*'s Caſe, *Plowd.* 501. 16 *Ed.* 4. 11. 22 *H.* 6. 14. 38 *H.* 6. 20. *b.* Accordingly, when a Clerk pleaded that he had been Parſon for Three Years, and Plenarty generally by ſix Months of the Preſentation of one not named in the Writ, the Court held the Plea to be inſufficient, becauſe the Parſon ſhewed no Title in him that Preſented him, being a Stranger to the Writ, *Brownlow* 1 *part* 162. But if he had pleaded that he had been in the Church by ſix Months of the Preſentment of the Plaintiff himſelf, or by the Ordinaries Collation for Laps, it had been good without making any other Title, *Liſter* v. *Crameel*, *Noy* 30. 10 *Ed.* 4. 11.

When the Defendants have pleaded according to their reſpective Rights and Intereſts; the Plaintiff is to reply according as his Caſe and the Pleas of the Defendant's ſhall require, *&c.* and if Iſſue be joined, then the Jury that is to try that Iſſue is alſo to enquire; *Firſt*, if the Church be full; and if ſo, *Secondly*, of whoſe Preſentment; *Thirdly*, if ſix Months be paſſed from the time that it became void; *Fourthly*, of the value of the Church by the Year, *Mich.* 20 *H.* 7. *Keilway* 57. & *Boſwell's Caſe*, 6 *Coke* 51. *and by Bracton* Lib. 4. Tract. 2. Cap. 6. Fol. 296. *Brownlow* & *Gouldsborough* 1 *part* 158. And they are to find what the clear yearly value of the Church is, deducting what is paid out of the ſame, *Trin.* 16 *Car. B. R.* Sir *John Dreyden*, &c. v. *Yates* 1 *Croke* 592. But if the Jury be not charged, or do not inquire of theſe Points, yet that may be ſupplied by a new Writ of Inquiry, and thoſe matters inquired of by another Inqueſt. Admitted in *Cheyney*'s Caſe, 10 *Coke* 119. Or if the Jury do not find what time the Church was void, nor whether the Writ was purchaſed before or after the ſix Months are paſt; yet it is good, for it ſhall be intended that the Writ was timely brought, unleſs a Plenarty be pleaded, *Hill.* 9 *Car. Lort* v. *the Biſhop of St. David's Jones* 332. And if Coſts be alſo aſſeſſed by the Jury, which ought not to be, yet that ſhall not prejudice the Plaintiff, if no Judgment be given for ſuch Coſts, *Paſch.* 14 *Jac. Grange* v. *Denny B. R. Bulſtrode* 3 *part* 174. When the Plaintiff hath replyed to the Plea of the Incumbent, if the Incumbent doth not rejoin any thing, nor join Iſſue, the Plaintiff ſhall have Judgment to recover his Preſentation as againſt him, and a Writ to the Biſhop, *non obſtante reclamatione*,

clamatione, &c. and to remove the Incumbent, but with a *Ceſſat Executio* until the Plea be determined between the Plaintiff and the other Defendants, *Hil.* 17 & 18 *Car* 2. *B. R.* Sir *John Tuſton* v. Sir *Richard Temple*, *Vaughan p.* 6.

And note that a Biſhop being a Peer of the Realm, he ought always to have a Knight in the Enqueſt between him and any other Perſon, and if no Knight be returned in the Enqueſt, a *venire facias de novo* ſhall be iſſued forth, if the Enqueſt be challenged for this Default, *Jenkins Cent.* 1. *Caſe* 19.

CHAP. XXVII.

Judgments in Quare Impedit, *&c. and of Writs to be Awarded to the Biſhop upon ſuch Judgments.*

AFter the Jury have given their Verdict, Judgment is to follow, which is, to recover the Preſentment; and if the Recovery be in a *Quare Impedit*, the Advowſon alſo, by *Coke Trin.* 13 *Jac. B. R. Harris* v. *Auſtin* 3. *Bulſtrode* 38. *Regiſt.* 30. *a.* & 1 *Brownlow* & *Gooldsborough* 160. but *Bro. tit. Baron & Feme* 28. & 1 *Brownlow* and *Gouldsborough* 158,159. ſeem to be to the contrary, that the Preſentation and Damages, are only recoverable in a *Quare Impedit.* But before I ſhew the Effects of the Judgment ſeveral things are to be Noted by the way; as firſt, That not always he, that peradventure, may have the beſt Title ſhall have Judgment and a Writ to the Biſhop, but the contrary Party, in that ſome Error or Miſcarriage doth happen, which prevents the merits of the Cauſe from being Debated.

If the Writ doth abate for ſome fault in the Declaration, the Defendant ſhall have the Writ to the Biſhop to admit his Clerk, 31 *H.* 6. 15. and ſo the Defendant ſhall have it, if he demur to the Plaintiffs Declaration, and upon the demurrer it be adjudged for him and againſt the Plaintiff, 28 *H.* 8 *Dyer* 24. *b.* Alſo if the Plaintiff doth diſcontinue his Suit, the Defendant ſhall have the Writ to the Biſhop, 31 *H.* 6. 15. So if the Plaintiff after appearance be Nonſuited, although it be within the ſix Months, the Defendant will have the Writ to the Biſhop, 19 *Ed.* 4. 9. 22 *H.* 6. 44. 33 *H.* 6. 1. 55. 20 *Ed.* 4. 14. 21 *Ed.* 4. 2. *b.* *F. N. B.* 38. *k.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *b.* and ſo it is if the Plantiff be Nonſuit after the Defendant hath pleaded, 38 *Ed.* 3. 8. *b.* But when the Plaintiff is Nonſuit, and Judgment is given that the Defendant ſhall recover the preſentation, yet the Defendant ſhall not have a Writ to the Biſhop before Title made; but if the Defendant at the day of the Proceſs ſerved doth make default, the Plaintiff ſhall have a Writ to the Biſhop without other Title made, 22 *H.* 6. 44, 45. And if the Caſe be, that in a *Quare Impedit*, the Defendant doth make Title to the Church to Himſelf and a Stranger, and after the Plaintiff is Nonſuit, the Writ to the Biſhop ſhall be awarded only for the Defendant, and not for the Stranger alſo, becauſe he is not named in the Writ, 13 *Ed.* 3. *Writ to the Biſhop* 20, 25. Or if in a *Quare Impedit*, againſt the Clerk and another, the Clerk doth plead that he claims nothing, *&c.* but conveys a Title to the King that preſented him, and the other makes another Title, and then the Plantiff is Nonſuited; the Writ to the Biſhop ſhall be awarded only for the other that was ſued with the Clerk, and not for the Clerk the Preſentee of the King, becauſe his Plea was but in excuſe of the wrong, and not to have the Writ. 14 *H.* 4 16. But if three do bring a *Quare Impedit*, and only two of them be Nonſuit, the Defendant ſhall not have a Writ to the Biſhop, becauſe the third

may

may have the right; or if a Man doth bring two Writs of *Quare Impedit*, and after is Nonſuit in one of them, the Defendent ſhall not have the Writ thereupon, although he doth make Title, 12 *R.* 2. *Writ to the Biſhop* 16.

In a *Quare Impedit*, if the Defendant doth plead, that he did not diſturb the Plantiff, the Plaintiff ſhall have a Writ to the Biſhop, 17 *Ed.* 3. 71. *a.* So if in a *Quare Impedit* for the Church of *D.* the Defendant doth ſay that there is no ſuch Church in the ſame County, the Plaintiff ſhall have a Writ to the Biſhop, 8 *H.* 6. 37. 9 *H.* 6. 17. *Contra* 45 *Ed.* 3. 6. for this can be no damage to the Defendant, for the Writ muſt be to the Church, named in the Declaration: If there be none ſuch, the Plaintiff can have no fruit or advantage by his Writ; if there be, the Defendant has no prejudice, for he is ſo far from claiming Title to that Church, that he knows nothing of it, *Quære.* So if the Defendant doth plead that pendant the Writ the Preſentee of the Plaintiff is Admitted, Inſtituted and Inducted. This is no good Plea in Abatement of the Writ, the ſame being the act of the Biſhop, more than of the Plaintiff, but the Plaintiff ſhall have a Writ to the Biſhop; becauſe the Defendant doth neither gain-ſay the Right of the Plaintiff, nor the diſturbance laid, 11 *R.* 2. *Quare Impedit* 144. But if the Defendant doth abate the Writ, for that the Church was full of the preſentment of the Plantiff himſelf, before the Writ purchaſed, the Defendant ſhall not have a Writ to the Biſhop without Title made, 13 *H.* 4. 7. *a.*

If the Action be brought againſt Patron and Incumbent, and the Patron doth make Default, and the Plaintiff and Incumbent be at Iſſue upon a Plea in abatement of the Writ, *viz.* whether the Plaintiff was made Knight after the laſt continuance, if it be found for the Defendant, though the Writ ſhall abate, yet the Defendant ſhall not have a Writ to the Biſhop, 7 *H.* 6. 37. *b.* but if ſuch Plea had been found for the Patron, he ſhould have had his Writ, *&c. Brook. Writ to the Biſhop* 30.

If a *Quare Impedit* being brought againſt diverſe doth abate, for that one of the Defendants was dead before the Writ purchaſed, the Defendant ſhall have his Writ to the Biſhop, 11 *H.* 6. 53. But if the Writ doth abate within the ſix Months, for falſe Latin, or inſufficiency of Form, the ſame is the fault of the Clerk, and ſhall not be peremptory to the Plaintiff; nor ſhall the Defendant thereupon have a Writ to the Biſhop, but the Plaintiff may have a new Writ of *Quare Impedit*, and therewith agreeth 3 *H.* 6. 3. 31 *H.* 6. 15. *F. N. B.* 38. *b. vide* 38 *Aſs. Pl.* 9. *Paſch.* 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *Contra* 13 *H.* 4. 7. So if the Writ doth abate for Miſnoſmer of the Plantiff, or Defendant, if the Plaintiff doth confeſs it, the Defendant ſhall not have a Writ to the Biſhop, for it may be the fault of the Clerk in writing of it, and therewith agreeth *F. N. B.* 38. *b. vide* 31 *H.* 6. 15. and it is ſaid, that if the Writ doth abate for Form, the Plaintiff ſhall never have a Writ to the Biſhop, *Trin.* 8 *Jac. Wallop* v. *Murrey*, *Brownlow* and *Gouldsborough* 1 *part*, 162. *Quære.* However generally, if the Writ be not well brought it will abate, and then the Plaintiff will not be only prevented from obtaining any Judgment, and of having a Writ to the Biſhop, but the Defendant ſhall have it, *Paſch.* 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *Jenkins Cent.* 2. *Caſe* 85.

Although the Merits of the Cauſe may not ſometimes come into queſtion, through Error, Exception, *&c.* and ſo he that hath no good Title, may happen to have the Preſentment, yea, and as the Caſe may be, carry thereby the Advowſon alſo; yet *Hobart* ſaith, that a Writ to the Biſhop can never be had without a Title appearing to the Court, and particularly, that if the Defendant doth never appear, or doth make Default, at the grand Diſtreſs return'd,

yet the Plaintiff muſt make a Title for Form-ſake, *Colt* and *Glover*'s Caſe, *Hobart* 163. 10 *H.* 6. 4. *b.* and this ſaid to is according to what was practiſed, 7 *Eliz. Dyer* 241. But yet 'tis ſaid, that if one of two Defendants do make default at the grand Diſtreſs, and the other doth plead in Bar, a Writ to the Biſhop ſhall be awarded for the Plaintiff by the Statue of *Marlborough* Ch. 12. without Title made, *Jenkins Cent.* 2. Caſe 85.

However in a *Quare Impedit* againſt the Biſhop, and others, if the others make Default, and the Biſhop doth appear, although the Plaintiff ſhall not have a Writ to the Biſhop againſt the others that make Default, without Title, yet if he declares againſt the Biſhop, this ſhall be a ſufficient Title againſt the others, 10 *H.* 6. 4. *b.* Alſo if the Plantiff be Nonſuit after appearance, the Defendant muſt make a Title at leaſt for Form-ſake, by *Hobart*, in *Colt* and *Glover*'s Caſe, *Hobart* 163. and by *Coke Paſch.* 40. *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. 9 *H.* 7. 4. *b.* 11 *H.* 6. 8. 2 *H.* 5. 6. yea, and though the Caſe be ſuch, that the Defendant cannot make a Title, becauſe one of the Defendants is alſo Plaintiff for that he holds in Coparcenary, ſo that if he ſhould make Title, it ſhould be contrary to the Action, which ſhall not be ſuffered; yet if the Plaintiff in ſuch caſe be Nonſuit, the Defendant ſhall not have a Writ to the Biſhop without Title made, 11 *H.* 6. 8. *a.* So if it appears by the Declaration, that the Plaintiffs and Defendants are Tenants in Common, ſo that the Defendant hath right to the Advowſon, although the Action abates thereby, yet a Writ ſhall not go to the Biſhop for the Defendant only, becauſe he cannot make a Title in ſuch Caſe, but for both; becauſe the Title appears to be in both, 20 *Ed.* 3. *Quare Impedit* 63. And ſo muſt the Defendant make Title, in caſe the Plaintiff doth diſcontinue his Suit before he can have the Writ, 31 *H.* 6. 15. 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *b.*

But in a *Quare Impedit* if the Plaintiff doth declare, and the Defendant doth demurr upon the Declaration, and it be adjudged againſt the Plaintiff upon the Demurrer, a Writ ſhall be granted for the Defendant without making any Title, if that upon the Declaration the Title of the Defendant doth appear, 28 *H.* 8. *Dyer* 24. *b.* And I conceive, that in all the Caſes aforeſaid, when a Writ is awarded to the Biſhop, the ſame is peremptory, and a good Bar in another *Quare Impedit*, although it be brought within the ſixth Months; for ſo it is ſaid to be in the Caſe of the Plaintiffs being Nonſuit after appearance, 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *b.*

Secondly, as he that hath the beſt Title, may not have Judgment given for him; ſo not always he that obtains a Judgment ſhall have Execution thereof, for the Plaintiff may have Judgment, againſt ſome of the Defendants, and yet be barred by the reſt, ſo that he ſhall never have a Writ to the Biſhop. And accordingly 'tis ſaid, that if the Incumbents Plea be found for him, he ſhall never be removed, although other Pleas be found for the Plaintiff, *Trin.* 8 *Jac. Wallop* v. *Murrey*, *Brownlow* and *Gouldsborough*, 1 *part* 162. And on the other hand, if it be adjudged againſt the Incumbent upon his Plea, yet the Plaintiff ſhall not have a Writ to the Biſhop, until, and unleſs it be alſo adjudged againſt the Patron, 25 *Ed.* 3. 34. *b.*

So if the Biſhop be made a Defendant, and he pleads that he claims nothing but as Ordinary, the Plaintiff may have Judgment againſt him preſently, but no Execution until he hath recovered againſt the reſt, 17 *H.* 7. *Keil.* 43. Or if the Plaintiff will not in ſuch caſe take his Judgment, but will maintain the Biſhop to be a Diſturber; although he ſhould recover againſt all other Defendants, yet if he doth not make out a ſpecial Diſturbance by the Biſhop, but that is found againſt him, he ſhall be totally Barred, by *Hobart*, *Mich.* 15. *Jac. Brickhead* v. *the Archbiſhop of York*, *Hobert* 198. *Jenkins Cent* 1. *Caſe* 19.

Yet

Yet we find, that where the Defendant pleaded, that he had not diſturbed, *&c.* the Plaintiff had a Writ to the Biſhop upon that Plea, and yet maintained the Defendant to be a Diſturber, upon the account to recover Damage, 17 *E.* 3. 71. *a.*

If there be beſides the Biſhop, two other Defendants or more, and Judgment be given againſt one upon a *nihil dicit*, no Writ ſhall goe to the Biſhop for the Plaintiff, until he hath Judgment alſo againſt the other, 17 *Ed.* 3. 58. Or if the other Defendants plead ſeveral Pleas in Bar, although the Plea of one of them upon iſſue joined be found againſt him and for the Plantiff; yet if the Plea of the other be tried againſt the Plaintiff, he ſhall never have a Writ to the Biſhop, *Jenkins Cent.* 1. *Caſe* 19. & *Cent.* 2. *Caſe* 58. So if the King doth recover againſt an Incumbent, that claims by the Collation of the Biſhop of the Dioceſs, yet if the King hath another *Quare Impedit* depending againſt the Biſhop alone for the ſame Church, the King ſhall not have a Writ to the Biſhop againſt the Incumbent, until the Plea be determined betwixt him and the Biſhop, although, that the Actions be by ſeveral Originals, 25 *Ed.* 3. 47. And the reaſon of theſe Caſes ſeems to be, becauſe, the Plaintiff by making many Diſturbers in his Writ, *&c.* obligeth himſelf to make Title and recover againſt them all, and until ſuch time as he hath ſo done, it appears not that the Title is in him, for that it may be in ſome other of the Defendants againſt whom a recovery is not had, and if upon tryal he be barred by one alone, his Action is gone as to all, *Mich.* 30. *Jac.* Lord *Say* v. *the Biſhop of Peterborough*, *Brownlow* & *Gouldsborough* 1 *part* 161.

Yet if one of two Defendants do make Default at the grand diſtreſs, and the other doth plead in Bar, a Writ to the Biſhop ſhall be awarded for the Plaintiff, by the Statute of *Marlborough*, Ch. 12. (*viz. Stat.* 52 *H.* 3. *Ch.* 12.) And if the Bar pleaded by the other Defendant be found for him, he alſo ſhall have a Writ to the Biſhop, and their Clerks being Inſtituted and Inducted, ſhall try their Rights in an Aſſize, Treſpaſs, *&c. Jenkins Cent.* 2 *Caſe* 85. 2 *Inſtit.* 125.

And in recovery in a *Quare Impedit*, the Plaintiff had a Writ of Inquiry of Damages, and alſo a Writ to the Biſhop; but it was adjudged that the Writ to the Biſhop ſhould abate, for that the Writ to the Biſhop ought not to iſſue till the Writ of Inquiry be returned, unleſs the Plaintiff releaſe the Damages, for till then Judgment is not given upon the entire Record. *The Biſhop of Gloceſter & al.* v. *Veal*, *Noy* 66.

Thirdly, *Note*, That as the Caſe may be, the Judgment may be given againſt the Plaintiff, and yet he may be equally Intituled in the Execution of that Judgment, *viz.* to have a Writ to the Biſhop with the Defendant, as if a Tenant in Common doth bring a *Quare Impedit* againſt another; that is, Tenant in Common of the Advowſon with himſelf, and this doth appear by the Declaration, and the Defendant doth demand Judgment of the Declaration, for that it appears thereby, that they are Tenants in Common, upon which the Court doth abate it; yet the Defendant ſhall not have any Writ to the Biſhop, for that he hath not made any Title; for though it appears by the Declaration, that the Defendant hath right to the Advowſon, yet this is in Common with the Plantiff, and ſo as hath been ſaid, both ought to have the Writ, 20 *Ed.* 3. *Quare Impedit* 67.

Fourthly, *Note*, That neither Plaintiff, nor Defendant may have Judgment or Execution, but a third Perſon: That is no Party to the Suit; for if in the Debate of a Cauſe betwixt a Plaintiff and Defendant, it doth appear to the Court, either by the Declaration of the Plaintiff, or by Pleading, or confeſſion of the Parties, that neither of them hath right, but the preſentation belongs

longs to the King; the Court may, nay they ought to award a Writ to the Bishop for the King, and without Prayer on the part of the King; for the Court and Judges are of the King's Council. But this must be where the King's Title appears so clear in *allegatis & probatis* to the Court, as that it is infallible both against Plaintiff and Defendant, by *Hobart* 163. *Colt* and *Glover*'s Case, 9 *H.* 7. 9. *b.* 16 *H.* 7. 12. 12 *H.* 7. 12. 11 *H.* 4. 71. *F. N. B.* 38. *G. Trin.* 31 *Eliz. Norwood* and *Dennis*, 1 *Leonard*, 323 *Hill.* 21 *Eliz. Crasshfield* v. *Lord Dacres*, 1 *Anderson*, 53 *Hill.* 6 *Jac. B. R. Cumber* v. *Bishop of Chichester*, &c. 2 *Croke* 216. *Vent.* 2 *Rep.* 3. Admitted. But if the King's Title doth appear to be good against the Plaintiff only, or against the Defendant only, the Writ to the Bishop shall not be awarded for the King, unless the other party doth confess (upon the demand of the Court, if they have any thing to say, why the Writ ought not to be awarded for the King) that they have no Title, and that such Writ ought to be awarded, *Mich.* 14 *Jac. Chancellor and Scholras of Cambridge* v. *Walgrave*, *Hobart* 126. Or if no Title doth appear for the King by the Pleading, although the Jury find the Title to be in the King, when it is out of their Issue and Charge, the Court is not to award a Writ to the Bishop for the King, because the one party or the other may answer to it, *Trin.* 31. *Eliz. C. B. Norwood* v. *Dennis*, 1 *Leonard* 323.

So if in a *Quare Impedit* for the King, the King and party be at Issue, which is found against the King, and yet a Title appears for the King by *nient dedire* of the Party, the Court shall not adjudge for the King, *Hill* 6 *Jac. Cumber* v. *Bishop of Chichester and Green*, 2 *Croke* 216. So if Judgment be given in a *Quare Impedit*, and a Writ of Error be brought, and pendant the Writ of Error, the King doth bring a Writ of right of Advowson, upon which by motion to the Court, the proceedings in the Writ of Error are stopped until tryal in the Writ of Right; and after the Writ of Right doth happen to be abated by death of one of the Tenants, so that the Court doth proceed to examin the Errors, and doth affirm the first Judgment, and before the Judgment is drawn up, it is shewed that the King had Title, *viz.* by the death of one of the Tenants, (who were Plaintiffs in the *Quare Impedit*, and held the Advowson *in Capite*) for which reason it was that the Writ of Right before did abate, yet the Court ought not in such Case, *ex Officio*, to award a Writ to the Bishop for the King; because, the Plea is but matter in fact, a bare surmise, and not grounded upon any matter of Record, *Mich.* 16. *Car. B. R. Yates* v. Sir *John Dryden*, 1 *Crok.* 589. neither is it to be awarded for the King, though the Title appear to belong to the King upon Evidence, unless it appear to be in him also by the Record, *Mich.* 12. *Jac. Rowth*, v. *the Bishop of Chester*, *Moor* 872.

And Note, That it is said generally, that if in an Assize of *Darrein Presentment*, it be found that neither the Plaintiff, nor Defendant hath right to present, but a third person, no party to the Writ; the Writ to the Bishop shall be awarded for him, 17 *Ed.* 3. 23. *Roll's Abr. part* 2 *p.* 386. *T.* But it seems by the former Cases, that the Court are not bound to award it of Office, from the reason that they awarded it for the King, but only at the Prayer of a Party; for the Courts are Intrusted with the King's Rights, to take care they be not Prejudiced; but 'tis not so of any other Persons Right, for they shall take no Notice of any Title found for a Common Person being a Stranger; so it is said by Chief Justice *Vaughan*, and Justice *Tyrrell*, in the Case of *Craw* and *Ramsey*. *Hill* 21. & 22. *Car.* 2. *Vent.* 2. *part* p. 3.

Lastly, I may add, That though the Issue be found against the Plaintiff, or Defendent, yet the same Person against whom the Issue is found, may have

have Judgment given for him, and the Writ awarded for him to the Biſhop; therefore in a *Quare Impedit* by the King, when the Iſſue was, whether the King had all the Advowſon or not, and the Jury found that he had but a third part, but that it was the King's turn to preſent to the preſent avoidance, although that the Iſſue was found againſt the King; yet becauſe it appeared that the King had Title, the Writ was awarded for him, for that the matter that was found was not out of their Iſſue, *Mich.* 14. *Jac. King* v. *the Biſhop of Rocheſter*, *Roll's Abr.* 2 p. 386. *ſame Caſe*, *Hobart* 119.

CHAP. XXVIII.

The Effects of a Judgment in Quare Impedit, *and* Darrein Preſentment, *and of the Writ awarded to the Biſhop,* &c. *to admit,* &c. *grounded thereupon. What is to be done upon ſuch Writ, and what return the Biſhop may make thereunto.*

JUdgment being given, the Effects thereof are, That in an Aſſize of *Darrein Preſentment*, he that prevails ſhall recover the Preſentment, and ſix of the Jury who had view of the Church, may put the Plaintiff into Poſſeſſion if he doth recover, *&c.* In a *Quare Impedit*, he that recovers, recovers the Advowſon as well as the Preſentment, as hath been ſaid, *Brownlow* and *Gouldsborough*, 1 *part* 158, 159, 160. 3 *Bulſtrode* 38. *Regiſter* 30. *a.* But in both Writs by the very Judgment abſolutely given, that is againſt all Parties, there is this Effect of the Judgment: That the Incumbent that was in the Church when the Writ was brought, if named in the Writ, is actually removed, but if not named in the Writ, he ſhall never be removed, by *Dodderidg* and *Coke*, *Trin.* 13. *Jac. B. R. Harris* v. *Auſtin* 3. *Bulſtrode* 38. *Jenkins Cent.* 5. *Caſe* 18. *Brownlow* and *Gouldsborough* 1 *part* 158. 46 *Ed.* 3. *fo.* 13. *Marſhal's Caſe*, 9 *H.* 6. 56. *b. Cort and the Biſhop of St. David's Caſe*, 1 *Croke* 348. And this was one of the Cauſes, that after the Statute of *Weſt.* 2. *Chap.* 5. it ſhall be enquired, if the Church be full, and of whoſe Preſentment.

If two Patrons do preſent, and the Biſhop doth refuſe both their Clerks, and one of the Patrons doth bring a *Quare Impedit* againſt the Biſhop, and pendant the Writ, the other Patron doth ſue a *duplex Querela*, in the Arches againſt the Biſhop, upon which Proceſs is made, and upon default of the Biſhop, the Archbiſhop doth receive the Clerk of this Patron, who is Inſtituted and Inducted, and in by ſix Months; and afterwards the Plaintiff in the *Quare Impedit* doth recover, he ſhall by his Writ to the Biſhop remove the Incumbent of the other Patron, that came in Pendant the Writ, although not named in the Writ, *Trin.* 41. *Eliz. B. R. betwixt Bennet and Edwards*, *Roll's Abr.* 2. p. 391. *and Moo.* 572. And though the Incumbent named in the Writ doth reſign Pendant the Writ, and after the Judgment is Preſented, Inſtituted and Inducted into the ſame Church for which the Action is brought; yet by the Judgment he is ſo removed, that the Clerk of him that recovers ought to be received, *Mich.* 28. *Eliz. C. B. Moor and the Biſhop of Norwich*, 3 *Leonard* 138. Or if the Incumbent againſt whom the Writ is brought doth reſign *pendente lite*, and then doth come into the ſame Church by a new Title; yet it appearing to the Court, that the Clerk is the Perſon againſt whom the

the Recovery is had, by the Judgment he ſhall be removed, l. 5 *Ed.* 4. 115, 116. *vouched in Moor and the Biſhop of Norwich's Caſe*, 3 *Leonard* 138. but in this Caſe the Clerk had his new Title upon the account of a laps *pendente lite* from the Biſhop, who was alſo made a Defendant in the Writ. And tho' the Biſhop be not made a Party to the Suit, if the Plaintiff be Nonſuit, ſo that the Defendant hath a Writ to the Biſhop, if the Biſhop had collated after the Judgment, though before the Writ ſerved, the ſix Months being expired, *Quære*, whether his Clerk ſhall be removed, the Judgment being had, though not excuted within the ſix Months; but 'tis ſaid in this Caſe, that the Plaintiff ſhall recover his Damage but for half a Year, 2 *Inſtitutes* 263.

If a Writ be brought againſt Patron and Incumbent after the ſix Months are paſſed, and they do not plead the plenarty before the Writ brought, but ſome other matter in Bar, upon which Iſſue is joined, and a Verdict given for the Plaintiff, the Incumbent ſhall be removed by the Judgment given upon this Verdict; becauſe, the Incumbent was partly to the Writ, and might have pleaded the Plenarty. And Note, That in this Caſe it was not enquired when the Church became void, but *quod tempus ſemeſtre modo tranſivit*, and yet not material to enquire of it for the cauſe aforeſaid, and alſo becauſe when the Jury find *quod tempus ſemeſtre modo tranſivit*, and Damages for half a Year, it ſhall be intended that the ſix Months paſs pendant the Writ, and not before the Action brought, *Hill.* 9 *Car. B. R. Biſhop of St. Davids and Lort's Caſe affirmed in Error*, *Roll's Abr.* 2 *part* 392. And if the Writ be brought within the ſix Months againſt Patron and Ordinary, though the recovery be after, yet the Incumbent ſhall be removed, 39 *Ed.* 3. 15. but in this Caſe the Biſhop was found to be a Diſturber. And if any that are made Defendants in the Action, do get their Clerk into the Church *pendente lite*, ſuch Clerk by the Judgment is ſo outed, that the Clerk of him that recovereth, may, and ought upon the Writ to the Biſhop to be received, *Booton* v. *the Biſhop of Rocheſter*, *Hutton* 24. *Mich.* 3. *Jac. Boſwell's Caſe*, 6 *Coke* 51. *Jenkin's Caſe* 7. *Cent.* 7. 14 *H.* 6. 68 *b.*

If the King doth preſent by Uſurpation, and a Writ is brought againſt his Incumbent, who is only Inſtituted (for the Writ doth not lye againſt the King) and pendant the Writ, the King doth preſent another, who is Inſtituted and Inducted, if the Plaintiff doth recover, the ſecond Clerk ſhall alſo be removed by the Judgment, for he comes in under the title of the Plaintiff, *Mich.* 3 *Jac.* 6. *Boſwell's Caſe* 6 *Coke* 52. So if pendant, a *Quare Impedit verſ.* J. S. the Plaintiff be Out-lawed, upon which the King doth preſent, and his Clerk is Inſtituted and Inducted, and after the Outlawry is reverſed, ſo that the Patron doth recover in the *Quare Impedit*, he ſhall by the recovery out the Incumbent of the King; for now by the reverſal of the Outlawry, the preſentment of the King appears to be without Title, 30 *Eliz. B. R. Cornwall's Caſe*, *Roll's Abr.* 2 *part* 391. *Gouldsborough* 44. 105. and ſo the King's Incumbent (the Outlawry being reverſed) ſhall be removed, although the Outlawry was before the Writ purchaſed, and although the Incumbent was not named in the Writ, for that he was preſented after the Writ brought againſt another Diſturber, *Mich.* 16. *Car. B. Resbie and Powle's Caſe*, *Roll's Abr.* 2 p. 391.

And yet when the Queens Incumbent (being Inducted after a Writ brought againſt him) did reſign, and the Queen *pendente lite* preſented another, the Plaintiff recovering; it was held by *Anderſon* and *Windham*, Serjeants of the Queen, Serjeant *Barber*, *Gerrard* Atturney General, and *Broom* Solicitor, that the laſt Incumbent being in by ſix Months, is not removeable upon ſuch recovery, by a Writ to the Biſhop with a Commandment in it to re-

remove the Clerk named in the Writ of *Quare Impedit*, and every other Incumbent; becauſe, he that was laſt admitted, was not party nor privy to the Judgment, nor to the Writ: But to this, *Dyer* ſaith, that it ſeems that this Opinion is not Law, although there had been twenty Incumbents ſucceſſively pendant the Writ, *Paſch.* 21 *Eliz. C. B. Dyer* 364. and *Rolls* ſaith, that he knew it adjudged according to *Dyer*'s Opinion in *Harris* and *Auſten*'s Caſe, *Rolls* 1 *Rep.* 213. And therefore, *Anderſon* (taking notice of what is reported as to his Opinion in *Dyer*) doth better explain himſelf, in *Beverly* and *Cornwell*'s Caſe, *Mich.* 30 & 31. *Eliz. Gouldsborough* 105. ſaying, that he and *Gerrard* held, as he then alſo ſaid he did, that if a Clerk doth come in under the Title of the Plaintiff, and ſince the ſame, then he ſhall be removed; but if he come in by Title *peramount*, he ſhall not be removed; by which he ſeems to grant, that if the Queens ſecond Incumbent doth come in upon the ſame Title that the firſt came in upon, he ſhall alſo be removed.

So it is ſaid, that if a Stranger, *viz.* he who is no Defendant in the Writ, doth preſent pendant the ſame, his Clerk ſhall be removed if the Plaintiff doth recover, by *Brownlow* and *Gouldsborough* 1 *p.* 159. But this is to be underſtood if the Plaintiff hath good Title, *Boſwell*'s Caſe 6 *Coke* 51. For if a ſtranger to the Writ who hath good right, preſenteth his Clerk pendant the Writ, and his Clerk is admitted, and inſtituted, he ſhall not be removed, or if he preſent the ſame Clerk that was adjudged a Diſturber; for then by ſuch Device the rightful Patron may be defeated of his Preſentment, and that was one of the Cauſes, that after the Act of *Weſt.* 2 *Ch.* 5. it ſhall be enquired by the Jury, if the Church be full, and of whoſe Preſentment, to the end it may appear whether the Plaintiff ſhall recover his Preſentment or not, *Mich.* 3 *Jac. Boſwell*'s Caſe 6 *Coke* 51. 18 *H.* 7. *Keil* 49. 2 *Cro.* 92.

But we find it ſaid by *Twiſden* Juſtice and not denied by any, that where there is an Incumbent who is not party to the Action, there ſhall not be a Writ awarded to the Biſhop without a *Scire Facias* firſt ſued againſt ſuch Incumbent; for that *res inter alios acta alteri nocere non debet*, and it is inconvenient that one ſhould be ſtript of his poſſeſſion without any Action brought againſt him; and although the Incumbent may have notice of the Action, yet he hath no day in Court to defend his Title; and this would be a means to encourage Perſons to bring Actions for to recover Churches againſt ſtrangers, which ought not to be ſuffered. And he ſaid, that *Boſwell*'s Caſe in 6 *Coke* 48. *b.* had been often denied for Law, and he himſelf knew that a Writ of Error was brought to reverſe it, and the Error aſſigned in the point in Law: But that Writ abated, and *Coke* in the End of the Caſe ſeems to confute the principal Judgment, *Mich.* 14. *Car.* 2. *B. R. Hall* v. *Broad*, 1 *Siderfin* 93. See more fully of this matter after in this Chapter.

If a man doth bring a *Quare Impedit* the Church being full of his own preſentment, and the Title is found for the Defendant, yet the Clerk of the Plaintiff ſhall not be removed, for that he might have abated the Writ upon the Church's being full of the preſentment of the Patron himſelf at the day of the Writ purchaſed, 19 *H.* 6. 68. *b.*

Another Effect of a Judgment given in a *Quare Impedit*, or *Darrein Preſentment* is, That he for whom the Judgment is given ſhall recover as well his Damages, as his Preſentment and Avowſon, as hath been before ſaid: For it hath been Enacted, **That in Writs of** Quare Impedit, **and** Darrein Preſentment, **Damages ſhall be awarded; that is, to wit, if the time of ſix Months paſs by the diſturbance of any, ſo that the Biſhop doth confer to the Church, and the very Patron loſeth his Preſentation for that time, Damages ſhall be awarded for two Years value of the Church; and if the ſix Months be not paſſed, but the Preſentment be deraigned within the ſaid time, then Dama-**

ges shall be awarded to the half Years value of the Church; and if the Disturber have not whereof he may recompence Damages, in Case where the Bishop confereth by Laps of time, he shall be punished by two Years Imprisonment. And if the Advowson be deraigned within the half Year, yet the Disturber shall be punished by the imprisonment of half a Year, Stat. West. 2 Ch. 5. 13 Ed. 1.

In a *Quare Impedit* for a Chantery where by Composition, if the Patron presented not within a Month, then the Bishop should present after the Month, although the Bishop hath not presented, yet the Patron shall recover his Damages for two Years, for this is not like a Benefice with cure of Souls, where the Patron may present after Lapse is come to the Bishop if the Church be not full, for here by Composition after the Month, the Patron hath lost his Presentment, 13 *Ed.* 4. 3.

In Case the Plaintiff in a *Quare Impedit* be Nonsuit after appearance, by which the Defendant hath a Writ to the Bishop, and so the Court are not informed by the inquiry of a Jury of the value of the Church; the course in such case is to award a Writ to the Sheriff to enquire, what time the Church became void, what is the value thereof, or whether it remain void or not, and if it be full, of whose Presentation, *&c.* and then if the Sheriff doth make return, that the Church is full by the Collation of the Bishop, though the Defendant doth pray to have Damages of the value of two Years; yet if it appear that the Judgment was given within the six Months, he shall have Damages of the value of half a Year of the Church only; the reason is, because the Bishops Clerk coming in within the six Months shall be removed, and the Defendant's Clerk received; but if the Collation be for Laps after the six Months expired, and the Judgment not given within the six Months, damages of two Years value of the Church shall be given to the Defendant, because his turn is lost, 24 *Ed.* 3. 25. 11 *H.* 4. 80. Yet even in this Cause, if the Patron will at his Peril pray a Writ to the Bishop, *viz.* when the Bishop hath after the six Months collated for Laps, he shall not have Damages of two Years value of the Church, but only of half a Year, for the Court cannot grant both a Writ to the Bishop, and Damages for two Years, 39 *Ed.* 3. 15. 11 *H.* 4. 80. Yet 'tis said, that when they were at issue in a *Quare Impedit*, and the Jury found that the Church was void at the time when they were charged, and that at the time of the Verdict the Church was full by the Collation of the Bishop by Laps, the Plaintiff recovered his Presentment and Damages according to the two Years value of the Church, although that the Defendant alledged that the Plantiff had recovered Damages to half a Years value of the Church in another *Quare Impedit* against another person, 43 *Ed.* 3. 10. albeit, the Bishop hath not Collated, yet if he hath *jus Conferendi*, the Plaintiff shall, if he will recover double Damages within this Statute; but if the six Months be past, so as the Bishop hath a just Title to Collate by Lapse, yet if the Church doth remain void, the Plaintiff may at his peril pray a Writ to the Bishop; but then he shall not recover Damages but for half a Year only, because he shall recover his presentation; so it is in the Plaintiff's Election, either to lose his presentation, and have double Damages, or to have his presentation and single Damages, for the Plaintiff in no Case can have double Damages but where he loseth his presentation, 2 *Institute* 363.

Notwithstanding this Statute, if Judgment be to recover the value of the Church but for half a Year, when the six Months are passed; this is no such Error as the Defendants shall take advantage of, for it is for his advantage, and therefore is not by him assignable for Error, *Jenkins Cent.* 5. *Case* 36.

Damages

Damages are not to be recovered by this Statute of every Defendant, for if the Biſhop be made a Defendant among others, and in his Plea doth claim nothing but as Ordinary, and the Patron doth not maintain him to be a Diſturber, but prays his Writ to the Biſhop, the Suit betwixt them is at an end, and the Patron having the Effect thereof as to the Biſhop, he ſhall have no damages againſt him, becauſe the Biſhop is not convicted of any wrong, by *Hobart, Mich.* 15. *Jac. Brickhead* v. *the Arch-biſhop of York, Hobart* 198 But if the Plaintiff be at iſſue with any other of the Defendants, and the Title is found with the Plaintiff, thoſe other Defendants ſhall alone anſwer the Plaintiff his Damages, for the Enqueſt ſhall not paſs betwixt the Plaintiff and the Biſhop, although that iſſue upon the diſturbance be joined with him alſo, *Jenkins Cent.* 1. *Caſe* 19. But when the Biſhop doth plead that he claims nothing but as Ordinary, and the Patron doth chooſe to maintain him to be a Diſturber, if it be found againſt the Biſhop, although the Patron doth recover againſt the other Diſturbers,as well as the Biſhop, yet he ſhall recover Damages againſt the Biſhop alſo; at leaſt, when the Writ is brought and a recovery had againſt the Biſhop only, Damages are to be recovered againſt him: So a Writ being brought only againſt the Biſhop for that he did refuſe the Patron's Clerk, and a recovery was had againſt him, the Judgment was, That the Biſhop ſhould be in *Miſericordia*, that is, Amerced; and every Amercement of a Biſhop is Five Pounds, *Hill* 32. *Eliz. B. R. Specot's Caſe, Coke* 5. *part* 58.

If a *Quare Impedit* be brought againſt the Biſhop, and he ſaith that he claims nothing but as Ordinary, and then the Plaintiff replies, that he preſented his Clerk, and the Biſhop's Officer examined him, and found him able, and that the Biſhop would not admit him, but preſented an other within the ſix Months: To which the Biſhop rejoins, that he examined his Clerk, and found him to be illiterate, ſo they are at Iſſue, able, or not able, and pendant the Iſſue the Biſhop doth accept, Inſtitute, and Induct the ſame Clerk, the Patron ſhall have Judgment to recover his Preſentment and Damages, becauſe, by receiving him, he doth admit him to be able at the time when he refuſed him; and ſo it would be, though the Biſhop ſhould alledg the Clerk is become able at the latter Examination, 4 *Ed.* 3. 25.

But whether the whole Damages, or but a part of them may be levied upon one of the Diſturbers alone when there are many, *Quære.* And what is ſaid concerning the Biſhop as to Damages, I ſuppoſe holds good as to other Diſturbers, when their Caſe is like thereto; and alſo in all caſes when Judgment is given againſt any one without Enqueſt by the Jury, as upon the abatement of a Writ, *&c.* becauſe, then the party againſt whom Judgment is given cannot be convicted of any wrong.

Notwithſtanding this Statute, it was, ſaith *Coke* in *Boſwell's* Caſe, *Coke* 6. *part* 28. adjudged *Paſch.* 32. *Eliz. B. R.* between *Buckherd* and the Queen upon a Writ of Error upon a Judgment given in the Common-Pleas, that the Queen ſhould not recover Damages in a *Quare Impedit*; *Firſt*, becauſe at the Common-Law before the Statute, no Damages were recoverable by any in a *Quare Impedit*, and now none but what are given by the ſaid Statute, for the Clauſe therein which relateth to this matter hath two Branches: *Firſt*, if the time of ſix Months do paſs by the impediment of any, ſo that the Biſhop doth conferr to the Church, and the Patron loſeth his Preſentation, *&c.* and the Queen is not within this Branch to have Damages for two Years, becauſe ſhe cannot loſe her Preſentment by Laps; and the *Second* Branch is, **And if the ſix Months be not paſſed**, &c doth depend upon the other, and foraſmuch as the Queen is not within the firſt, ſhe cannot be within the Second; and with this agree 3 *H.* 6. *Damages* 17. *adjudged* 14 *Ed.* 3. *Quare Impedit* 54. 34 *H.* 6.

12 *Ed.* 3. *Champerty* 9. 18 *Ed.* 3. 2. And yet all Declarations in the Caſe of the King are laid to his Damage, though no Damages are thereby recovered. And *Coke* ſaith, that 13 *Ed.* 3. *Quare Impedit* 181. which ſeems to be to the Contrary, was the Error of the Clerk, or Reporter: See the Caſe of *Bugberd* v. *the Queen*, *Mic.* 31, 32. *Eliz. C. B.* 3 *Croke* 261. *and* 1 *Leonard* 149. where it is ſaid by *Wray*, that he had conferred with *Anderſon*, *Manwood*, *Periam*, and *Walmſly*, and that all but *Periam*, who doubted, agreed, that no Damages were to be given; and there it is alſo ſaid (as by *Coke* in *Boſwell's Caſe*) that the Caſe of Sir *John Thinn*, *Hill* 7. *Eliz. C. B. Dyer* 236. was but an *adviſare vult*. *Jenkins Cent.* 7. *Caſe.* 7. and *Godfrey* who had ſearched the Roll of that Caſe affirmed, That he found there, that the Court would adviſe as to the Damages, but there ſeems to be a difference between the Reports of *Croke* and *Leonard*, who both mention this Caſe of the *Queen* and *Bugberd*; for by *Croke*, it is ſaid, that the Judgment was Reverſed, becauſe Damages were given; and the Opinion of the Judges, as reported by *Leonard*, are to that purpoſe: But when he ſets down the Judgment, he ſays, that the Judgment was, that the Queen ſhould have a Writ to the Biſhop and Damages: But *Coke* in *Boſwel's* Caſe agrees with the Report of *Croke*, that the Judgment was Reverſed, and the Law and Practice is, as I conceive agreeable to the Report of *Coke* and *Croke*; that is, that the King recovers no Damages in a *Quare Impedit*.

And ſome doubt, if a Biſhop be ſued in a *Quare Impedit*, and the Plaintiff be Nonſuit, whether the Biſhop ſhall recover Damages, unleſs he could have a Writ to the Biſhop; but by *Aſhton*, *Danby*, *Newton* and *Porting* he ſhall recover Damages, 22 *H.* 6. 27.

Alſo the Incumbent againſt whom the Writ is brought recovering, ſhall have Damages, for he cannot have a Writ to the Biſhop, *Brownlow* and *Gouldsborough* 1 *part* 159. And 'tis ſaid, where Patron and Incumbent plead the ſame Plea, both ſhall recover Damages, and in that caſe Judgment being againſt them, both ſhall pay Damages, 46 *Ed.* 3. 15.

Though Damages be given by the aforeſaid Statute of *Weſt.* 2. *Ch.* 5. yet the Plaintiff (if he will) may take the Judgment at the Common-Law, and leave the benefit of the Statute, *Hill.* 32. *Eliz. Specot's Caſe*, *Coke* 5. 58.

Alſo there is this Effect of a Judgment given in theſe Writs, that the Plaintiff or Defendant that doth recover, ſhall as hath been before ſhewed, have a Writ to the Biſhop to admit his Clerk, *Winchcomb* and *Pulleſton's Caſe*, *Hobart* 193. for the Defendant if it be found for him, ſhall have the Writ as well as the Plaintiff, had it been found againſt him, *Roll's*, 2 *Abr.* 386. *Vaughan* 7. And yet in divers Caſes a Patron may recover his Damages, and yet not have a Writ to the Biſhop to admit his Clerk, as if he whoſe Clerk is Inducted, be ſued in a *Quare Impedit*, and the Plaintiff is Nonſuit, the Defendant ſhall have Damages, yet cannot have a Writ ro the Biſhop, becauſe, the Church is full of his own Clerk. So in a *Quare Impedit*, if the Defendant doth intitle himſelf to hold the Church as appropriated, or to hold it as a Donative, free from the Biſhop's Inſtitution, and the Plaintiff be Nonſuit, the Law is the ſame, 22 *H.* 6. 27. But when one doth recover in a *Quare Impedit*, altho' that no Writ be awarded for him to the Biſhop, yet he that doth recover may preſent, 46 *Ed.* 3. 14. but not before he hath recovered, if the Church be full, And if upon a preſentment made, the Biſhop will Admit, and Inſtitute his Clerk, and he be Inducted it is good, for after Judgment the Incumbent is *Debito modo amotus*, and the Writ is not to remove the former Clerk, but is *non obſtante reclamatione* of the Incumbent, *&c.* and is but an execution of the Judgment, *Rudd* v. *the Biſhop of Lincoln*, *Hutton* 66. *Trin.* 13. *Jac. Harris* v. *Auſtin*

v. *Auſtin* 3. *Bulſtrode* 38. *and Mich.* 12. *Jac. B. R. Whiſtler* v. *Singleton*, 1 *Roll's Rep.* 62.

If upon the Admiſſion and Inſtitution of the Clerk of him that recovers without a Writ to the Biſhop to remove the preſent Incumbent, the firſt Clerk doth bring a ſuit in the Court of Arches, or Audience, as for a ſuper inſtitution a Prohibition lies, and is grantable at the Prayer of the Clerk of him that recovered; and this holds good, although that a Writ of Error was brought upon the former Judgment; for without a Writ to the Biſhop, the Patron may preſent, and the Inſtitution will be no ſuper-inſtitution: But (as *Coke* ſaid) the firſt Incumbent doth continue Incumbent *de facto* until the laſt Incumbent be Inſtituted, *Mich.* 12 *Jac. B. R. Whiſtler* v. *Singleton*, *Roll's* 1. *Reports* 62. And accordingly 'tis ſaid by him, *Mich.* 12 *Jac. B. R. in Grange* and *Howlet's Caſe*, *Roll's* 1 *Rep.* 61. That if the Incumbent be removed in a *Quare Impedit*, the Plaintiff ſhall not have the mean profits, and that the Law is the ſame in a Writ of Error; and by *Coke* in *Harris* and *Auſten's* Caſe, *Roll's* 1 *Rep.* 212. the Incumbent againſt whom a Recovery is had, before a new Incumbent is admitted, or a Writ ſent to the Biſhop may reſign, and then the Ordinary ſhall give notice of ſuch Reſignation to the Patron that hath recovered; or if the Patron that doth recover pleaſeth, it ſeems, he may ſuffer the Clerk againſt whom the Recovery is, to continue Incumbent for his life, notwithſtanding that the Patronage is reveſted in him that recovered by the Judgment, by *Coke*, *Dodderidg* and *Haughton*.

But what is ſaid that the Perſon that recovers may preſent, *&c.* without a Writ to the Biſhop, is true in the Caſe of the Plaintiff only, when he hath Judgment againſt all that he hath made Defendants, 19 *H.* 6. 68. *b.* and in Caſe he hath named the Incumbent in the Writ, if he was Incumbent before the Writ brought; for otherwiſe ſuch Incumbent ſhall not be removed, and if the Patron in ſuch Caſe ſhould preſent his Clerk to the Biſhop, and the Biſhop ſhould inſtitute him, *&c.* all is void, the Patron in ſuch Caſe recovering only the Advowſon, not the Preſentment, and ſo the inſtitution is to a full Church, 9 *H.* 6. 56. *b.*

When a Writ is awarded according to the Judgment, it is regularly to be directed to the Biſhop of the Dioceſs in which the Church is; and although the Biſhop be made a Defendant in the Writ, if in his Plea he claims nothing but as Ordinary, upon which Plea Judgment is given againſt him, with a *Ceſſet Executio*, and after Judgment is given alſo againſt the Patron, and a Writ to the Biſhop granted againſt him, yet this Writ may be directed to the ſame Biſhop, altho' that he be party to the Action, for that he is not found to be a Diſturber, *Boſwell's Caſe*, 6 *Coke* 51. *New Entries* 494. or the Writ in this caſe may (as it is ſaid) be awarded to the Metropolitan, becauſe the immediate Ordinary is party to the Action, 8 *H.* 4. 22. *b.* but there it was found that the Biſhop had Collated by Laps to the Church, *Contra* 5 *H.* 7. 22. And ſo if the Writ be againſt the immediate Ordinary, upon that reaſon only, it ſeems, that the Plaintiff is at his Election to have his Writ to him, or to the Metropolitan; for when a Writ was brought againſt the Biſhop, Arch-biſhop, and other Defendants, (the Biſhop having admitted the Clerk of the other Defendants before the Writ, and not otherwiſe than according to his duty) and the Arch-biſhop pleaded that he claimed nothing but as Metropolitan, and the Biſhop that he claimed nothing but as Ordinary, and ſo the Biſhop no Diſturber, and the Arch-biſhop equally charged with him as party, yet the whole Court after ſeveral motions was clear of Opinion, that the party was at his Election, and that the Writ (as was done in this Caſe) was well awarded to the Metropolitan, and only upon the reaſon of the Biſhops being made

made party in the Writ, *Paſch.* 14. *Jac. B. R. Grange* and *Denny*'s *Caſe*, 3 *Bulſtrode* 174. For which were alſo cited 8 *H.* 4. *fol.* 22. *Old Book of Entries*, *fol.* 278 & 478. *and New Book of Entries*, *fol.* 898, 501, 507, 509, & 599. 38 *Ed.* 3. *fol.* 12. *Jenkins Cent.* 8. *Caſe* 36. But it ſeems ſtrange that the Biſhop ſhould loſe his right of Inſtituting, only by being named in the Writ wrongfully, and without neceſſity, *Quære.*

When he that recovers hath had a Writ to the Metropolitan, he cannot afterwards have a Writ to the immediate Ordinary, and if the Writ be awarded to the Metropolitan, and he doth certify that the Church is out of his Juriſdiction, and that the Biſhop is out of the Realm, and hath conſtituted a Vicar general to do all things for him, the Judges are not bound to take notice that he hath made a Vicar General, and till they are ſufficiently certified thereof, they cannot write to him, but to the Biſhop, who is the immediate Officer of the Court, by *Thorp. Br. Ab. Brief al. Eveſq.* 12. But if the Biſhop doth plead that he claims nothing but as Ordinary, and the Plaintiff doth not pray Judgment, but doth proceed for a Recovery againſt the Biſhop, and the Biſhop be found a Diſturber, the Writ ought to be granted to the Metropolitan, upon the Prayer of the Plaintiff, *Temp. Ed.* 1. 83. *Contra* 30. *Rol.* 2 *Abr.* 389.

Or if the Biſhop hath Collated by Laps, and a Writ being brought againſt him and his Incumbent, the Biſhop doth plead that he claims nothing but as Ordinary by Laps, and the Incumbent doth plead the Biſhop's Title by Laps; the Plaintiff recovering ſhall upon his Prayer have the Writ awarded to the Metropolitan, 19 *Ed.* 3. *Quare Impedit* 153. 5 *H.* 7. 22. 8 *H.* 4. 22. *b.* And ſo in all Caſes, when the Biſhop doth in his Plea make a Title to preſent, and Judgment is given againſt him, the Writ ſhall be awarded to the Metropolitan, or Guardian of the Spiritualties at the Prayer of the Plaintiff, *Br. Ab. Brief al. Eveſq.* 6. *Temp. Ed.* 1. 83. *contra.* 30. or to the Biſhop that is the Diſturber, if the party will, by *Coke* and *Dodderidg*, *Paſch.* 14. *Jac. Grange* v. *Denny*, *Roll*'s 1 *Rep.* 363, 397. and upon a Judgment by a *non ſum informatus*, or *nihil dicit*, the Writ ſhall iſſue to the Metropolitan, and not to the immediate Ordinary if the Writ be againſt him, by *Brownlow* and *Gouldsborough* 1 *part* 159. and by *Hobert* in *Brickhead*, and the *Arch-biſhop of York*'s Caſe, *Hobart* 198. *F. N. B. fol.* 38. But if the Biſhop that doth make Title in his Plea to Collate be dead, and a new Biſhop be alſo made before the Plaintiff recovering hath his Writ to the Biſhop, the Writ by the Judgment of the Court may be awarded either to the new Biſhop, or to his Metropolitan, at the Election of him that recovered, *Mich.* 22 & 23. *Eliz. C. B. Dyer* 194. and ſo it may be directed to either at the Election of the Recoverer, if the Biſhop be a Diſturber and uot dead, *Grange* and *Denny*'s Caſe, *Paſch.* 14. *Jac. B. R.* 3 *Bulſtrode* 174. *Jenkins Cent.* 8. *Caſe* 36.

As the Writ to the Biſhop in the Caſes before put, may be awarded to the reſpective Metropolitan, and the Biſhop of the Dioceſs waived; ſo if the Arch-biſhop of *York* be found to be a Diſturber, the Writ may iſſue to the Arch-biſhop of *Canterbury*, *Trin.* 3. *Jac. Roll*'s *Abr. part* 2. p. 390. 16 *Eliz. Dyer* 327. *Coke*'s *Entry* 496. *a.*

When a Biſhop's See is void, the Writ is to be directed to the Guardian of the Spiritualities, *Paſch.* 18 *Eliz. C. B. Dyer* 350. *Paſch.* 14. *Jac. B. R.* in *Grange* and *Denny*'s *Caſe* 3. *Bulſtrode* 174. And when the Arch-biſhop is Guardian of the Spiritualities of a Church, and the Arch-biſhoprick is void, the Writ ſhall be ſent to the Guardian of the Spiritualities of the Arch-biſhoprick, *Mich.* 6 *Ed.* 6. *C. B. Henſlow* and *Stanesby* v. *the Biſhop of Sarum* and *Keble*, *Dyer* 76. *b.* And ſo if the inferior Ordinary be a Diſturber, the Arch-

biſhoprick

biſhoprick being void, the Writ is to go to the Guardian of the Spiritualties of the Arch-biſhoprick, *Temp. Ed.* 1. 83. *Roll's Abr.* 2. *p.* 390. But if a Biſhoprick being void, the Writ is brought againſt the Arch-biſhop as Guardian of the Spiritualities, and the Plaintiff hath Judgment by a *non ſum Informatus*, and in the mean time the See where the Church is, happens to be filled, the Writ ſhall be directed to the new Biſhop, for that he is the immediate Ordinary, *Mich.* 5 *Jac. C. B.* Sir *Thomas Pelham's* Caſe, *Roll's Ab.* 2 *part* 390. and *Pelham's Caſe*, *Noy* 148. 22 *Ed.* 3. 13. But when the Writ was directed (the See being void) to the Dean and Chapter, as Guardian of the Spiritualties, the Writ not being returnable, and before the Execution of the Writ, a new Biſhop is made, it being doubted if the Dean and Chapters authority to execute the Writ was not ceaſed; it was held, that becauſe nothing was done in the Writ aforeſaid, another Writ might be awarded to the new Biſhop, and that it might be returnable if it pleaſed the party, *&c. Paſch.* 18. *Eliz. C. B. Dyer* 350.

When a Perſon doth recover a Benefice that is a Donative, the Writ ſhall go to him that ought to inſtall, or induct in that Caſe, or to the Sheriff, to put the Clerk into poſſeſſion, *No. Na. Bre.* 48. *a.*

If the Writ is awarded to a wrong Ordinary, as if to the Arch-biſhop when it ought to be directed to the immediate Ordinary, or to the Arch-biſhop of *Canterbury* to admit to a Church within the Province of *York*; the Arch-biſhop of *York* not being found a Diſturber, this is Error only in the Execution of the Judgment, and the Writ of Error is to be brought as to this only, and thereby the Judgment ſhall not be reverſed, but only *quoad* awarding of the Writ, &c. according to *Coke*, in *Grange* and *Denny's* Caſe, *Paſch.* 14. *Jac. B. R. Bulſtrode* 3 *part* 178. *Trin.* 3. *Jac. B. per Cur. Roll's Abr.* 2. p. 390.

And *Note*, That if a Tryal for the Right of preſenting, be had before the Juſtices of the Grand Seſſions in *Wales*, they have power to write to the Arch-biſhop of *Canterbury*, as well as to the immediate Biſhop, to receive the Clerk of him that recovers, if the Church be within his Province, *Hill.* 9 *Car. Lort* v. *the Biſhop of St. Davids*, *Jones* 332. *&* 1 *Cro.* 342.

The Writ being awarded and brought to the Biſhop to receive the Clerk of him that recovers, if the Church be void, or full only of a Clerk that was incumbent before the Writ brought, and who was made a Defendant in the Writ, the Biſhop without doubt, ought to admit the Clerk, for the Admiſſion of whom the Writ is brought; and ſo, though the incumbent againſt whom the Writ was brought hath reſigned, and be admitted again before the Writ comes to the Biſhop. Accordingly, when upon a Recovery in a *Quare Impedit*, a Writ was awarded to the Biſhop, which was not returned, and an *alias* thereupon did iſſue forth, upon which the Biſhop did return, that after Judgment given in the *Quare Impedit*, viz. after the awarding of the firſt, and before the awarding of the ſecond Writ, the ſame Incumbent againſt whom the Action was brought, was Peſented, Inſtituted, and Inducted into the ſame Church, and ſo the Church was full; in this Caſe it was adjudged, that the return was not good, wherefore the Biſhop was fined Ten Pounds, and a *ſicut alias* awarded upon pain of one Hundred Pounds, *Mich.* 28 *Eliz. C. B. Moor and the Biſhop of Norwich his Caſe*, 3 *Leonard* 138. *ſame Caſe in Gouldsborough* 3. And if any that are named in the Writ, do get their Incumbent admitted, *&c. pendente lite*, the Clerk of him that recovers, ought to be received by the Ordinary, ſuch preadmiſſion notwithſtanding, *Mich.* 3 *Jac. Boſwell's Caſe*, *Coke part* 6. 51 *Jenkin's Caſe*, 7 *Cent.* 7 *Booton* v. *the Biſhop of Rocheſter*, *Hutton* 24. And ſo if the Writ be brought againſt the King's Incumbent, who is only Inſtituted, and pendant the Writ, another is Inſtituted, and Inducted upon the King's

King's Preſentment; yet the Plaintiff having a Writ to the Biſhop, his Clerk ought to be received, becauſe the King's ſecond Clerk cometh in under the Title of the Plaintiff, *Mich.* 3. *Jac. Boſwell*'s Caſe 6 *Coke* 51. So when (the King having preſented for Simony) a Recovery was had againſt the Simonical Patron, and upon a Writ to the Biſhop he returned, that before the Writ accepted, (*viz.* after Judgment) the Church was full by preſentment out of the Court of Wards, becauſe, Livery was not ſued, *&c.* It was ſaid, that if in this Caſe the Ordinary had returned another preſented by Simony, under the great Seal, and that the former preſentment was by the latter revoked, it had been good; for it is an Execution of the Judgment, and may be pleaded in abatement of the Writ. But as this Caſe was, it was agreed by two Judges only then preſent, that the Judgment ought to be Executed, and that the Biſhop ſhould have day to amend his return, and not that a new Writ ſhould be awarded, *Hill.* 4. *Car. C. B.* Sir *John Hall*'s Caſe, *Hetly* 130.

But if a Stranger, that is, he who is no party to the Writ, doth preſent his Clerk *pendente lite*, it ſeems as hath been before ſhewed in this Chapter, that no Writ ſhall be awarded to admit the Clerk of him that recovers, before a *ſcire facis* ſued againſt him that is got into the Church; for when upon a *Quare Impedit* by *A.* againſt *B.* upon the Juries finding that the Church was full of the preſentee of a Stranger *pendente lite*, Judgment was given in this manner.---- *Ideo conſideratum eſt quod predictus* A. *recuperet verſus prefatum* B. *præſentationem ſuam ad Eccleſiam prædictam quæ modo plena exiſtit de præfato* C. *ex præſentatione, pendente Brevi predicto de* Qare Impedit *inter ipſum* A. *& præfatum* B. *& damna ſua*, &c. *& habeat Breve præfato Epiſcopo quod non obſtante reclamatione ſua aut reclamatione prædicti* C. *&* B. *ſeu eorum alterius licet idem* C. *ad Eccleſiam prædictam pendente Brevi pædicto admiſſus inſtitutus & in eandem Eccleſiam inductus exiſtit eundem* C. *ab Eccleſia prædicta removeat ac ad Eccleſiam illam ad præſentationem ipſius* A. *idoneam perſonam admittat.*----And upon this Judgment, a Writ of Error was brought by *B.* againſt *A. viz.* by him againſt whom the Judgment was given, againſt him that had the Judgment, becauſe a Writ was awarded to remove him that came in *pendente lite*, that was no party to the Suit, and that without any *ſcire facias* ſued againſt him; and *Popham*, *Fenner* and *Williams*, held it to be Error, for thereby Judgment is given againſt a Stranger who is no party to the Suit, ſo that he is to be removed without anſwer, *Mich.* 3 *Jac. B. R. Lancaſter* v. *Low.* 2 *Croke* 92. *Mich.* 6 *Ed.* 6. *Dyer* 77. *Contra. Co. Ent.* 265. *Mich.* 14. *Car.* 2 *B. R. Hall.* v. *Broad* 1 *Siderſin.* 93. And according to this, when (the Church being litigious) the Ordinary had refuſed both Clerks, and one Patron by bringing a *Duplex Querela*, had got his Clerk, admitted by the Metropolitan, and pendant the *Duplex Querela*; the other Patron recovered againſt the Biſhop in a *Quare Impedit*, which was brought before the *Duplex Querela* commenced, and upon this Recovery had a Writ to the Metropolitan, whereupon his Clerk alſo was Inſtituted and Inducted, and takes the profits of the Gleab, whereupon the firſt Clerk brings his Action of Treſpaſs. And it was firſt agreed, that it was a good return upon a Writ to the Biſhop of *Quare non admiſit*, that before the receipt of the Writ the Church was full, and that upon ſuch return by the Biſhop, a *Scire Facias* ſhall iſſue forth, and then the tryal ſhall be between the Incumbents, upon the Plea in the *Scire Facias*; but where the ſame Biſhop doth not make any return upon the Writ, but doth Inſtitute and Induct the Clerk, there is no cauſe of a *Scire Facias*; but the two Incumbents in poſſeſſory Actions, may try their Rights at Common-Law; and when a poſſeſſory Action is brought, and it doth appear to the Court in whom the Right is, the Judgment in the poſſeſſory Action of Treſ-

paſs

paſs, *&c.* ſhall be with the Right, and it was adjudged in this Caſe upon Conference, and reſolution of all the Juſtices, that the entry of the ſecond Incumbent was good without a *Scire Facias*, *Hill.* 41. *Eliz. Bennet* v. *Edwards*, *Moor* 572.

But as *Coke* reports the Caſe of *Lancaſter* v. *Low*, which in his Reports he calls *Boſwell*'s Caſe, 'tis ſaid, that when it is found *Ex Officio*, that the Church is full of the preſentment of a Stranger to the Writ pendant the ſame, and it doth not appear whether the Stranger hath a better Title than he that recovers; yet ſuch perſon ought to have a general Writ to the Biſhop, and the Biſhop ought to Execute it, prevail who can, and he cannot return upon the Writ directed to him; that the Church is full of another, for no iſſue can be joined between the Recoverer and him, for he hath no day in Court. And although that the third perſon hath Right, yet the Biſhop is excuſed, becauſe, he hath his Warrant by Proceſs of Law, and then the Parties may try their Rights as the Law requireth, *Mich.* 13. *Jac. Boſwell*'s Caſe 6 *Coke* 51. and by *Hobart Paſch.* 17. *Jac.* Sir *William Elvis and the Arch-biſhop of* York, *Taylor and Biſhop*, Hobart 320. *Hill* 4 *Car. C. B.* Sir *John Hall*'s Caſe, *Hetly* 130. And *Jenkins* following *Coke* in *Boſwell*'s Caſe, ſaith, That although the Clerk of a Stranger be admitted, *&c. Pendente lite*, yet the Clerk of him that recovers ſhall alſo be admitted, and they two in Treſpaſs, Ejectment, or Aſſize ſhall try their Right, *Jenkins Cent.* 7 *Caſe* 7. But *Boſwell*'s Caſe in this point, as hath been before ſhewed, is denied to be a Law, 1 *Siderf.* 93. and by *Hobart*, if in ſuch Caſe a Writ be awarded to the Biſhop, *Non obſtante reclamatione* of the Defendant, the Biſhop ſhall receive the Clerk of the Plaintiff without diſputing the right of the Plaintiff, or of him whoſe Clerk was firſt in the Church, and that he that hath the better right ſhall retain the Benefice, ſo that the others Inſtitution, and Induction ſhall be Null, *Brickhead and the Arch-biſhop of* York's *Caſe*, *Hobart* 200, 201.

So when a Recovery was had for the King upon the Title of *Simony*, and *Pendente lite*, another had got the Living by a Preſentment under the Seal of the Court of Wards, and the Biſhop returned that the Church was full as aforeſaid; it was ſaid, that theſe Returns that the Church was full before the Receipt of the Writ are always ruled to be inſufficient, and that the Biſhop ought to Execute the Writ when it comes to him, *Hill.* 4. *Car. C. B.* Sir *John Hall*'s Caſe, *Hetly* 130. *Jenkins Cent.* 1. *Caſe* 47. *Booton* v. *Biſhop of Rocheſter*, *Hutton* 24. And yet a Caſe was to this Effect, a *Quare Impedit* was brought againſt the Ordinary, Patron and *J. S.* Clerk, and found for the Plaintiff; and further *ex Officio Curiæ*, that the Church was full of the ſaid *J. S.* of the Preſentment of the ſaid Patron, as the Defendants had pleaded, upon which the Juſtices of *Niſi Prius* gave judgment for the Plaintiff according to the Statute of *Weſt.* 2. and awarded a Writ to the Biſhop, requiring him, *quod licet Eccleſia plena ſit de prædicto* J. S. *vel non*, to remove the ſaid *J. S. Non obſtante reclamatione*, &c. but this Writ was not returnable, as was ſaid, and the Record was removed into the Common Pleas, and there the Plaintiff had another Writ to the Biſhop, *ſicut alias*, and returnable in Bank as it ought, (2 *Inſtitute* 424. 425.) upon which ſecond Writ the Biſhop returned, that pendant the *Quare Impedit*, and before the Judgment, it was found by Commiſſion *De Melius inquirend'*, that the Advowſon, *&c.* was held of the Queen in Capite, and that the Title to preſent was then in her, who had preſented her Clerk to the Church then alſo void, and which had been void by the ſpace of three Months before the delivery of the firſt Writ to him, which Clerk he had admitted, *&c.* and the Church is now full, ſo that he could not execute this, nor the other Writ, *&c.* And in this Caſe (being well debated) by

the better Opinion of the Court, the Ordinary was not ſtopped to make this return of the Title of the Queen, and of the plenarty of the Church of her Incumbent, by any thing contrary in the Record, becauſe, the Biſhop is not party, nor privy to the Verdict, nor to any Plea that doth acknowledge the plenarty of the Church, by which, *&c.* But if the matter be falſe which the Biſhop doth return for his Excuſe of not ſerving the two Writs, the Plaintiff may have his *Quare non admiſit*; and alſo the Plaintiff may have a *Scire Facias* againſt the firſt Incumbent and him that came in *Pendente lite*, to have Execution, and ſo the Title of the Queen ſhall come into Debate, *Paſch.* 9. *Eliz. Dyer* 260. 21. In this Caſe I ſuppoſe, the firſt Clerk was not inducted, and ſo the Church remained open to the King's Preſentee, elſe his Inſtitution, *&c.* muſt be void. And ſee the Opinion of Juſtice *Twiſden* mentioned before, that the Clerk of him who is no party to the Action, ſhall not be removed by a Writ to the Biſhop, but a *Scire Facias* ought ſuch Caſe to be awarded againſt ſuch Clerk, *Hall* v. *Broad*, 1 *Siderf.* 93.

So 'tis ſaid, that when a Common Perſon doth recover, and hath a Writ to the Biſhop, if the Ordinary doth return, that the Church is full of his own Collation before the Writ received, it is good Sir *John Hall*'s Caſe, *Hill.* 4. *Car. C. B. Hetly* 130.

Yet when a *Quare Impedit* was brought againſt Parſon, Patron and Ordinary, and pendant the Writ the Parſon reſigned, and the Ordinary gave notice to the Patron; and afterwards the Ordinary preſented the ſame Clerk, that had reſigned, the Plaintiff in the *Quare Impedit* having judgment to recover, it was held, that the Incumbent ſhould be removed (and by conſequence that the Biſhop ſhould admit the Clerk of him that recovered) becauſe, he is the perſon againſt whom the Recovery was had although he came in by a new Title, *L.* 5 *Ed.* 4. 115. 116. *vouched in* Moor *and the Biſhop of* Norwich *his Caſe*, *Mich.* 28. *Eliz. C. B.* 3 *Leonard* 138. but it ſeems to be otherwiſe as is before ſhewed, if another Clerk had been Collated; and yet why the Biſhop if a Title by Laps was in him, ſhould loſe it by Collating ſuch Clerk, I ſee not, if there be no Fraud or Practice in the Caſe. And *Hobart* ſaith, that if a perſon having right to preſent to an Advowſon, doth not preſent when the Church is void, nor is any way diſturbed, and yet either before the ſix Months paſs, or before the Biſhop doth Collate, doth bring a *Quare Impedit* againſt the Biſhop, and then the Biſhop doth Collate in his due time for Laps, (as he holds in this Caſe that he may) and pleads *ne diſturba pas*, or that he claims nothing but as Ordinary; yet when ſuch Patron hath a Writ to the Biſhop, the Biſhop, ſaith he, may perhaps be compellable to admit the Clerk of the Plaintiff in obedience to the Writ, and yet it ſhall not work a removal of the Biſhops Clerk, but he ſhall retain the Benefice, as having the better Right, *Brickhead and the Arch-biſhop of* York's *Caſe*, *Mich.* 15. *Jac. Hobart* 200.

So if the Church being litigious, the Biſhop doth refuſe both Clerks, and being made a Defendant in the Writ, doth plead the general Plea; yet if he doth Collate for Laps *Pendente lite*, although the Plaintiff doth pray his Writ to the Biſhop, and recovering hath it, and the Biſhop thereupon doth admit his Clerk; yet the Biſhop's Collatee upon Tryal, may peradventure hold the Benefice as having good Title, although the Biſhop was made a Defendant. See *Chap.* 24. *add f.* 288.

Upon the whole matter, although the preſentee of a Stranger be admitted *Pendente lite*, or the Biſhop hath Collated *Pendente lite*, it is adviſable for the Biſhop to Execute the Writ when it comes to him, becauſe it is a Queſtion, whether in either Caſe he may refuſe; and no perjudice can be to him by admitting, whereas if the Biſhop doth refuſe to admit upon the Receipt of the Writ,

Writ, and doth make a return of the Writ, with ſuch reaſon of his refuſal which ſhall not be allowed by the Court, the Biſhop may be fined, as was done *Mich.* 28. *Eliz. C. B.* Moor *and the Biſhop of* Norwich *his Caſe* 3 *Leonard* 138. where the Biſhop for making an ill Return upon the Writ not executed, was fined Ten Pounds, and a *Sicut alias* awarded upon pain of an Hundred Pounds.

Alſo if the Biſhop doth not admit the Clerk of him that recovers upon the Writ brought, the Writ of *Quare non admiſit* doth lye againſt him, *Hill.* 9 *Car. B. R.* Cort *againſt the Biſhop of St.* David's, 1 *Croke* 342. So 'tis ſaid, that when the Biſhop did refuſe to admit the King's Clerk upon a Writ directed to him, the King brought a *Quare non admiſit* againſt the Biſhop, who counterpleaded the Title of the King, and pleaded that he (before the King had his Judgment) had Collated by Laps, the ſix Months being then paſt, notwithſtanding this Plea, it being found againſt the Biſhop, another Writ was awarded to the Biſhop, and the Temporalities of his Biſhoprick were ſeized into the King's hands for the Contempt. But ſee *Articuli Cleri, Stat.* 25. *Ed.* 3. *Cap.* 6. by which the Biſhop ſhall be Fined, and the Temporalties of the Biſhop ſhall not be ſeized at this day in ſuch Caſe, 25 *Ed.* 3. 22 *Jenkins Cent.* 1. *Caſe* 47.

But generally, if a *Quare non admiſit* be brought againſt the Biſhop, for that he doth refuſe to admit the Clerk of the Patron that hath Judgment, it is a good Plea for the Biſhop to ſay, that the Church is Litigious betwixt the Plaintiff, and a Stranger; for then the Biſhop is not bound to receive the Clerk of either party, and the Recovery may be without Title, and by Fraud. But it is no Plea for the Biſhop to ſay, that the Church is Litigious betwixt the Plaintiff and Defendant in the *Quare Impedit*, for the recovery determines the matter betwixt them, of which the Biſhop is to take notice, 7 *H.* 4. 26. 34 *H.* 6. 41. 47 *E.* 3. 11.

Alſo if the Biſhop admit and inſtitute the Clerk, and makes Letters tothe Arch-deacon to induct him, this being pleaded, is a good Excuſe in a *Quare non admiſit*, without ſaying that he is Inducted, for the Plaintiff ſhall have his Suit in the Spiritual Court againſt the Arch-deacon if he refuſe to Induct, 38 *H.* 6. 16.

This Writ of *Qare non admiſit* is to be brought in the County where the refuſal is, and not where the Church is, 38 *H.* 6. 14.

And in a *Quare non Admiſit* a protection doth not lye, becauſe it is grounded upon a *Quare Impedit*, in which, and in a *Darrein Preſentment* a protection doth not lye for the eminent Danger of a Laps, 1 *Inſt.* 131. *a.* So it is a good Excuſe for the Biſhop in a Writ of *Quare non Admiſit*, to ſay, that the Clerk hath not made any requeſt to be admitted, *Kelw.* 71.

CHAP. XXIX.

Of Writs of Error upon Judgments in Quare Impedit, *and Aſſize of* Darrein Preſentment.

AFter Judgment is given upon a *Quare Impedit*, or an Aſſize of *Darrein Preſentment*, he againſt whom it is given may bring his Writ of Error upon the Judgment, if he be not ſatisfied therewith: But before a Writ of Error be brought againſt the King when he doth Recover, a Petition ought to be made to the King by thoſe who would bring the Writ of Error, that they may bring the ſame, and upon liberty granted, they may proceed to impeach the Judgment, 23 *Ed.* 3. 22. *Fenkins Cent.* 1. *Caſe* 47. And by *Popham*, the Court ought not to proceed to the Examination of the Errors without ſuch Petition made to the King; and ſaith, that was the Caſe of one *Mordant*, where an Infant levied a Fine to the Queen, and thereupon brought a Writ of Error; and afterwards by the Reſolution of all the Judges, the proceedings thereupon were ſtayed, *Trin.* 36. *Eliz. B. R. Queen and Buckberd*'s Caſe, 1 *Leonard* 152. See 10 *H.* 4. 4. & *Hurlſton*'s Caſe, 2 *Leonard* 194.

A *Quare Impedit* is brought againſt the Biſhop and another Defendant; the Biſhop pleads that he claims nothing but as Ordinary, upon which Judgment is given againſt the Biſhop, with a *Ceſſet Executio*, for that he claims nothing but as Ordinary, and after that Judgment is given alſo againſt the other Defendant. The Biſhop, in this caſe may join with the other Defendant in a Writ of Error to reverſe this Judgment, he being party to the Action: For (ſaith *Wray*) the Biſhop hath loſs by the Judgment, in that thereby the Writ ſhall be to the Arch-biſhop for Admiſſion, and Inſtitution, and ſo he is ouſted of his Juriſdiction in that part, *Mich.* 29 & 30. *Eliz. B. R. the Biſhop of* Glouceſter *and* Savacres's *Caſe*, 3 *Croke* 65 & 3 *Leonard* 176. *So Paſch.* 36 *Eliz. B. R. Pipe* v. *the Queen*, 3 *Croke* 324.

If a *Quare Impedit* be brought againſt the Biſhop, Patron and Incumbent, and the Patron doth die *Pendente lite*, and yet Judgment is given againſt them all, and then a Writ of Error is brought by the Son and Heir, who is alſo Executor of the Patron, if the Biſhop and Incumbent be named with him in the Writ of Error, they may be Summoned, and Severed: For as Summons, and Severance ſhall be in a *Quare Impedit*, ſo in a Writ of Error upon it. And although it was moved in this Caſe, that ſuch Writ of Error was not well brought, for that the Plaintiff in it had no cauſe to bring a Writ of Error, as Heir, or as Executor, for he could not have it as Heir, becauſe the inheritance was not touched in that Action, for that the Queen being Plaintiff, claimed only by Laps, and ſo affirmed the Inheritance to be in him; and as Executor he could not bring it, becauſe he had no Damage, for that the Teſtator had preſented, and the Incumbent was in the Church: And here, all the loſs is to the Incumbent; and he could not reverſe the Judgment, for that he was ſevered. But the Court held, that the Writ of Error did well lie, for that it is to maintain the Incumbent in the Church, and the Incumbent, although he were ſevered ſhould of neceſſity have Judgment to be reſtored; for the Judgment is entirely to be reverſed, and the Incumbent may well enter, for that by the reverſal there is no Record of the Recovery againſt him, *Paſch.* 36. *Eliz. B. R. Pipe* v. *the Queen*, 3 *Cro.* 324.

If

If a Judgment be given in the Common-Pleas in a *Quare Impedit*, and a Writ is thereupon awarded to the Biſhop for the Party who recovers, and afterwards a Writ of Error is brought in the *King's-Bench* upon that Judgment; the Court of Common-Pleas may award a *Superſedeas* to the Writ awarded to the Biſhop, and ſo may the *King's-Bench* do alſo.

And where a Writ of Error is brought, and the Defendants therein do ſue a *Scire Facias* to the Sheriff againſt the Plaintiffs in the Writ of Error to have Execution, for that they were too ſlow in the Aſſignment of Errors; the Plaintiff in the Writ of Error may aſſign Errors upon this *Scire Facias*, as well as upon a *Scire Facias ex parte Querentis ad audiendum Errores*, becauſe this *Scire Facias* brought by the Defendant, is in a manner in nature of a *Scire Facias* to aſſign Errors, although there be not any ſuch word in it; and 'tis ſaid, that they have not any other courſe or words in ſuch Writs, *Mich.* 6 *Ed.* 6. *Dyer* 76. *b. Jenkins Cent.* 5 *Caſe* 36.

But if in an Aſſize of *Darrein Preſentment*, Judgment is given for the Plaintiff, and a Writ is thereupon awarded to the Biſhop for him, and alſo a Writ to enquire of the Damages, and after a Writ of Error is brought upon the principal Judgment; this is not any *Superſedeas* to the Writ to enquire of the Damages, but the Sheriff may ſerve and return it notwithſtanding, *Roll's Abr.* 2. p. 491. But if a Man doth recover in a *Quare Impedit* in the Common-Pleas, and after, this is removed into the *King's-Bench* by a Writ of Error, a *Quare Incumbravit* doth lye; although that it doth not lye without a Judgment, for that it is a new Original, and is a Common-plea in it ſelf, *Roll's Abr.* 1. p. 537.

If a Writ of Error be brought, and the firſt Judgment be affirmed, Damages are to be given againſt the Plaintiff in the Writ of Error. Accordingly, a Judgment in a *Quare Impedit* being given for the Plaintiff, and the value of the Church found to be Eighty Pounds *per Annum*; and this Judgment being afterwards affirmed upon a Writ of Error, it was moved, that according to the Statute, 3 *H.* 7. *Ch.* 10. which appoints Damages and Coſts to be allowed where Writs of Error are brought *Pro Dilatione Executionis.* The Court awarded that the Defendant in the Writ of Error ſhould have Damages for a Year (during which time the Writ of Error was depending) according to the value of the Church found by the Verdict; and ſo they awarded him Eighty Pounds beſides Coſts, *Mich.* 4. *Car. B. R. Anonymus*, 1 *Croke* 145. *Mich.* 7 *Ed.* 6. *Dyer* 77. But if Judgment be given for the Defendant, and that Judgment be affirmed upon a Writ of Error brought, the Defendant ſhall not have Coſts expended in the Writ of Error, upon the Statute of 3 *H.* 7. for the Statute is, where Judgment is given againſt the Defendant, or Tenant, and he to delay Execution, brings a Writ of Error, and the Judgment is affirmed, that he ſhall have Coſts for delaying his Execution. But in this Caſe, Judgment is given for the Defendant, and no Execution is to be awarded againſt him, ſo is out of the Statute, *Hill.* 10. *Car. B. R. Bowton* v. *Nicholls*, 1 *Croke* 401. but *Mich.* 19 *Car.* 2. *B. R. Conner* and *Exam's Caſe*, 2 *Keble* 266. 287. there the Court ſeemed to be of a contrary Opinion, and that the Statute ought to be liberally Expounded. And if the Biſhop and Incumbent do bring a Writ of Error, and do not prevail in it, but the Judgment is affirmed, a *Levari Facias* ſhall be awarded againſt them to the Arch-biſhop of the Province; or *Sede vacante* to the Guardian of the Spiritualties, for the Damages and Coſts given againſt them, *Jenkins Cent.* 5 *Caſe* 36. But Note, that the Plaintiff in the Writ of Error ſhall not recover Damages.

If Judgment be given in a *Quare Impedit*, and a Writ of Error is brought, upon which the firſt Judgment is affirmed, although that the latter Judgment be Erroneous, yet the firſt Judgment remains good and perfect in it ſelf, and

ſhall

ſhall not be impeached for any Error in the ſecond Judgment, ſo although that the Judgment in a *Quare Impedit* given by the Statute of *Weſt.* 2. for the Damages, be Erroneous and Reverſed, yet the Judgment given to have a Writ to the Biſhop being the Judgment at the Common-Law, ſhall ſtand good, *Hill.* 32 *Eliz. B. R. Specot's Caſe* 5 *Co.* 57. *Roll's* 1 *Abr.* 776. But if a Man doth recover in a *Quare Impedit*, and hath a Writ to the Biſhop, and after doth recover againſt the Biſhop in a *Quare non Admiſit*; if the Judgment given in the *Quare Impedit* be after reverſed, the Judgment in the *Quare non Admiſit* ſhall be reverſed alſo, although it ſeems to be for the contempt to the King, *Roll's* 1 *Abr.* 777. for that, it is grounded upon the firſt Judgment, and cannot ſtand without it.

If the Jury give Damages and Coſts where no Coſts ought to be given, becauſe the Statute doth not give them; and after Judgment is entred, *Quod nullo habito reſpectu* of the Coſts, the Court doth award that he ſhall recover the Damages, without any releaſe of the Coſts; this ſpecial Entry ſhall aid the Error, *Paſch.* 14 *Jac. B. R. Grange* v. *Denny*, *Roll's* 1 *Ab.* 784.

CHAP. XXX.

Of Induction: Vi laica removenda, *and Spoliation.*

HAving declared what Remedies both in the Eccleſiaſtical, and Temporal Courts, the Law doth afford a Clerk preſented to a Benefice, in caſe the Biſhop doth refuſe to give him Inſtitution thereunto. Induction being next to follow as neceſſary to the making of a Clerk compleat Incumbent of his Church. I come to ſpeak of the Remedies the Law doth give him againſt the Perſon that is to Induct him, or give him poſſeſſion of his Benefice, in caſe he doth refuſe to perform what appertains to his Office in that part.

As to which, the Common Law doth declare, that the Clerk may have his remedy againſt the Arch-deacon (whoſe Office it is for the moſt part to give Induction) in the Spiritual Court, to which he is ſubject, 38 *H.* 6. 16. and there may force him to do his duty, if he cannot ſhew good cauſe of his refuſal, but no Damages can there be recovered; but an Action of the caſe may be brought at the Common Law againſt the Arch-deacon, *&c.* if he refuſe to Induct, Parſon's *Law*, *Chap.* 14. Ford *and* Hoskin's *Caſe*, *Hill.* 12 *Jac. B. R.* 2 *Croke* 369. 2 *Bulſtrode* 336. *Mich.* 12 *Jac. Pole* v. *Godfrey Moor* 835. and by *Haughton* in the ſame Caſe, *Bulſtrode* 2 *part* 264. the ſame Caſe *Roll's* 1 *Rep.* 63. *Roll's Abr.* 1 *p.* 108. But by ſuch Action at Common Law, Induction cannot be enforced to be made, but only Damages recovered upon the neglect or delay of him that is to Induct.

If a Sheriff will not put the Clerk of the King into poſſeſſion of a free Chapel, it is ſaid that a *Quare Impedit* lies againſt the Sheriff, 14 *H.* 4. 11. *b.*

And let it be Noted, That the ſame Courſe that is to be taken by a Patron of a Benefice Preſentative, when he is uſurped upon, may alſo be taken by the Patron of a Donative, in caſe his Church be filled by Uſurpation; for ſuch Patron may have his *Quare Impedit præſentare ad Eccleſiam*, and declare upon the ſpecial matter, as is ſhewed before, *Chap.* 22 *&* 23. or his Writ of Right, as his Caſe ſhall require, 1 *Inſtit.* 344. *a. Parſon's* Counſellor 205.

But

But I ſuppoſe that theſe Writs are not neceſſary to be brought, but at the Election of the Patron, for that a Church Donative cannot be ſo filled by Preſentation, Inſtitution, and Induction, as to hinder the Patron to prefer his Clerk to the ſame, for that Inſtitution and Induction, in ſuch caſes are void; and although an Uſurper doth put in his Clerk by Donation, yet that will not prevent the true Patron, but that he may put in his Clerk alſo; and then the two Clerks ſo preferred, ſhall try their Rights in an Action of Treſpaſs, or Ejectment: But if the true Patron pleaſe, he may in ſuch Caſes admit himſelf out of Poſſeſſion, and bring (as hath been ſaid) his *Quare Impedit*, or Writ of Right.

If the Authority of the Perſon who made the Mandate to the Arch-deacon, *&c.* to Induct be determined by death or removal, Induction made after by vertue of that Authority, is null and void; for ſo it is ſaid to have been held in the Caſe of one *Stainsby*, who was preſented to the Rectory of *Miſſenden*, and admitted, and Inſtituted by the Archbiſhop, who was then Guardian of the Spiritualities, *ratione vacationis ſedis Gloceſtr'*, and the Archbiſhop alſo directed a Mandate to the Arch-deacon for his Induction, who made a Mandate to two Clerks to Induct the ſaid *Stainsby* into the ſaid Church, but before Induction had, a Biſhop of *Gloceſter* was Elected, and Conſecrated, and then Induction was made by vertue of thoſe Mandates. It was adjudged, that the Induction was void, for that the Authority of the Arch-biſhop was determined, by the Conſecration of a new Biſhop; and conſequently, the Induction made by virtue of that Authority after it was determined was void. But this Judgment, as 'tis ſaid, was afterwards reverſt by a Writ of Error in the *Exchequer* Chamber, *Mich.* 29 *Car.* 2. *B. R. Robinſon* v. *Woolley*, Sir *Tho. Jones Rep.* 78. 1 *Ventris* 309, 319. 3 *Keble* 747, 821.

If an Arch-deacon, or other Perſon authorized to give a Clerk Induction, coming to do his Office, be kept out of the Church; or if a Clerk be kept out of the Parſonage-Houſe by Lay-men, the Writ of *Vi laica removenda* lyes for the Clerk, and this Writ is to be obtained in the Court of Chancery, either by the Certificate of the Biſhop within whoſe Dioceſs, or Juriſdiction the Church is; or it may be had there, upon a ſurmiſe made thereof by the Clerk himſelf without the Biſhop's Certificate. And this Writ is to be directed to the Sheriff of the County to remove the force, and if need be to raiſe the *poſſe commitatus* to his aſſiſtance, and to Arreſt, and Impriſon the perſons that make reſiſtance, and to make return of the Writ into the *King's-Bench*, in which Court the Offenders ſhall be Fined and Puniſhed for the Force. But the *King's-Bench*, as is ſaid by one Book, cannot award Reſtitution upon any Affidavit of Expulſion by Force; but the Writ in ſuch Caſe ought to be returned into the Chancery, or taken off the File in the *King's-Bench* if returned there, and put upon the File in the Chancery (*Quære* how this can be) and then upon Affidavit there, that the Sheriff by colour of a Writ hath removed one, and put another into poſſeſſion, a Writ of reſtitution is awardable, *F. N. B. fol.* 54. *Reg. of Writs, fol.* 59. *and* 60. *Trin.* 4. *Jac. Bird* v. *Smith*, *Moor* 781. *Hill.* 14 *&* 15. *Car.* 2. *Le Roy vers March*, &c. 1 *Siderfin* 101. 1 *Keble* 438. *but in* Robins *and* Agmondeſham's *Caſe*, *Moor* 462. there Reſtitution was awarded by the *King's-Bench*, the Writ being returned there; and I ſuppoſe the practice, and experience is, to have Reſtitution awarded out of that Court.

After a Clerk hath obtained Admiſſion, Inſtitution, and Induction, whether by the free Act of the Ordinary, or by Courſe of Law, either in the Eccleſiaſtical Court, or at Common Law. Then to maintain ſuch his Right, or poſſeſſion, the Law in ſome Caſes doth give him remedy in the Eccleſiaſtical Court, *viz.* a Spoliation 33 *H.* 6. 24. But this is a remedy only to be uſed againſt

againſt another Incumbent, or pretended Incumbent of the ſame Church, who is admitted, and Inſtituted upon the preſentation of the ſame Patron that preſented the former Incumbent, or of ſome other claiming under him; ſo that the right of Patronage doth not come into debate in the Spiritual Court. As if a Parſon be created a Biſhop, or hath taken a ſecond Benefice incompatible, and with all hath a ſufficient Diſpenſation to retain his former Benefice; if the Patron doth preſent another to his Benefice, who is Inſtituted, and Inducted, as ſuppoſing the Church to be open to his Preſentment, a *Spoliation* lyeth for the firſt Clerk, *F. N. B. fol.* 36. But if the Ordinary, hath Inſtituted, and Inducted my Clerk, and after doth Collate, and Induct a Clerk of his own, no *Spoliation* lies for my Clerk, but he ought to try his Right by Aſſize, Treſpaſs, or *Ejectione Firmæ* at the Common Law, 26 *H.* 8. 3.--- Or if Leſſee for Years of an Appropriation, doth, when the Vicarage is void, preſent to the Rectory with the Biſhop's conſent, whereby the Parſonage, and Vicarage are united, and ſo remain for ſeveral Years; yet the Appropriator ſhall not be relieved by *Spoliation*, but at Common Law, 44 *Ed.* 3. 33. And it is ſaid, that Parſon *imperſonee*, or Appropriator, may have a *Spoliation* as Incumbent, and a Writ of Right of Advowſon as Patron, 38 *H.* 6. 19. yet it ſeems, that a *Spoliation* cannot in any caſe lye for an Appropriator, for if an Incumbent be preſented by the Appropriator himſelf, he is the only Incumbent, and the Appropiation diſſolved; and if he be preſented by a Stranger, the right of Patronage muſt then come in Queſtion, becauſe, the Appropriator muſt be Patron when the Appropriation is made, 38 *H.* 6. 19.

When a *Spoliation* is brought, and doth not lye in the Caſe, the proceedings in the Eccleſiaſtical Court may be ſtayed by a Prohibition, 38 *H.* 6. 19. or by *Indicavit*, as the Caſe may be, 44 *Ed.* 3. 33.

When a *Spoliation* is brought, to try which of two perſons Inſtituted is the rightful Incumbent of a Parſonage, or Vicarage, or after Sentence given againſt one of the parties, who hath appealed; it is uſual for the Eccleſiaſtical Judge at the Petition of either of the Parties, alledging, that Controverſy, and Oppoſition is about the Collecting the profits, to decree, that the Fruits of the Church be Sequeſtred, and to commit the power of Collecting them to the Church-wardens, or ſome others of the ſame Pariſh; firſt taking Bond of ſuch Perſons, whereby they ſhall be obliged to Collect, and keep the Tithes, for the uſe of him that ſhall be found to have the right, and to render a juſt account when called thereunto. And the Judge is alſo wont to appoint ſome Miniſter to ſerve the Cure for the time that the Controverſy ſhall depend, and to command thoſe to whom the Sequeſtration is committed, to allow ſuch Sallery as he ſhall aſſign out of the profits of the Church, to the Parſon that he orders to attend the Cure; and thoſe to whom this Sequeſtration is committed, are to cauſe the ſame to be publiſhed in the reſpective Churches, in the time of Divine Service. After the Suit is determined, the Sequeſtration is to be taken off, and the profits Collected to be reſtored to him that prevails at Law, *viz.* in Specie, if they remain ſo, or if not, the value of them; if the Sequeſtrators refuſe to do this, they are to be compelled to do the ſame by the Eccleſiaſtical Court, and if they ſhall, being called thereunto, delay to give an Account, the Judge uſeth to deliver to the party grieved the Bond given, with a Warrant of Attorney to ſue for the Penalty thereof to his own uſe at the Common Law.

CHAP.

CHAP. XXXI.

The Miniſters Duty in Reading the Common Prayers, Adminiſtering the Sacraments, &c.

HItherto hath been ſhewed by what meanes a Perſon may make himſelf the lawful Incumbent of an Eccleſiaſtical Benefice. The following Chapters are to declare the Effects of ſuch Incumbency, that is, to what Duties the Clerk thereby is obliged by Inſtitution, and to what Benefits he is to receive by Induction.

He that is Incumbent of a Benefice with Cure (though it be only by Admiſſion, and Inſtitution) hath thereby, not only the Authority, but is alſo under an obligation, to perform, all the Offices of a Miniſter, to the People belonging thereunto. And it hath been Enacted, **That all and ſingular Miniſters in any Cathedral, Collegiate, or Pariſh Church, or Chappel, or other place of publick Worſhip within this Realm of** England, **Dominion of** Wales, **and Town of** Berwick **upon** Tweed, **ſhall be bound to ſay, and uſe the Morning Prayer, Evening Prayer, Celebration and Adminiſtration of both the Sacraments, and all other the publick and Common Prayer, in ſuch order and form as is mentioned in the ſaid Book annexed, and joyned to this preſent Act, and Entitled,** The Book of Common Prayer and Adminiſtration of the Sacraments, and other Rites and Ceremonies of the Church, according to the Uſe of the Church of England; together with the Pſalter or Pſalms of David, pointed as they are to be ſung or ſaid in Churches; and the form or manner of Making, Ordaining and Conſecrating of Biſhops, Prieſts and Deacons: **And that the Morning and Evening Prayers therein contained, ſhall upon every Lord's Day, and upon all other days and occaſions, and at the times therein appointed, be openly and ſolemnly Read by all, and every Miniſter or Curate, in every Church, Chappel, or other place of publick Worſhip, within this Realm of** England, **and places aforeſaid.**

Provided, that the penalties in this Act ſhall not extend to the Foreigners or Aliens of the Forreign Reformed Churches, allowed, or to be allowed by the King's Majeſty, his Heirs and Succeſſors, in England. Stat. 14 Car. 2. c. 4.

This Clauſe of this Statute, doth make it the duty of every Miniſter obliged to officiate in any place of publick Worſhip, to ſay, and uſe the Morning and Evening Prayer; as to which from the ſaid Clauſe, theſe things may be Noted.

Firſt, That if the whole Morning, and Evening Prayer, or all the Prayers appointed to be read by the Book of Common Prayer on every *Sunday*, and Holy-Day, and upon any occaſion both in the Morning and Afternoon of ſuch days, without the Omiſſion of any one, or part of any one of them, *&c.* not Read, the Offender is puniſhable by this Statute, and *Stat.* 1 *Eliz. Cap.* 2.

Secondly, That not only the Morning, or the Evening, but both Morning, and Evening Prayers at the time appointed, are to be read by every Miniſter obliged to in Officiate every Church, Chappel, and place of publick Worſhip, every *Sunday*, and Holy-Day, *&c.* From which it follows: That no Miniſter that hath two Benefices, can by himſelf alone ſupply both his Cures; or if he hath but one Benefice, can ſerve that with another as Curate; or if his

Benefice hath a Chappel of eaſe belonging to it, in which he is bound to ſay Divine Service, or to provide one to ſay it, can by himſelf in perſon Officiate in both, nor can one perſon be a Curate in two Churches, unleſs ſuch may ſatisfy the Law, by reading both Morning, and Evening Prayers at each place, which cannot well be done; nor may a Miniſter read Morning Prayer at one Church, and Evening Prayer at another Church, or Chappel, by the allowance of the Ordinary, for he cannot diſpence with Acts of Parliaments; neither can he ſerve one Cure on one *Sunday*, and another Cure on the next, nor can he ſtrictly ſpeaking, at any time neglect to read either Morning, or Evening Prayer in his Church; however, not unleſs his neglect be neceſſary, but ſhall be ſubject to puniſhment by this Statute, and *Stat. 1 Eliz. Cap. 2.*

Thirdly, Every Miniſter in any Church, as it ſeems, is as much bound, to ſay Morning, and Evening Prayers, on every Holy-Day, and on the Fifth of *November*, the thirtieth of *January*, and on the twenty ninth day of *May*, as on the Lord's Day; but *Quære*, for thoſe Forms of Prayer appointed to be read on thoſe days, are no part of the Book of Common-Prayer, but added to it by the King's Order: And the Obligation of Miniſters, to read ſuch Forms of Prayer as have been, or ſhall be occaſionally preſcribed for any ſolemn days of Faſting, or Thanksgiving, ſeems to be founded, not ſo much on any expreſs Law, or Statute, as on the Equity, and reaſon of the thing, that extraordinary occaſions ſhould be ſupplied with ſpecial and extraordinary Forms, which may be ſaid to be *Appointed* but not *Enacted*, and rather *Allowed* than *Ordered*. Yet they may not only be ſafely uſed, without treſpaſs upon any Act of Uniformity, but being drawn up by the Biſhops of the Church, and recommended by the King's Authority, and containing nothing contrary to the Eſtabliſhed Forms of Divine Service, they ought to be uſed at the proper times by every Miniſter: And though there is no Statutable Penalty for ſuch Neglect, or Omiſſion, yet ſuch contempt of Authority, may undoubtedly be puniſh'd by other legal ways. Some have thought that there is a Proviſo made for authorizing ſuch extraordinary Forms of Prayer in the Rubrick after the Nicene Creed, where it is ordered, that *Nothing ſhall be proclaimed, or publiſhed in the Church during the time of Divine Service, but by the Miniſter; nor by him, any thing, but what is preſcribed in the Rules of this Book, or enjoyed by the King, or by the Ordinary of the Place:* This latter part of the exception does imply, that any thing in it ſelf Lawful, and Honeſt, enjoined by the King, or Ordinary, ſhall be, or at leaſt may be Publiſhed, or Read; and eſpecially ſuch Forms, as by joint Authority of King and Ordinary are appointed on ſuch particular Occaſions. And further, the very Acts of Parliament which ordain a Publick Thanksgiving on the ſtated Days, do imply, that ſome Proviſion ſhall be made for a proper Form adapted to the occaſion of the Day; as in the Act for a *Publick Thanksgiving to Almighty God every Year on the fifth day of* November; it is Enacted, That *all and ſingular Miniſters in every Cathedral, and Pariſh Church, ſhall always upon the fifth day of* November *ſay Morning Prayer, and give unto Almighty God thanks for this moſt happy Deliverance.* But how ſhall the Miniſter give thanks; in any Arbitrary Form or Manner of his own Deviſing? Or not rather, in ſuch common Form as his lawful Superiors ſhall preſcribe to him?

Fourthly, Note, That a Miniſter is bound to ſay, and uſe the Morning, and Evening Prayer. and the Celebration, and Adminſtration of both the Sacraments, in ſuch Order and Form, as is mentioned in the Book of Common-Prayer; ſo that ſtrictly ſpeaking, if in reading the Morning, and Evening Prayers, he ſhall Stand, or Sit, when he is directed to Kneel, or Kneel; or Sit when he ſhould Stand, or ſhall read them in other Order, than is appointed,

ted, or ſhall omit any thing that is appointed to be read on certain days, or miſplace the Prayers in reading them, or read in one day, what is appointed to be read on another, or do not Celebrate, and Adminiſter the Sacrament, in ſuch Order, and Form as is appointed, he is puniſhable by this Law.

Fifthly, Not only Miniſters of Parochial Churches, but alſo all Miniſters, that by their places are to Officiate in any Cathedral, or Collegiate Churches, or Chappels, or other places of publick Worſhip, (excepting ſuch Proteſtant Diſſentors as are provided for, by the Statute, 1 *W.* and *M.*) if Morning, and Evening Prayer be not read by them, or ſuch of them, whoſe part it is to read the ſame, *&c.* in ſuch Order, and Form as is appointed, are puniſhable by this Law. And alſo all, as well Biſhops as others, that do read Morning, and Evening Prayers in any of them, Celebrate the Sacraments, Confirm, give Orders, Marry, *&c.* although that they do any of theſe things for others obliged by their places to do the ſame, if they perform them not in ſuch Order, and Form as is appointed by the Book of Common-Prayer, *&c.* are tranſgreſſors of this Law. And in Churches where there is a Vicar Endowed, that is preſentative, and a Parſon alſo that is preſentative, it is ſaid, that the Vicar, and not the Parſon hath the Cure of Souls, 5 *Ed.* 2. *Quare Impedit* 165. *per Paſt.* But I conceive, that the Parſon hath alſo the Cure habitually, altho' the Vicar actually, who is in *Subſidium Rectoris*, and is to perform the Duty, and puniſhable upon a Neglect: And ſo are Curates of Beneficed Miniſters lawfully abſent from their Charges, if (being duly admitted to be Curates of a Church by the Ordinary) they, whilſt they remain Curates, neglect duly to read both Morning and Evening Prayers; for ſuch Curates are Miniſters in the Churches where they ought to ſerve, and are expreſly named in the Statute. And in ſuch caſe, I ſuppoſe, that the Incumbent of the Church is not puniſhable, if Divine Service be neglected by the Curate, whilſt he remains ſuch; but *Quære*, for that the charge of the Souls remains upon the Incumbent. However, if the Curate doth read the Prayers, the Incumbent is excuſed, that is, unleſs the Miniſter doth reſide on his Benefice, as will be ſhewed.

Note, The Canons which preſcribe the Qualification and Duty of Curates are chiefly theſe two.

CAN. XLVII. Abſence of Beneficed Men to be ſupplied by Curates that are allowed Preachers.

Every Beneficed Man licenſed by the Laws of this Realm, upon urgent occaſions of other ſervice not to reſide upon his Benefice, ſhall cauſe his Cure to be ſupplied by a Curate, that is, a ſufficient and Licenſed Preacher, if the worth of the Benefice will bear it. But whoſoever hath two Benefices, ſhall maintain a Preacher Licenſed, in the Benefice where he doth not reſide, except he Preach himſelf at both of them uſually.

CAN. XLVIII. None to be Curates, but allowed by the Biſhop.

No Curate, or Miniſter ſhall be permitted to ſerve in any Place, without Examination, and Admiſſion of the Biſhop of the Dioceſs, or Ordinary of the Place having Epiſcopal Juriſdiction, in writing under his Hand and Seal, having reſpect to the greatneſs of the Cure, and Meetneſs of the Party. And the ſaid Curates, and Miniſters, if they remove from one Dioceſs to another, ſhall not be by any means admitted to ſerve without Teſtimony of the Biſhop of the Dioceſs, or Ordinary of the Place as aforeſaid, whence they came, in Writing, of their Honeſty,

Ability, and conformity to the Eccleſiaſtical Laws of the Church of England. *Nor any ſhall ſerve more than one Church, or Chappel upon one Day, except that Chappel be a Member of the Pariſh Church, or united thereunto; and unleſs the ſaid Church, or Chappel where ſuch a Miniſter ſhall ſerve in two places, be not able in the judgment of the Biſhop, or Ordinary as aforeſaid, to maintain a Curate.*

Sixthly, Note, that though by the aforeſaid Clauſe of the Statute, every Miniſter in every Church, Chappel, and place of Publick Worſhip, is bound openly, and ſolemnly to read the Morning and Evening Prayer, contained in the Book of Common-Prayers, *&c.* upon every Lord's Day, and upon all other days, and occaſions, and at the time therein appointed, for the neglect of which alſo the Ordinary may puniſh, though the ancient Service be altered, 1 *Inſt.* 95. *b.* Yet by the ſaid Clauſe, no Miniſter is obliged to Adminiſter either of the Sacraments, to ſolemnize Marriages, viſit the Sick, bury the Dead, church Women; nor is any Biſhop obliged thereby to Confirm the Baptized, or to Conſecrate, or Ordain any one to be a Biſhop, Prieſt, or Deacon, and therefore not puniſhable by this Statute, for the neglect of any of theſe Offices, but only when he doth perform, Celebrate, or Adminiſter either of the Sacraments, he is to Celebrate and Adminiſter them, in ſuch Order, and Form, as is mentioned in the Book of Common-Prayer; and when he doth perform any of the other Duties, to ſay and uſe ſuch Prayers as are appointed by the ſaid Book to be uſed at the performance of any of them, in ſuch Order, and Form as the ſaid Book doth appoint.

Note, The Celebration of *Sundays* and *Holy-days*, and the Form of Divine Service to be uſed on them, are alſo provided for by theſe wholſom Canons of the Church.

CAN. XIII. Due Celebration of Sundays and Holy-days.

All manner of Perſons within the Church of England, *ſhall from henceforth Celebrate and keep the Lord's Day, commonly called* Sunday, *and other* Holy-days, *according to God's Holy Will and Pleaſure, and the Orders of the Church of* England *preſcribed in that behalf; that is, in hearing the Word of God Read and Taught, in private and publick Prayers, and acknowledging their Offences to God, and Amendment of the ſame, in reconciling themſelves charitably to their Neighbours, where Diſpleaſure hath been, in oftentimes receiving the Communion of the Body and Blood of Chriſt, in viſiting of the Poor and Sick, uſing all godly and ſober Converſation.*

CAN. XIV. The preſcript Form of Divine Service to be uſed on Sundays and Holy-days.

The Common Prayer ſhall be ſaid or ſung diſtinctly, and reverently upon ſuch days as are appointed to be kept Holy by the Book of Common Prayer, and their Eves, and at convenient and uſual times of thoſe daies, and in ſuch place of every Church, as the Biſhop of the Dioceſe, or Eccleſiaſtical Ordinary of the Place ſhall think meet for the largeneſs or ſtraitneſs of the ſame, ſo as the People may be moſt Edified. All Miniſters ſhall likewiſe obſerve the Orders, Rites, and Ceremonies preſcribed in the Book of Common Prayer, as well in reading the Holy Scripture, and ſaying of Prayers, as in Adminiſtration of the Sacraments, without either diminiſhing, in regard of Preaching, or in any other reſpect, or adding any thing in the matter or form thereof.

How-

And as concerning an Incumbent of a Church who is Reſident, and keeps a Curate, and be it further Enacted by the authority aforeſaid, That in all places where the proper Incumbent of any Parſonage, or Vicarage, or Benefice with Cure, doth reſide on his Living, and keeps a Curate, the Incumbent himſelf in perſon (not having ſome lawful impediment to be allowed by the Ordinary of the place) ſhall once (at the leaſt) in every Month, openly and publickly, Read the Common Prayers and Service, in, and by the ſaid Book preſcribed, and (if there be occaſion) adminiſter each of the Sacraments, and other Rites of the Church, in the Pariſh Church or Chappel, of, or belonging to the ſame Parſonage, Vicarage or Benefice, in ſuch order, manner and form, as in, and by the ſaid Book is appointed, upon pain to forfeit the ſum of Five Pounds, to the uſe of the poor of the Pariſh for every Offence, upon conviction, by confeſſion, or proof of two credible witneſſes upon Oath, before two Juſtices of the Peace of the County, or Town-corporate where the Offence ſhall be committed, (which Oath the ſaid two Juſtices are hereby impowred to adminiſter) and in default of payment within ten days, to be levied by diſtreſs and ſale of the Goods and Chattels of the Offendor, by the Warrant of the ſaid Juſtices, by the Church wardens, or Overſeers of the Poor of the ſaid Pariſh, rendring the ſurpluſage to the party, Stat. 14 Car. 2. c. 4.

So that though in other Caſes, this Statute doth not oblige Miniſters of Churches to adminiſter the Sacraments, and uſe other Rites appointed in the Book of Common Prayer, but ſeems only to direct the Miniſter; yet by this Clauſe, the Miniſter that is reſident upon his Cure, is bound as well to adminiſter the Sacrament once every Month, as alſo to perform all other Rites, as to Marry, Bury, *&c.* if there be occaſion, as to read the Prayers, otherwiſe, he is ſubject to the penalty mentioned in this Clauſe.

Though not by the aforeſaid Statute, yet by the Rubrick, a Miniſter muſt ſay, and uſe the Celebration, and Adminiſtration of both the Sacraments as is mentioned; and yet thereby he is not bound to Adminiſter the Lord's Supper to all Perſons what ever they be: For firſt, none are to be admitted to the Holy Communion, until ſuch time as they be Confirmed, or be ready, and deſirous to be Confirmed: *See Rubrick in the Order for the Adminiſtration of the Lord's Supper, or Holy Communion.*----For by the Order for the Adminiſtration of the Lord's Supper it is Ordered, *That if any one be an open, and notorious evil Liver, or hath done any wrong to his Neighbour, by Word or Deed, ſo that the Congregation be thereby offended; the Curate having knowledge thereof, ſhall call him, and advertiſe him, that in any wiſe he preſume not to come to the Lord's Table, until he hath openly declared himſelf to have truly Repented, and amended his former naughty Life, that the Congregation may thereby be ſatisfied, which before were offended, and that he hath recompenced the Parties to whom he hath done wrong, or at leaſt declare himſelf to be in full purpoſe ſo to do, as ſoon as he can conveniently.*

The ſame Order ſhall the Curate uſe with thoſe betwixt whom he perceiveth Malice, and Hatred to reign, not ſuffering them to be partakers of the Lord's Table, until he know them to be reconciled: And if one of the parties ſo at Variance be content to forgive from the bottom of his heart, all that the other hath treſpaſſed againſt him, and to make amends for that he himſelf hath offended, and the other party will not be perſwaded to a Godly Unity, but remain ſtill in his Frowardneſs and Malice, the Miniſter in that caſe ought to admit the Penitent Perſon to the Holy Communion, and not him that is Obſtinate. Provided that every Miniſter ſo repelling any, as is ſpecified in this, or the next precedent Paragraph of this Rubrick, ſhall be obliged to

give

give an account of the ſame to the Ordinary within fourteen days after at the furtheſt; and the Ordinary ſhall proceed againſt the offending perſon according to the Canon.

The Canons which provide for the more regular Adminiſtration of the Lord's Supper are theſe, of which the Titles follow,

CAN. XX. *Bread and Wine to be provided againſt every Communion.*
CAN. XXI. *The Communion to be thrice a Year received.*
CAN. XXII. *Warning to be given before-hand for the Communion.*
CAN. XXIII. *Students in Colleges to receive the Communion four times a Year.*
CAN. XXIV. *Copes to be worn in Cathedral Churches by thoſe that Adminiſter the Communion.*
CAN. XXVI. *Notorious Offenders not to be admitted to the Communion.*
CAN. XXVII. *Schiſmaticks not to be admitted to the Communion.*
CAN. XXVIII. *Strangers not to be admitted to the Communion.*
CAN. XXIX. *Fathers not to be Godfathers in Baptiſm, nor Children not Communicants.*

There ſeems to be a common Error in Perſons to be qualified for any Office by receiving the Sacrament of the Lord's Supper, according to the order of the Church of *England*, to challenge an abſolute right of admiſſion to it, and to pretend that an Action upon the Caſe may be brought againſt thoſe Miniſters who refuſe to Adminiſter unto them, and will not allow the Miniſter a liberty to inquire into their fitneſs to receive it. The Perſons to be thus qualified preſent themſelves to communicate either 1*ſt.* more regularly to their own Pariſh Prieſt, or 2*ly.* to ſome other Parochial Miniſter. If to their own Pariſh Prieſt, he has as much right by Rubrick, to ſuſpend his Miniſtration to any Magiſtrate, or Officer Elect, as to any of his meaneſt, and moſt private People, if he can give the ſame reaſon for rejecting of Him. Or if the Perſon to be qualified offer to communicate with ſome other Parochial Miniſter, ſuch Miniſter may perhaps more juſtly refuſe to admit him, becauſe 1*ſt.* no Prieſt is obliged to Adminiſter the Sacraments to any but his own People committed to his peculiar Charge, and may decline admitting any Foreigner or Stranger; beſides, ſome faithful and conſciencious Miniſters, have much doubted whether they ought to admit thoſe Perſons to the Holy Sacrament for a legal qualification, who come only to ſerve that turn, and who at other times live in a negative Separation, abſenting themſelves from the Church, and the holy Offices of it; or perhaps in a poſitive Schiſm, joining themſelves to ſome ſeparate Congregation. This is certainly a moſt ſcandalous Practice in thoſe Lay Perſons, who can thus dare to mock God, and play with the *Holy of Holies* in Religion. And even thoſe Clergy Men who connive at this Hypocriſie of Communicants, may be thought in ſome meaſure partakers of thoſe other mens ſins, and help to proſtrate Sacraments. To prevent this and other miſchiefs, it is highly expedient, that the good Rule in Rubrick ſhould be better obſerved. *So many as intend to be Partakers of the Holy Communion, ſhall ſignifie their Names to the Curate, at leaſt ſome time the day before.*

When a Miniſter doth intend to adminiſter the Lord's Supper, he is to give warning for the Celebration thereof, upon the *Sunday*, or ſome Holy day immediately preceeding, which he is to do after his Sermon, or Homily ended: And then alſo he is to read one of thoſe Exhortations, as the Rubrick in the Communion Service doth direct to be read, at ſuch time, according as he ſhall ſee cauſe.

When

When the day prefixed by the Miniſter for his Adminiſtring of the Sacrament doth come, the Miniſter ſhall not without lawful cauſe deny the ſame to any perſon that will devoutly, and humbly deſire it, *Stat.* 1 *Ed.* 6.*Cap.* 1.

Yet it is ordered by the Rubrick in the Communion Service, *That there ſhall be no Celebration of the Lord's Supper, except there be a convenient number to communicate with the Prieſt according to his Diſcretion; and if there be not above twenty perſons in the Pariſh of Diſcretion to receive the Communion, yet there ſhall be no Communion, except four (or three at the leaſt) communicate with the Prieſt.*

When the Sacrament is Adminiſtred by any Prieſt, it is to be Adminiſtred in both kinds, that is to ſay, of Bread and Wine, except neceſſity otherwiſe require, *Stat.* 1 *Ed.* 6. *Ch.* 1. And the Bread and Wine for the Communion, ſhall be provided by the Curate, and the Church-wardens at the charges of the Pariſh, and to take away all occaſion of Diſſention, and Superſtition which any perſon hath or might have concerning the Bread and Wine; it ſhall ſuffice, that the Bread be ſuch as is uſual to be eaten, but the beſt and pureſt Wheat Bread that conveniently may be gotten. And if any of the Bread and Wine remain unconſecrated, the Curate ſhall have it to his own uſe; but if any remain of that which was Conſecrated, it ſhall not be carried out of the Church, but the Prieſt, and ſuch other of the Communicants as he ſhall then call to him, ſhall immediately after the Bleſſing, reverently Eat, and Drink the ſame.

It is moſt regular, and expedient, that the Sacrament of the Lord's Supper be received, by perſons that are to receive the ſame in their Pariſh Church, or other place of Publick Worſhip, and not in Private Houſes: But if a ſick Perſon be not able to come to the Church, and yet is deſirous to receive the Communion in his Houſe, then he muſt give timely notice to the Curate, ſignifying alſo how many there are to communicate with him, (which ſhall be three, or two at the leaſt) and having a convenient place in the ſick Man's Houſe, with all things neceſſary, ſo prepared that the Curate may reverently Miniſter, he ſhall there Celebrate the Holy Communion. *Rubrick for the Communion of the Sick.*

From which Note, That if the ſick Perſon be able to come to the Church, or doth not ſignify how many are prepared to Communicate with him, or if there be not two at the leaſt to Communicate with him, or if he have not things neceſſary for the Celebration thereof in reverent manner, the Curate is not bound to Adminiſter it, yea, he is bound not to Adminiſter it, which alſo may be collected from other Words in the Rubrick. Yet in the time of Plague, Sweat, or other like contagious times of Sickneſs or Diſeaſes, when none of the Pariſh, or Neighbours can be gotten to Communicate with the Sick in their Houſes, for fear of the Infection, upon ſpecial requeſt of the Diſeaſed, the Miniſter may only Communicate with him. *Rubrick for the Communion of the Sick,*

Note, This Duty of Adminiſtring the Holy Sacrament only in Churches or Chappels, except to Sick Perſons in Private Houſes, is thus ordered by the Canon.

No Miniſter ſhall Preach, or Adminiſter the Holy Communion in any private Houſe, except it be in times of neceſſity, when any being either ſo impotent, as he cannot go to the Church, or very dangerouſly ſick, are deſirous to be Partakers of the Holy Sacrament, upon pain of ſuſpenſion for the firſt Offence, and excommunication for the ſecond, &c. *Can.* 71.

Alſo

Alſo though by the Rubrick, every one having cure of Souls is bound to ſay, and uſe the Celebration, and Adminiſtration of the Sacrament of Baptiſm to all the Infants of Baptized Parents; yet in ſome Caſes, he may ſuſpend, at the leaſt, to Baptize Perſons brought to him for that purpoſe.

As if they be not brought to the place of Publick Worſhip and to the Font there, on ſome Sunday, or Holy-day immediately after the laſt Leſſon at Morning Prayer, or elſe immediately after the laſt Leſſon at Evening Prayer, as the Curate by his Diſcretion ſhall appoint; or if there be not ready at the ſaid time and place for every Male-child to be Baptized, two Godfathers, and one Godmother, and for every Female, one Godfather, and two Godmothers, *Rubrick.*

But in caſe of neceſſity, as if a Child be Sick, *&c.* the Curate is bound to Baptize it on any day, and in a private Houſe, and without Godfathers, or Godmothers, and then the Child (if it afterward live) regularly, ought to be brought into the Church in the preſence of the Congregation there, that if the Miniſter of the ſame Pariſh did Baptize it, he may certify the Congregation that it was duly Baptized; or if the Child was Baptized by any other, that he may Examin, whether the Child was lawfully Baptized, that is, whether by a lawful Miniſter, by proper Water, and in the name of the Father, and of the Son, and of the Holy Ghoſt; ſo that if it was done with improper matter, as Milk or Wine, or other Liquid, inſtead of Water, or not in the name of the Father, and of the Son, and of the Holy Ghoſt, the Miniſter may Baptize it according to the form appointed for publick Baptiſm; or if upon Examination of the matter, he doth find that all things were done as they ought to be, that he may certify as much to the Congregation, at which time Godfathers, and Godmothers are to be preſent, and to undertake for the Child. *Rubrick.*

And Note, that a Child Baptized with Water in the name of the Father, and of the Son, and of the Holy Ghoſt, is ſufficiently Baptized, although not Baptized by a lawful Prieſt, as may be collected from the Rubrick; and ſo it is, if the Child be Baptized by other Form, yet the Perſon Baptizing not being a lawful Prieſt is puniſhable, like as a lawful Prieſt Baptizing by other Form than is ſet down by the Book of Common-Prayer, is puniſhable.

In former times the neceſſity of Baptiſm to new born Infants was ſo rigorouſly taught, that for this reaſon they allow'd Lay People, and even Women to Baptize the declining Child, where a Prieſt could not be immediately found. So fondly ſuperſtitious in this matter, that in hard labours the head of the Infant was ſometimes Baptized before the whole Delivery. This Office of Baptizing in ſuch caſes of neceſſity, was commonly perform'd by the Midwife; and 'tis very probable, this gave firſt occaſion to Midwives, being licenſed by the Biſhop, becauſe, they were to be firſt examined by the Biſhop, or his delegated Officer, whether they could repeat the form of Baptiſm, which they were in haſt to Adminiſter upon ſuch extraordinary occaſion. But we thank God our Times are reform'd in Senſe and in Religion.

Alſo if a Miniſter hath in his Pariſh any unbaptized Perſon, that is of years of Diſcretion, and which doth deſire to be Baptized, it ſeems the Miniſter ought to ſuſpend the Baptizing of him, until notice of ſuch Perſon's purpoſe ſhall be given to the Biſhop, or to whom he ſhall appoint to take cognizance of ſuch matters, and until ſuch time as he ſhall be examined, and found to be ſufficiently inſtructed in the Principles of Chriſtian Religion. *Rubrick.* And yet he is to Baptize (even as Infants) thoſe not Baptized in their Infancy that be brought to him before they come to years of Diſcretion, that is either

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by the form of publick, or private Baptiſm, as neceſſity ſhall require, and without notice given to the Biſhop, or precedent Examination. *Rubrick.*

He that hath the Cure of any People, is not only bound by Law to ſay Divine Service, and Adminiſter the Sacraments to them, but alſo of them within his Cure to viſit the Sick, Bury the Dead, Church Women after Childbirth, to Solemnize Matrimony betwixt perſons to be Married, and to inſtruct them all in things to be believed and done in order to their Salvation; the Youth by Catechizing them (who are afterwards to be Confirmed by the Biſhop) and alſo by Preaching God's Word unto them. *Rubrick.*

But though it be his duty, generally ſpeaking, to Bury thoſe that dye within his Pariſh, yet he ought not to Bury the Corps of any Perſon dying unbaptized, excommunicated, or who hath laid violent hands upon himſelf. *Rubrick.*

And though it be his part to Solemnize Matrimony betwixt thoſe of his Pariſh that are to be Married, yet the Banns of all that are to be married together, muſt before their Marriage be publiſhed in the Church, three ſeveral Sundays, or Holy-days, in the time of Divine Service, immediately before the Sentences for the Offertory, in the very form of words appointed in the Rubrick. And if the Perſons that are to be Married dwell in divers Pariſhes, the Banns muſt be asked in both Pariſhes, and the Curate of the one Pariſh, ſhall not ſolemnize Matrimony betwixt them, without a Certificate of the Banns being thrice asked from the Curate of the other Pariſh; and at their day of Marriage, if any man do alledg and declare any Impediment, why they may not be coupled together in Matrimony by God's Laws, or the Laws of this Realm, and will be bound and ſufficient Sureties with him, to the Parties, or elſe put in a caution to the full value of the Charges as the Perſons to be married do thereby ſuſtain to prove his Allegation; then the Solemnization muſt be deferred until ſuch time as the truth be tryed. *Rubrick.*

And as to a Curate's Catechiſing the Youth within his Pariſh, it is to be Noted, that he is to Inſtruct, and Examine upon Sundays, and Holy-days, after the ſecond Leſſon at Evening Prayer, openly in the Church, ſo many Children of his Pariſh ſent unto him as he ſhall think convenient, in ſome part of the Catechiſm in the Common-Prayer-Book. *Rubrick.*

And ſo ſoon as Children are come to a competent Age, and can ſay in their Mother Tongue, the Creed, the Lord's Prayer, and the Ten Commandments, and alſo can anſwer to the other queſtions in the ſaid ſhort Catechiſm, they ſhall be brought to the Biſhop, and every one ſhall have a Godfather, or a Godmother as a Witneſs of their confirmation. *Rubrick.*

And whenſoever the Biſhop ſhall give knowledge for Children to be brought unto him for their Confirmation, the Curate of every Pariſh, ſhall either bring, or ſend in Writing with his hand ſubſcribed thereunto, the Names of all ſuch Perſons within his Pariſh as he ſhall think fit to be preſented to the Biſhop to be Confirmed; and if the Biſhop approve them, he ſhall confirm them according to the Form in the Book of Common-Prayer preſcribed. *Rubrick.*

In the performance of which Offices as appears by the aforeſaid clauſe of the Statute, 14 *Car.* 2. c. 4. a Miniſter is bound to ſay and uſe all other publick and Common-Prayer, in ſuch order and form as is mentioned in the ſaid Book, that is, all thoſe Prayers that are therein appointed to be read upon any occaſion, *viz.* at the Solemnization of Matrimony, Viſitation of the Sick, Burial of the Dead, Churching of Women, Confirmation of the Baptized, and at the Conſecration or Ordination of Biſhops, Prieſts, and Deacons; ſo that he who doth perform the ſaid Rites, or Offices, doth not uſe the Prayers, and all the Prayers according as they are appointed by the Book of Common-Prayer, he is an offender againſt this Law.

And it is further enacted by the Authority aforesaid, That no Form or Order of Common Prayers, Administration of Sacraments, Rites or Ceremonies, shall be openly used in any Church, Chappel, or other publick place of, or in any College or Hall in either of the Universities, the Colledges of Westminster, Winchester or Eaton, or any of them, other then what is prescribed, and appointed to be used in and by the said Book.

Provided always, That it shall and may be lawful to use the Morning and Evening Prayers, and all other Prayers and Service prescribed in and by the said Book, in the Chappels or other publick places of the respective Colleges and Halls in both the Universities, in the Colleges of Westminster, Winchester and Eaton, and in the convocations of the Clergie of either Province, in Latine; any thing in this Act contained to the contrary notwithstanding.

Provided always, and be it enacted by the authority aforesaid, That the Bishops of Hereford, St. Davids, Asaph, Bangor and Landaff, and their Successors, shall take such order among themselves, for the Souls health of the Flocks committed to their charge within Wales, that the Book hereunto annexed, be truly and exactly translated into the Brittish or Welsh Tongue, and that the same so Translated, and being by them, or any three of them at the least, viewed, perused and allowed, be imprinted to such number at least, so that one of the said Books so Translated and Imprinted, may be had for every Cathedral, Collegiate and Parish Church, and Chappel of Ease in the said respective Dioceses and places in Wales, where the Welsh is commonly spoken or used, before the first day of May, 1665.

And that from and after the Imprinting and Publishing of the said Book so Translated, the whole Divine Service shall be used and said by the Ministers and Curates throughout all Wales within the said Dioceses where the Welsh Tongue is commonly used, in the British or Welsh Tongue, in such manner and form as is prescribed according to the Book hereunto annexed to be used in the English Tongue, differing nothing in any order or form from the said English Book.

Provided always, That in all those Prayers, Litanies, and Collects, which any way relate to the King, Queen or Royal Progeny, the names be altered and changed from time to time, and fitted to the present occasion, according to direction of lawful authority, 14 Car. 2. c. 4.

Note, That from the aforesaid Clauses, it is unlawful for any Minister, to use any Form of Prayer, other than what is appointed in the Book of Common Prayer in place of publick Worship, and therefore it might seem that any person using any other form before his Sermon (which is most common) is against this Statute. The Statute 1 *Eliz. Cap.* 1. is expounded to extend to such other Prayers only, as are used in hinderance of, or opposition to the Common Prayer; therefore the Prayers used in the Pulpit before Sermon, are said not to be within the meaning of that Law, nor to be forbidden by it, because, they are tolerated by those in Authority, and so cannot be said to be *obstinately used*, according to the words of that Statute, *Cawley's Laws against Recusants* 21. but no such words are in the Statute, 14 *Car.* 2. But the Proviso of using no other Form, *&c.* must be meant of the proper Divine Service in the Desk, which is not to be interrupted, or mixed with any arbitrary Forms of private Persons. But after the publick order of Common Prayers is regularly observ'd, and fully absolv'd, a Pulpit Prayer preparatory to the Sermon is not excluded or forbid by this or any other Law, see *Pasch.* 1 *Jac.* 2. *B. R. the King* v. *Sparks* 3 *Modern Rep.* 79.

And by the *55th.* Canon it is thus Directed, *Before all Sermons, Lectures and Homilies, the Preachers and Ministers shall move the People to join with them in Prayer,*

Prayer, in this Form, or to this Effect, as briefly as conveniently they may. Ye ſhall pray for Chriſt's Holy Catholick Church, &c. *See the Canon.*

But as ſome have tranſgreſſed this Canon by a long and profuſe way of Praying before Sermon, ſo others have run into another extreme, by affecting Brevity, and uſing only the Lord's Prayer, or ſome ſhort Collect with it, which gave occaſion to his Grace the Arch-biſhop of *Canterbury* in his *Letter to the right Reverend the Lords Biſhops of his Province*, July 16. 1695. to give them this particular Advice. *It ſeems very fit, that You require your Clergy, in their Prayer before Sermon, to keep to the Effect of the* 55th. *Canon, it being commonly reported, that it is the manner of ſome in every Dioceſe, either to uſe only the Lord's Prayer (which the Canon preſcribes as the concluſion of the Prayer, and not the whole Prayer) or at leaſt to leave out the King's Titles, and to forbear to pray for the Biſhops as ſuch.*

And Note, That all Rites and Ceremonies appointed in and by the Book of Common Prayer, are ſtrictly to be uſed and none other; and the party offending is puniſhable by Endictment upon the Statute 14 *Car.* 2. c. 4. or upon Statute 1 *Eliz.* c. 1. or by the Ordinary.

And it is Enacted, That ſuch Ornaments of the Church and of the Miniſters thereof, ſhall be retained and be in uſe, as was in this Church of England, **by authority of Parliament, in the ſecond Year of the Reign of King** Edward **the Sixth, until other order ſhall be therein taken by the authority of the Queens Majeſty, with the Advice of her Commiſſioners appointed and authorized under the Great Seal of** England **for cauſes Eccleſiaſtical, or of the Metropolitan of this Realm. And alſo, That if there ſhall happen any contempt or irreverence to be uſed in the Ceremonies or Rites of the Church, by the miſuſing of the Orders appointed in this Book,** (which is to be underſtood now of the preſent Book of Common-Prayer) **the Queens Majeſty may by the like advice of the ſaid Commiſſioners or Metropolitan, ordain and publiſh ſuch further Ceremonies or Rites as may be moſt for the advancement of God's Glory, the edifying of his Church, and due reverence of Chriſt's holy Myſteries and Sacraments,** Stat. 1 Eliz. Ch. 2.

Note, It was by vertue of this Proviſo, that King *James* I. in the firſt Year of his Reign gave Directions to the Arch-biſhop, and other High Commiſſioners, to review the Common Prayer Book; and they did make ſeveral material Alterations and Enlargements of it, as in the Office of Private Baptiſm, and in ſeveral Rubricks and other Paſſages: And added five or ſix new Prayers and Thanksgivings, and all that part of the Catechiſm, which contains the Doctrine of the Sacraments. And yet the Powers ſpecified in that Proviſo, ſeem not to extend to the Qeen's Heirs and Succeſſors, but to be only lodg'd perſonally in the Queen; yet the Book of Common Prayer ſo altered, ſtood in force from the firſt of King *James* to the 14 of *Char.* II. when upon a better review, it was again altered, and confirm'd by Parliament. And upon this clauſe of the Statute, **That ſuch Ornaments of the Church, and of the Miniſters thereof at all times of their Miniſtring, ſhall be retained, and be in uſe, as were in the Church of** England **by authority of Parliament, in the ſecond year of the Reign of King** Edward **the ſixth.** It is ſaid, that the Dean of *Chriſt-Church* was convened before the Ordinary for Schiſm, becauſe, he would not uſe a Surplice, and that therefore he was condemned as a Schiſmatick, and deprived of his Deanry in the time of Queen *Elizabeth*, *Specot's Caſe*, *Mich.* 30 *Eliz.* 3 *Leonard* 199.

CHAP. XXXII.

Statutes for Uniformity of Prayers. Of Holy-days to be obſerved. Miniſters bound by Tenure, or Covenant to ſay Divine Service in a Chappel, &c.

Although upon the aforeſaid Statutes, perſons as hath been ſaid, are puniſhable by Endictment that neglect to read the Morning and Evening Prayer, or that do not read them, or other publick Prayers, or Adminiſter the Sacraments in ſuch order and form, as is mentioned in the Book of Common Prayer, or uſe other forms of Prayer, or Adminiſtration of Sacraments, Rites, or Ceremonies, than what is appointed, *&c.* or in any reſpect offend againſt the ſame; yet for the further eſtabliſhing of the Book of Common Prayer, it is further Enacted.

That the ſeveral good Laws and Statutes of this Realm, which have been formerly made, and are now in force for the Uniformity of Prayer and Adminiſtration of the Sacraments, within this Realm of England, **and places aforeſaid, ſhall ſtand in full force and ſtrength, to all intents and purpoſes whatſoever, for the eſtabliſhing and confirming of the ſaid Book, entituled,** The Book of Common Prayer and the Adminiſtration of the Sacraments, and other Rites and Ceremonies of the Church; according to the Uſe of the Church of England; together with the Pſalter or Pſalms of David, pointed as they are to be ſung or ſaid in Churches, and the form and manner of Making, Ordaining and Conſecrating of Biſhops, Prieſts and Deacons, **herein before mentioned to be joyned and annexed to this Act; and ſhall be applied, practiſed and put in ure for the puniſhing of all offences contrary to the ſaid Laws, with relation to the Book aforeſaid, and no other,** Stat. 14 Car. 2. cap. 4.

The Statutes that were in force for the Uniformity of Prayer, and Adminiſtration of the Sacraments before this Statute, and which are continued by the aforeſaid Clauſe to be applied to this new Book of Common Prayer, are theſe that follow 2 *&* 3 *Ed.* 6. *Ch.* 1. 5 *&* 6 *Ed.* 6. *Ch.* 1. 1 *Eliz. Ch.* 1. 13 *Eliz. Ch.* 12.

The Statutes of the 2 *&* 3 *Ed.* 6. c. 1. and the 5 *&* 6 *Ed.* 6 c. 1. although they be in force, ſo that an offender againſt the ſame may thereupon be endicted; yet becauſe that there is not any thing in them but what is contained in the Statute of 1 *Eliz. Ch.* 2. I ſhall only ſet down the ſaid 1 *Eliz.* c. 2. and but ſo much of it in this place as doth touch the Miniſters Duty.

Where at the death of our late Sovereign Lord King Edward **the Sixth, there remained one Uniform Order of Common Service and Prayer,** and **of the Adminiſtration of Sacraments, Rites and Ceremonies in the Church of** England, **which was ſet forth in one Book intituled, The Book of Common Prayer, and Adminiſtration of Sacraments, and other Rites and Ceremonies in the Church of** England, **authorized by Act of Parliament, holden in the fifth and ſixth Years of our ſaid late Sovereign Lord King** Ed. **the ſixth intituled, An Act for the Uniformity of Common Prayer, and Adminiſtration of the Sacraments; the which was repealed and taken away by Act of Parliament in the firſt Year of the Reign of our late Sovereign Lady Queen** Mary, **to the great decay of the due honour of God, and diſcomfort to the profeſſors of the truth of Chriſt's Religion.**

Be it therefore Enacted by the authority of this present Parliament, That the said Estatute of Repeal, and every thing therein contained, only concerning the said Book, and the Service, Administration of the Sacraments, Rites and Ceremonies, contained or appointed in or by the said Book, shall be void and of none effect, from and after the Feast of the Nativity of Saint John Baptist next coming; and that the said book with the order of Service, and of the administration of Sacraments, Rites and Ceremonies, with the alteration and additions therein added and appointed by this Estatute, shall stand and be from and after the said Feast of the Nativity of Saint John Baptist, in full force and effect, according to the tenour and effect of this Estatute; any thing in the foresaid Estatute of Repeal to the contrary notwithstanding.

And further be it enacted by the Queens Highness, with the assent of the Lords and Commons in this present Parliament assembled, and by the authority of the same, That all and singular Ministers in any Cathedral or Parish Church, or other place within this Realm of England, Wales, and the Marches of the same, or other the Queens Dominions, shall from and after the Feast of the Nativity of Saint John Baptist next coming, be bound to say and use the Mattens, Even-song, Celebration of the Lord's Supper, and administration of each of the Sacraments, and all the Common and open prayer, in such order and form as is mentioned in the said Book so authorized by Parliament, in the said fifth and sixth years of the Reign of King Edward the sixth.

And that if any manner of Parson, Vicar, or other whatsoever Minister, that ought or should sing or say Common Prayer mentioned in the said book, or minister the Sacraments, from and after the Feast of the Nativity of Saint John Baptist next coming, refuse to use the said Common Prayers, or to minister the Sacraments in such Cathedral or Parish Church, or other places as he should use to minister the same, in such order and form as they be mentioned and set forth in the said Book; or shall wilfully or obstinately, standing in the same, use any other Right, Ceremony, Order, Form, or manner of Celebrating the Lord's Supper, openly or privily, or Mattens, Even-songs, Administration of the Sacraments, or other open Prayers, than is mentioned and set forth in the said Book; open Prayer in and throughout this Act, is meant that Prayer which is for others to come unto, or hear, either in common Churches or Private Chappels or Oratories, commonly called, the Service of the Church, or shall preach, declare, or speak any thing in the derogation or depraving of the said Book, or any thing therein contained, or of any part thereof, and shall be thereof lawfully convicted, according to the Laws of this Realm, by verdict of twelve Men, or by his own confession, or by the notorious evidence of the fact, shall lose and forfeit to the Queens Highness, her Heirs and Successors, for his first offence, the profit of all his Spiritual benefices or promotions coming or arising in one whole Year next after his conviction. And also that the person so convicted, shall for the same offence, suffer imprisonment for the space of six Months, without bail or mainprise.

And if any such person once convict of any offence concerning the premisses, shall after his first conviction eftsoons offend, and be thereof in form aforesaid lawfully convict, that then the same person shall for his second offence suffer imprisonment by the space of one whole Year, and also shall therefore be deprived, ipso facto, of all his Spiritual promotions, and that it shall be lawful to all Patrons or Donors of all and singular the same Spiritual promotions, or of any of them, to present or collate to the same, as though the person or persons so offending were dead.

And

And that if any such person or persons after he shall be twice convicted in form aforesaid, shall offend against any of the premisses the third time, and shall be thereof in form aforesaid lawfully convicted, that then the person so offending and convicted the third time, shall be deprived ipso facto, of all his Spiritual promotions, and also shall suffer imprisonment during his life.

And if the person that shall offend, and be convicted in form aforesaid, concerning any of the premisses, shall not be beneficed, nor have any Spiritual promotion, that then the same person so offending and convict, shall for the first offence suffer imprisonment during one whole Year next after his said conviction, without bail or mainprise.

And if any such person not having any Spiritual promotion, after his first covidion shall eftsoons offend in any thing concerning the premisses, and shall in form aforesaid be thereof lawfully convicted, that then the same person shall for his second offence suffer imprisonment during his life.

And for the due execution hereof, the Queens most excellent Majesty, the Lords Temporal, and all the Commons in this present Parliament assembled, do in God's Name earnestly require and charge all the Archbishops, Bishops, and other Ordinaries, that they shall endeavour themselves to the uttermost of their knowledges, that the due and true execution hereof may be had throughout their Dioces and Charges, as they will answer before God, for such evils and plagues wherewith Almighty God may justly punish his people for neglecting this good and wholsom Law.

And for their authority in this behalf, be it further enacted by the authority aforesaid, That all and singular the said Arch-bishops, Bishops, and all other their Officers exercising Ecclesiastical Jurisdiction, as well in places exempt as not exempt, within their Dioces, shall have full power and authority by this Act, to reform, correct and punish by the censures of the Church, all and singular persons which shall offend within any their Jurisdictions or Dioces, after the said Feast of the Nativity of St. John Baptist next coming, against this Act and Statute; any other Law, Statute, Priviledge, Liberty or Provision, heretofore made, had or suffered to the contrary notwithstanding.

And it is ordained and enacted by the authority aforesaid, That all and every Justices of Oyer and Determiner, or Justices of Assize, shall have full power and authority in every of their open and general Sessions, to enquire, hear and determin all and all manner of offences that shall be committed or done contrary to any Article contained in this present Act, within the limits of the Commission to them directed, and to make Process for the execution of the same, as they may do against any person being endicted before them of trepals, or lawfully convicted thereof.

Provided always, and be it enacted by the authority aforesaid, That all and every Archbishop and Bishop, shall and may at all time and times, at his liberty and pleasure, join and associate himself by vertue of this Act, to the said Justices of Oyer and Determiner, or to the said Justices of Assize, at every of the said open and general Sessions to be holden in any place within his Dioces, for and to the enquiry, hearing and determining of the offences aforesaid.

And be it further enacted by the authority aforesaid, That no person or persons shall be at any time impeached, or otherwise molested of, or for any of the offences above mentioned, hereafter to be committed or done contrary to this Act, unless he or they so offending, be thereof endicted at the next general Sessions to be holden before any such Justices of Oyer and Determiner, or Justices of Assize, next after any offence committed or done contrary to the tenour of this Act.

Pro-

Provided always, and be it ordained and enacted by the authority aforesaid, That all and singular Lords of the Parliament, for the third offence above mentioned, shall be tryed by their Peers.

Provided also, and be it ordained and enacted by the authority aforesaid, That the Mayor of London, and all other Mayors, Bailiffs, and other head-officers of all and singular Cities, Boroughs and Towns-corporate within this Realm, Wales, and the Marches of the same, to the which Justices of Assize do not commonly repair, shall have full power and authority by virtue of this Act, to enquire, hear and determine the offences abovesaid, and every of them, yearly within fifteen days after the Feasts of Easter, and Saint Michael the Archangel, in like manner and form as Justices of Assize, and Oyer and Determiner may do.

Provided always, and be it ordained and enacted by the authority aforesaid, That all and singular Archbishops and Bishops, and every of their Chancellors, Commissaries, Archdeacons, and other Ordinaries, having any peculiar Ecclesiastical Jurisdiction, shall have full power and authority by virtue of this Act, as well to inquire in their Visitation, Synods and elsewhere within their Jurisdiction, at any other time and place, to take accusations and informations of all and every the things above mentioned, done, committed, or perpetrated within the limits of their Jurisdictions and Authority, and to punish the same with admonition, excommunication, sequestration or deprivation, and other censures and process, in like form as heretofore hath been used in like cases by the Queens Ecclesiastical Laws.

Provided always, and be it enacted, That whatsoever persons offending in the premisses, shall for their offences, first receive punishment of the Ordinary, having a testimonial thereof under the said Ordinaries Seal, shall not for the same offence eftsoons be convicted before the Justices: And likewise receiving for the said first offence punishment by the Justices, shall not for the same offence eftsoons receive punishment of the Ordinary; any thing contained in this Act, to the contrary notwithstanding, Stat. 1 Eliz. cap. 2.

Note, That the Title of this Act in the printed Book is mistaken, which must be regarded in framing an Endictment upon it; and it hath been a great question when this Parliament of 1 *Eliz.* began. *Poulton* saith the 23 of *January*, *Dyer* the 25 of *January*, *Dyer* 203. *Coke* the 25. of *February*, 4 *Instit.* 7. and for the incertainty when it commenced, an Information was brought upon this Statute against Sir *Edward Walgrave*, and his Wife without any special recital of the Statute, only supposing the offence to be *contra formam & effectum cujusdam Statuti in Parliamento tent. apud Westmonasterium anno primo*, &c. for this being a general Statute need not to be particularly recited, *Cawley's Laws against Recusants* 24.

Note also, That if this Act had never inflicted any punishment for depraving, or not observing the Book of Common Prayer, yet the same being allowed and commanded to be observed for uniformity of Common Prayer, and the Unity and Peace of the Church; the Ecclesiastical Judge may deprive such Parson, Vicar, *&c.* as shall deprave and not observe the said Book, as well for the first offence, as he might have done by the Censures of the Church, and the Ecclesiastical Laws, as if no form of punishment had been inflicted by this Act; and this doth evidently appear by the Proviso in this Act, for thereby, notwithstanding any thing in the Act contained, they may punish such offenders, by Admonition, Excommunication, Sequestration, or Deprivation, and other Censures and Process in like Form as heretofore hath been used in like

like caſes by the Queens Eccleſiaſtical Laws, and are not bound to purſue the form preſcribed by the ſaid Act, which is to puniſh the offender according to the Temporal Law, *Mich.* 33 *Eliz. Caudrey's Caſe, Coke* 5. *de Jure Eccleſiaſtico, fol.* 5. 6.

Every Almanack, and particularly that in the Book of Common Prayers, doth declare what thoſe Holy-days be,on which perſons as aforeſaid obliged to ſay Morning and Evening Prayers are to ſay the ſame, and moſt of thoſe days are appointed to be kept Holy, by *Stat.* 5 and 6 *Ed.* 6. *Chap.* 3. which is as followeth,----For as much as at all times men be not ſo mindful to Laud and praiſe God, ſo ready to reſort and hear God's holy Word, and to come to the Holy Communion, and other laudable Rites which are to be obſerved in every Chriſtian Congregation, as their bounden duty doth require: Therefore to call Men to remembrance of their duty, and to help their infirmity, it hath been wholſomly provided, that there ſhould be ſome certain times and days appointed, wherein the Chriſtian ſhould ceaſe from all other kind of labours, and ſhould apply themſelves only and wholly unto the aforeſaid holy Works, properly pertaining unto true Religion: That is, to Hear, to Learn, and to remember Almighty God's great Benefits, his manifold Mercies, his inestimable gracious Goodneſs, ſo plenteouſly powred upon all his Creatures, and that of his infinite and unſpeakable Goodneſs without any man's deſert. And in remembrance hereof, to render unto him moſt high and hearty thanks, with Prayers and Supplications, for the relief of all our daily Neceſſities; and becauſe theſe be the chief and principal Works wherein Man is commanded to worſhip God, and do properly pertain unto the firſt Table; therefore as theſe Works are both moſt commonly, and alſo may well be called God's Service,ſo the times appointed,ſpecially for the ſame, are called Holy Days, not for the matter or nature, either of the time or day, nor for any of the Saints ſake, whoſe memories are had on thoſe days (for ſo all days and times conſidered are God's Creatures, and all of like Holineſs) but for the nature and condition of thoſe godly and holy Works,wherewith only God is to be Honoured, and the Congregation to be Edified, whereunto ſuch times and days are Sanctified and Hallowed. That is to ſay, ſeparated from all prophane Uſes, and dedicated and appointed, not unto any Saint or Creature, but only unto God and his true Worſhip; neither is it to be thought, that there is any certain time or definite number of days preſcribed in Holy Scripture, but that the appointment both of the time, and alſo of the number of the days, is left by the authority of God's Word, to the liberty of Chriſt's Church to be determined and aſſigned orderly in every Country, by the diſcretion of the Rulers and Miniſters thereof, as they ſhall judge moſt expedient to the true ſetting forth of God's Glory, and the Edification of their people. Be it therefore enacted by the King our Sovereign Lord, with the aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, that all the days hereafter mentioned, ſhall be kept, and commanded to be kept Holy-days, and none other; that is to ſay, all Sundays in the Year, the days of the Feaſt of the Circumciſion of our Lord Jeſus Chriſt, of the Epiphany, of the Purification of the bleſſed Virgin, of Saint Matthew the Apoſtle, of the Annunciation of the Bleſſed Virgin, of Saint Mark the Evangeliſt, of Saint Philip and Jacob the Apoſtles, of the Aſcenſion of our Lord Jeſus Chriſt, of the Nativity of Saint John Baptiſt, of Saint Peter the Apoſtle, of Saint James the Apoſtle, of Saint Bartholomew the Apoſtle, of Saint Matthew the Apoſtle, of Saint Michael the Archangel, of Saint Luke the Evangeliſt, of Saint Simon and Jude the Apoſtles, of All Saints, of Saint Andrew the Apoſtle,

Apoſtle, of Saint Thomas the Apoſtle, of the Nativity of our Lord, of Saint Stephen the Martyr, of Saint John the Evangeliſt, of the holy Innocents, Monday and Tueſday in Eaſter-week, Monday and Tueſday in Whitſun-week; and that none other day ſhall be kept and commanded to be kept Holy-day, or to abſtain from lawful bodily labour.

And it is alſo Enacted by the Authority aforeſaid, That every Even or Day next going before any of the aforeſaid days of the Feaſts of the Nativity of our Lord, of Eaſter, of the Aſcenſion of our Lord, Pentecoſt, and the Purification, and the Annunciation of the aforeſaid Bleſſed Virgin, of All Saints, and of all the ſaid Feaſts of the Apoſtles, (other then of Saint John the Evangeliſt, and Philip and Jacob) ſhall be Faſted, and commanded to be kept and obſerved, and that none other Even or Day ſhall be commanded to be Faſted.

And it is enacted by the authority aforeſaid, That it ſhall be lawful to all Archbiſhops and Biſhops in their Dioceſſes, and to all other having Eccleſiaſtical or Spiritual Juriſdiction, to enquire of every perſon that ſhall offend in the premiſſes, and to puniſh every ſuch offender by the Cenſures of the Church, and to enjoyn him or them ſuch penance as ſhall be to the Spiritual Judge by his diſcretion thought meet and convenient.

Provided always, That this Act, or any thing therein contained, ſhall not extend to abrogate or take away the abſtinence from Fleſh in Lent, or on Frydays and Saturdays, or any other day which is already appointed ſo to be kept, by virtue of an Act made and provided in the third year of the Reign of our Sovereign Lord the Kings Majeſty that now is, ſaving only of thoſe Evens or Days whereof the Holy-day next following is abrogated by this Statute; any thing above mentioned to the contrary in any wiſe notwithſtanding.

But this Act being repealed by 1 *Mar. Chap.* 2. and after revived by 1 *Jac. Cap.* 25. to continue until the end of the firſt Seſſions of the next Parliament; and not having been by any Parliament ſince, continued or revived, ſome Queſtions are made of the continuance of it: See *Wingate's Abridgment, the* 5 and 6 *Ed.* 6. c. 3. 15. *by the* 1 *Mar. Parl.* 1 *Repealed*, and afterwards by 1 *Jac.* 25. again Repealed, and therefore *Quære* whether it be now in force, unleſs it had been revived by ſpecial words: But it ſeems to be well revived, by *Coke*, 2 *Inſt.* 686.

But grant the Statute for obſervance of *Holy-days* to be not now in full force and vertue, yet ſince the Calendar prefixed to the Liturgy, and the ſeveral Rules and Directions relating to the uſe of it, are now received and eſtabliſhed with the ſaid Book of Common Prayer by the Act of Uniformity, 14 *Car.* 2. the obſervance of our Moveable and Immoveable Feaſts, together with the days of Faſting and Abſtinence, may be call'd the Law of the Land, as well as the Order of the Church. See annexed to our Liturgy Calendar, *A Table of all the Feaſts that are to be obſerved in the Church of* England *through the Year.*

Alſo other days are by ſpecial Acts of Parliament ordained to be kept Holy, as days of Thankſgiving, which Acts are theſe that follow.

Stat. 3 Jac. Chap. 1. *An Act for a Publick Thanksgiving to Almighty God every Year on the Fifth day of* November.

FOr as much as Almighty God hath in all ages shewed his Power and Mercy in the miraculous and gracious deliverance of his Church, and in the Protection of Religious Kings and States; and that no Nation of the Earth hath been blessed with greater benefits than this Kingdom now enjoyeth, having the true and free profession of the Gospel under our most gracious Sovereign Lord King JAMES, the most great, learned and religious King that ever Reigned therein, enriched with a most hopeful and plentiful Progeny, proceeding out of his Royal Loyns, promising continuance of this happiness and profession to all posterity; the which many malignant and develish Papists, Jesuits and Seminary Priests much envying and fearing, conspired most horribly, when the King's most excellent Majesty, the Queen, the Prince, and all the Lords Spiritual and Temporal, and Commons should have been assembled in the Upper house of Parliament upon the Fifth day of Novemb. in the year of our Lord, 1605. suddenly to have blown up the said whole House with Gun-powder: An invention so inhumane, barbarous and cruel, as the like was never before heard of, and (as some of the principal Conspirators thereof confess) purposely devised and concluded to be done in the said House, that where sundry necessary and religious Laws for preservation of the Church and State were made, which they falsly and slanderously term cruel Laws, enacted against them and their Religion, both place and persons should be all destroyed and blown up at once, which would have turned to the utter ruine of this whole Kingdom, had it not pleased Almighty God, by inspiring the King's most excellent Majesty with a Divine Spirit, to interpret some dark phrases of a Letter shewed to his Majesty above and beyond all ordinary construction, thereby miraculously discovering the hidden Treason not many ours before the appointed time for the execution thereof: Therefore the King's most excellent Majesty, the Lords Spiritual and Temporal, and all his Majesties faithful and loving Subjects, do most justly acknowledge this great and infinite Blessing to have proceeded meerly from GOD his great mercy, and to his most holy Name do ascribe all honour, glory and praise: And to the end that this unfeigned Thankfulness may never be forgotten, but be had in a perpetual remembrance, that all ages to come may yield praise to his Divine Majesty for the same, and have in memory THIS JOYFUL DAY OF DELIVERANCE.

Be it therefore enacted by the King's most excellent Majesty, The Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, That all and singular Ministers in every Cathedral and Parish Church, or other usual Place for Common Prayer, within this Realm of England and the Dominions of the same, shall always upon the Fifth day of November say Morning Prayer, and give unto Almighty God thanks for this most happy deliverance: And that all and every person and persons inhabiting within this Realm of England and the Dominions of the same, shall always upon that day diligently and faithfully resort to the Parish Church or Chappel accustomed, or to some usual Church or Chappel where the said Morning Prayer, Preaching or other Service of God shall be used, and then and there to abide orderly and soberly during the time of the said Prayers, Preaching, or other Service of God there to be used and ministred.

And

And because all and every person may be put in mind of his duty, and be then better prepared to the said holy Service, be it enacted by the authority aforesaid, That every Minister shall give warning to his Parishioners publickly in the Church at Morning Prayer, the Sunday before every such Fifth day of November, for the due observation of the said day: And that after Morning Prayer or Preaching upon the said Fifth day of November, they read publickly, distinctly and plainly this present Act.

For the more effectual Solemnizing this Annual Festival, by the King's Order there was drawn up by the Bishops of the Church, *A Form of Prayer with Thanksgiving to be used yearly upon the Fifth day of* November, *for the happy deliverance of the King and the three Estates of the Realm, from the most traiterous and bloody intended Massacre by Gun-powder.* Printed and Prescribed at the end of our Common Prayer,

Stat. 12 Car. 2. 14. *An Act for a perpetual Anniversary Thanksgiving on the Nine and Twentieth Day of* May.

FOrasmuch as Almighty God the King of Kings, and sole disposer of all earthly Crowns and Kingdoms, hath by his All-swaying providence and power miraculously demonstrated in the view of all the world, his Transcendent Mercy, Love and Graciousness towards his most excellent Majesty, CHARLES the Second, by his especial Grace, of England, Scotland, France and Ireland, King, Defender of the true Faith, and all his Majesties Loyal Subjects of this his Kingdom of England, and the Dominions thereunto annexed, by his Majesties late most wonderful, glorious, peaceable and joyful Restauration to the actual possession and exercise of his undoubted Hereditary Sovereign and Legal authority over them (after sundry years forced extermination into Foreign parts, by the most Traiterous Conspiracies, and Armed power of usurping Tyrants, and execrable perfidious Traitors) and that without the least opposition, or effusion of blood, through the unanimous, cordial, Loyal Votes of the Lords and Commons in this present Parliament assembled, and passionate desires of all other his Majesties Subjects; which unexpressible Blessing (by God's own most wonderful dispensation) was compleated on the Twenty Ninth day of May last past, being the most memorable Birth-day, not only of his Majesty, both as a Man and Prince, but likewise as an actual King, and of this and other his Majesties Kingdoms, all in a great measure new born and raised from the dead on this most joyful day, wherein many Thousands of the Nobility, Gentry, Citizens, and other his Lieges of this Realm, conducted his Majesty unto his Royal Cities of London and Westminster, with all possible expressions of their joy and loyal affections, in far greater Triumph then any of his most Victorious Predecessors Kings of England, returned thither from the Foreign Conquests: and both his Majesties Houses of Parliament, with all dutiful and joyful Demonstrations of their Allegiance, publickly received, and cordially congratulated his Majesties most happy Arrival, and Investiture in his Royal Throne, at his Palace at White-hall; upon all which considerations, this being the day which the Lord himself hath made and crowned with so many publick Blessings and signal deliverances, both of his Majesty and his people, from all their late most deplorable Confusions, Divisions, Wars, Devastations, and Oppressions, to the end that it may be kept in perpetual Remembrance in all Ages to come, and that his Sacred Majesty with all his Subjects of this Realm, and the Dominions thereof,

and their posterities after them, might annually celebrate the perpetual memory thereof, by sacrificing their unfeigned hearty publick Thanks thereon to Almighty God, with one heart and voice, in a most devout and Christian manner, for all these publick benefits received and conferred on them, upon this most joyful day. Be it therefore enacted by the King's most excellent Majesty, the Lords and Commons in this present Parliament assembled, and by the authority of the same, that all and singular Ministers of God's Word and Sacraments, in every Church, Chappel, and other usual place of Divine Service, and publick Prayer, which now are, or hereafter shall be within this Realm of England and the respective Dominions thereof, and their Successors, shall in all succeeding Ages, annually celebrate the Twenty Ninth day of May, by rendring their hearty publick Praises and Thanksgivings unto Almighty God, for all the forementioned extraordinary Mercies, Blessings and Deliverances received, and mighty acts done thereon, and declare the same to all the people there assembled, and the generations yet to come, that so they may for ever praise the Lord for the same, whose name alone is excellent, and his glory above the Earth and Heavens.

And be it further Enacted, That all and every person and persons inhabiting within this Kingdom, and the Dominions thereunto belonging, shall upon the said day annually resort with diligence and devotion to some usual Church, Chappel or Place where such publick Thanksgivings and Praises to God's most Divine Majesty shall be rendred, and there orderly and devoutly abide during the said publick Thanksgiving, Prayers, Preaching, Singing of Psalms, and other Service of God there to be used and ministred.

And to the end that all persons may be put in mind of their duty therein, and be the better prepared to discharge the same with that piety and devotion as becomes them; be it further enacted, That every Minister shall give notice to his Parishioners publickly in the Church at Morning Prayers the Lords day next before every such Twenty Ninth day of May, for the due observation of the said day, and shall then likewise publickly and distinctly read this present Act to the people, Stat. 13 Car. 2. c. 11.

And to make the observance of this Festival more solemn and uniform, by the King's Order there was drawn up by the Bishops, *A Form of Prayer with Thanksgiving to be used yearly upon the* 29 *day of* May, *being the day of his Majesty's Birth, and happy Return to his Kingdoms.*

There is likewise an Act of Parliament for the yearly keeping a Fast on the 30 of *January*, the day of the execrable Murder of King *Charles* I. but the Act not appointed to be read in Churches. For the more regular observation of this Fast, there was compiled by the Bishops at the appointment of the King, *A Form of Common Prayer to be used upon the* 30 *day of* January, *being the day of the Martyrdom of King* Charles *the First.*

Note, These three Forms of Publick Service are not expresly confirm'd by any Act of Parliament, but are authorised by this Order of the King.

Charles R.

OUr Will and Pleasure is, That these three Forms of Prayer and Service made for the Fifth day of November, *the Thirtieth of* January, *and the Twenty Ninth of* May, *be forthwith Printed and Published, and for the future, annexed to the*

Book

Book of Common Prayer and Liturgy of the Church of England, *to be uſed yearly on the ſaid Days, in all Cathedral and Collegiate Churches and Chappels, in all Chappels of Colleges and Halls within both our Univerſities; and of our Colleges of* Eaton *and* Wincheſter, *and in all Pariſh Churches and Chappels within Our Kingdom of* England, *Dominion of* Wales, *and Town of* Berwick *upon* Tweed.

Given at Our Court at *White-hall*, the Second day of *May*, in the Fourteenth Year of Our Reign.

Miniſters are not only bound to give Notice of the aforeſaid Special days appointed to be kept Holy, but alſo they are on the *Sunday* before going any Holy-day, or Faſting-day, after the Communion-ſervice, to declare to the People what days are in the Week following to be obſerved, as Holy-days or Faſting-days. *Rubrick.*

Note, That no Penalty is appointed for thoſe that do not Celebrate Divine Service on the days appointed to be obſerved by the aforeſaid Acts, nor is any Penalty ſet by *Stat.* 14 *Car.* 2. *Chap.* 4. for thoſe that neglect to ſay Divine Service on any *Sunday* or *Holy-day*; and therefore ſuch as are negligent muſt be puniſhed in the ordinary way of Tryal by Jury, *&c.* and the Juſtices are to impoſe a reaſonable Fine, or elſe they may be puniſhed in the Eccleſiaſtical Court by the Ordinary, as I conceive; *Quære*, as to the Ordinary's Power to puniſh for the neglect of the keeping the days ſpecially appointed by the three laſt Acts; but I think that however, he may puniſh the neglect of Divine Service on *Sundays*, and other *Holy-days* by the Statute 14 *Car.* 2. *Chap.* 4. with Statute 1 *Eliz.* 1. and by the Statute 14 *Car.* 2. *Chap.* 4. every Miniſter is bound to read the Morning and Evening Prayers, in the Book of Common Prayer contained, upon every Lord's Day, and upon all other days, and occaſions, and at the times therein appointed, *&c.* And thereby alſo the Statute of 1 *Eliz.* 1. is to be applied to this Book of Common Prayer now in force, which gives to the Ordinary an Authority to puniſh all offences againſt the ſaid Act, unleſs it may be objected, that the ſaid Act of 1 *Eliz.* 1. doth not enjoyn the reading of the Prayers, but only the reading of them in ſuch order and form as is mentioned in the ſaid Book, at ſuch times when they are read, and then the Ordinary hath not power thereby to puniſh the neglect of reading Prayers on *Sundays* or other *Holy-days*; *Quære*, however ſuch neglecters may be puniſhed in Temporal Courts as before is ſaid.

If *A.* be ſeized of a Mannor whereof a Chappel is parcell, and a Spiritual Corporation doth Covenant by Deed indented with *A.* and his Heirs to celebrate Divine Service weekly in the ſaid Chappel for the Lord of the ſaid Mannor and his Servants; in this Caſe, the Aſſignees of *A.* ſhall have an Action of Covenant, albeit, they are not named in the deed, for that the remedy by Covenant doth run with the Land, to give Damages to the party grieved, and is as appurtenant to the Mannor. But if the Covenant had been with a Stranger, and not with the Lord of the Mannor, to Celebrate Divine Service in the Chappel of *A.* and his Heirs, there the Aſſignee ſhall not have an Action of Covenant, for the Covenant cannot be annexed to the Mannor, becauſe the Covenantee was not ſeized of the Mannor, 1 *Inſt.* 385. *a.* So, and if a Lord of

of a Mannor hath a Chappel within any Pariſh, that is private for himſelf and his Servants within the ſaid Mannor, in which time whereof the memory of Man is not to the contrary, the Parſon or Vicar of the Pariſh in which ſuch Chappel or Mannor is, have uſed to ſay Divine Service, and to Adminiſter the Sacraments, *&c.* either by himſelf, or ſome Chaplain provided by him; if the ſaid Parſon, or Vicar, neither by himſelf, nor other Perſon doth celebrate Divine Service, and Adminiſter the Sacraments, *&c.* according to the preſcription, an Action upon the caſe by reaſon of the preſcription, ſhall be maintainable by the Lord of the Mannor, and he himſelf only, and none of his Servants ſhall have the Action: For although that the Divine Service be Spiritual, yet for as much as the ſame by preſcription doth belong to a private Perſon, and is to be celebrated for his eaſe within his Mannor, which ſhall be intended to begin at firſt by Covenant, the Action for not performing of the Service doth well lye, and damages ſhall be recovered for the neglect, and therewith agreeth 22 *H.* 6. 46. *in the Prior of* Woodburn's *Caſe*, *Co.* 5. *William's Caſe* 73. *Roll's Abr.* 1. 110. But when the Chappel is not private to the Lord, and his Family, but publick and common to all his Tenants of the ſame Mannor, which may be many, and of great number, there no Action upon the caſe lieth by the Lord; for then every one of his Tenants may have his Action upon the caſe as well as the Lord himſelf, and ſo infinite Actions might be brought for one default, and the offender puniſhed without end, which the Law will not allow, as being unreaſonable. And yet they ſhall not be without remedy in ſuch caſe, for they may ſue in the Spiritual Court for the Default, and there the ſame ſhall be redreſſed, *Littleton lib.* 2. *Cap. Frankalmoign Sect.* 136. *Mich.* 34 *&* 35. *Eliz. B. R. William's Caſe* 5 *Coke* 73. *vide* 27 *H.* 8. 27. *a.* 5 *Ed.* 4. 2. 2 *Ed.* 4. 9. *a. Roll's Ab.* 1. p. 110. 1 *Inſt.* 96. *a.* An Action of the Caſe was brought, wherein the Plaintiff declared, that the Sacrament of the Lord's Supper was to be Adminiſtred to the Pariſhioners upon ſuch a Sunday, and that the Defendant Parſon, *&c.* refuſed to admit the Plaintiff to the ſaid Sacrament; and a Verdict was found for the Plaintiff, but it was moved in Arreſt of Judgment, that the Action in this caſe would not lie, becauſe, it was a meer Eccleſiaſtical Offence, and puniſhable by Cenſures of the Church, and is not proper for a Jury to judge what damage the Plaintiff hath ſuſtained by being refuſed this Spiritual Food: And if the Plaintiff may maintain this Action, then every other of the Pariſhioners may bring the like Action, and the Law allows not Multiplicity of Actions, but the Judgment was Arreſted upon an exception to the form of the Declaration, and the Court gave no Opinion whether the Action would lie or not, *Paſch.* 13 *Car.* 2. *Clovell* verſ. *Cardinal* 1 *Siderfin* 34.

And though the Liturgy, or Book of Common Prayer, and of celebrating Divine Service be altered, yet this alteration notwithſtanding, where any Tenements be held in Frankalmoign, the Tenure in Frankalmoign remaineth, and ſuch Prayers, and Divine Service ſhall be ſaid and celebrated as now is authorized; yea, and though the Tenure be in particular, as to ſing a Maſs, or a Placebo, or Dirige, yet ſaying the Prayers now authorized ſufficeth, for the changing of Spiritual Services into other Spiritual Services, altereth neither the Name, nor the effect of the Tenure; and albeit the Tenure in Frankalmoign is now reduced to a certainty contained in the Book of Common Prayer, yet ſeeing the Original Tenure was in Frankalmoign, and the change is by general conſent, by authority of Parliament, whereunto every Man is party, the Tenure remains as it was before 1 *Inſt.* 95. *b.* from which it ſeems to appear; that the Eccleſiaſtical Judge may correct, if Divine Service be neglected in any Church or Chappel, although no authority be given by any Statute

to

to enable him thereunto; and I conceive, that the altering the ancient form of Divine Service, or rather the confirmation of the alteration of it, by Act of Parliament, doth not take from the Ordinary his *Curam animarum*, and therefore not his ancient authority he had by the Common Law and Common Right, to ſee that Divine Offices be performed by thoſe under his Charge; and to puniſh Offenders in that reſpect by the Cenſures of the Church.

But if any hold Land by a certain Divine Service to be done, as to ſing a Maſs every *Fryday* in the Week, or every year ſuch a day to ſing a Placebo or Dirige, *&c.* or to find a Chaplain to ſing a Maſs, *&c.* or to diſtribute in Alms an hundred pence to an hundred poor People on ſuch a day, in this caſe, if ſuch Divine Service be not done, the Lord may diſtrain, becauſe, the Divine Service is put in certain by the Tenure; and if the Lord doth diſtrain for not doing Divine Service which is certain, he ſhall upon his avowry recover Damages at the Common Law, that is, in the King's Temporal Court for the not doing of it; and if Iſſue be taken upon the performance of the Divine Service, it ſhall be tryed by a Jury of twelve Men, becauſe, albeit the Service be Spiritual, yet the damages and loſs are Temporal, and ſo is the Seigniorie alſo, and in this Caſe the Lord ſhall have Fealty, *&c.* and ſuch Tenure ſhall not be ſaid to be Tenure in Frankalmoign, but is called Tenure by Divine Service; for none can hold in Frankalmoign if there be expreſſed any particular manner of ſervice that he ought to do, 1 *Inſt.* 96. *b.* 97. *b.* But if a grant be made by Fine to find a Chaplain in a certain Chappel of the Conuſee to ſay Divine Service there, and when the ſaid Chappel is become ruinous and decayed, a *Scire Facias* is brought upon the Fine; if the Conuſor doth plead that the Chappel is ruinated, and decayed, ſo that no Prieſt can ſay Divine Service therein, although that the Covenant by ſuch plea is confeſſed, and it be prayed on the behalf of the Plaintiff, that therefore Judgment may be given, but that execution ſhould ceaſe until the Chappel be rebuilt, yet no Judgment ſhall be given, for that this is a good bar for the time; for during the time that there is no Chappel, Divine Service ſhall ceaſe, in that it ought to be done in a decent and reverend manner, and not at large; but if the Chappel be rebuilt in the place where the old Chappel ſtood, Divine Service ought to be ſaid there again, and a Chaplain ought to be found for that purpoſe as formerly. But it was ſaid, that if the Chappel be built in another place than where the old Chappel ſtood, the Grantor is not tied to ſay Divine Service in it, 10 *H.* 7. 13. 16 *H.* 7. 9, 10. *Trin.* 30 *Eliz. B. R. Wade and Preſthall's Caſe* 1 *Leonard* 331. *Paſch.* 43 *Eliz. Cottel* v. *Luttrell's Caſe*, *B. R.* 4 *Coke* 86. and this I ſuppoſe holds as to a Pariſh Church, *&c.* when the caſe is the ſame.

And *Note*, That where there is a Chappel of eaſe in a Pariſh, the Incumbent of the Mother Church being bound to find a Chaplain there, he himſelf may ſerve in the Chappel as well as his Curate or Chaplain. *The caſe of the Parſon of* Aſhton *and Caſtle* Burnidg *Chappel*, Hobart 66, 67.

CHAP.

CHAP. XXXIII.

Miniſters Duty in Preaching.

ANother Duty incumbent upon every Miniſter that hath cure of Souls is, to declare by Preaching the Will of God to his People. And albeit, that every Perſon when he is ordained Prieſt, doth thereby receive Authority to preach the Word of God. *Rubrick.* And altho', when he is Inſtituted, the Biſhop doth commit to him the cure of Souls, yet *Shephard* in his ſure Guide for Juſtices of the Peace ſaith, that the Clauſe in the Statute 14 *Car.* 2. concerning Lecturers ſeems to extend to all Miniſters that Preach any where without Licenſe, the Words of which Statue are theſe: **And be it further Enacted by the authority aforeſaid, That no Perſon ſhall be, or be received as a Lecturer, or permitted, ſuffered or allowed to preach as a Lecturer, or to preach or read any Sermon or Lecture in any Church,** &c. **unleſs he be firſt approved, and thereunto Licenſed,** &c. But I conceive that this Clauſe was only deſigned for ſuch who are to Preach in the quality of Lecturers. *Quære*, however, it may extend to all Miniſters preaching in any Church, Chappel, or other place of Publick Worſhip, of which the Preacher hath not the Cure, although he be not a ſetled and conſtant Lecturer. And before this Statute was made, it was lawful for Church-wardens, not to ſuffer any Stranger not Licenſed, to preach in their Church, or Chappel, which ſeems to be allowed in *Creſwick* and *Rokesby*'s *Caſe*, *Hill.* 10 *Jac. B. R.* 2 *Bulſtrode* 49. where the Church-wardens were committed to Goal by the Juſtices of the Peace upon the Statute of 1 *Mar.* and the commitment in that Caſe allowed to be good, although the Miniſter that in truth was Licenſed, did not ſhew his Licenſe, (as it ſeems) to the Church-wardens. And if one be Curate in a Free Chappel, or Donative, yet he ought not to preach without Licenſe, but the Biſhop may cite him to take Licenſe to Preach, *Allain* v. *Exton*, *Hill.* 23 & 24 *Car.* 2. 2 *Keb.* 876. 1 *Mod. Rep.* 90.

But whether a Miniſter doth Preach, with, or without Licenſe, he is not to preach what Doctrine he may pleaſe, and therefore it hath been Enacted,--- **That if any perſon Eccleſiaſtical, or which ſhall have Eccleſiaſtical Living, ſhall adviſedly maintain or affirm any Doctrine directly contrary or repugnant to any of the thirty nine Articles, and being convented before the Biſhop of the Dioceſs, or the Ordinary, or before the Queens Highneſs Commiſſioners in cauſes Eccleſiaſtical, ſhall perſiſt therein, or not revoke his Error, or after ſuch revocation eftſoons affirm ſuch untrue Doctrine, ſuch maintaining or affirming, and perſiſting, or ſuch eftſoon affirming, ſhall be juſt cauſe to deprive ſuch perſon of his Eccleſiaſtical Promotion; and it ſhall be lawful to the Biſhop of the Dioceſs, or the Ordinary, or the ſaid Commiſſioners, to deprive ſuch perſon ſo perſiſting, or lawfully convicted of ſuch eftſoons affirming, and upon ſuch ſentence of deprivation pronounced, he ſhall be indeed deprived,** Stat. 13 Eliz. Cap. 12.

Neither may any Miniſter Preach, Declare, or ſpeak any thing in Derogation, or depraving of the Book of Common Prayer, or of any thing therein contained, or of any part thereof, and if he offend in this particular, he is to forfeit for the firſt offence, one whole Years profit of all his Spiritual Benefices, or promotions ariſing after his Conviction, and ſuffer ſix Months impriſonment; for the ſecond offence twelve Months impriſonment, and deprivation

on *ipso facto* of all his Spititual Promotions; and for the third offence the like deprivation, and impriſonment during life: And if he hath no Spiritual Promotion, he ſhall for the firſt offence be impriſoned ſix Months, and for the ſecond during his Life, *Stat.* 1 *Eliz.* c. 2.

Neither may he in his Preaching, or at other time, deprave, deſpiſe, or contemn the moſt Bleſſed Sacrament of the Lord's Supper, by any contemptuous words, or by any words of depraving, deſpiſing, or reviling, or adviſedly in any otherwiſe, contemn, deſpiſe, or revile the ſaid Sacrament, upon the penalty of ſuffering impriſonment, and of making Fine and Ranſom at the King's Will, *stat.* 1 *Ed.* 6. c. 1. A Miniſter may be alſo bound to his good behaviour for uſing ſcandalous and reflecting Words in his Preaching, *Trin.* 16 *Car.* 2. *Juſtice Tyrel* v. *Hatch*, 1 *Keble* 751.

And it is further Enacted, **That for the utter extinguiſhment of all foreign and uſurped power and authority, may it pleaſe your Highneſs, that it may be enacted by the authority aforeſaid, That if any perſon or perſons dwelling or inhabiting within this your Realm, or in any other your Highneſs Realms or Dominions, of what eſtate dignity or degree ſoever he or they be, after the end of thirty days next, after the determination of this Seſſion of this preſent Parliament, ſhall by writing, printing, teaching, preaching, expreſs words, deed or act, adviſedly, maliciouſly, and directly affirm, hold, ſtand with, ſet forth, maintain or defend the authority, preheminence, power or juriſdiction, Spiritual or Eccleſiaſtical, of any Foreign Prince, Prelate, Perſon, State or Potentate whatſoever heretofore claimed, uſed or uſurped within this Realm, or any Dominion or Countrey being within or under the power, dominion or obeyſance of your Highneſs; or ſhall adviſedly, maliciouſly and directly put in ure, or execute any thing for the extolling, advancement, ſetting forth, maintenance or defence of any ſuch pretended or uſurped juriſdiction, power, preheminence and authority, or any part thereof; that then every ſuch perſon and perſons ſo doing and offending, their abettors, aiders, procurers and counſellors, being thereof lawfully convicted and attainted, according to the true order and courſe of the Common Laws of this Realm, for his or their firſt offence, ſhall forfeit and loſe unto your Highneſs, your Heirs and Succeſſors, all his and their goods and Chattels, as well real as perſonal.**

And if any perſon ſo convicted or attainted, ſhall not have, or be worth of his proper goods and chattels to the value of twenty pound, at the time of his conviction or attainder; that then every ſuch perſon ſo convicted and attainted, over and beſides the forfeiture of all his ſaid goods and Chattels, ſhall have and ſuffer impriſonment by the ſpace of one whole Year, without bail or mainprize.

And that alſo, all and every the Benefices, Prebends, and other Eccleſiaſtical promotions, and dignities whatſoever, of every Spiritual perſon ſo offending, and being attainted, ſhall immediately after ſuch attaindour be utterly void to all intents and purpoſes, as though the Incumbent thereof were dead, and that the Patron and Donour of every ſuch Benefice, Prebend, Spiritual promotion and dignity, ſhall and may lawfully preſent unto the ſame, or give the ſame in ſuch manner and form, as if the ſaid Incumbent were dead; and if any ſuch offendor or offendors, after ſuch conviction or attainder, do eftſoons commit or do the ſaid offences, or any of them in manner and form aforeſaid, and be thereof duly convicted and attainted, as is aforeſaid; that then every ſuch offendor and offendors, ſhall for the ſame ſecond offence, incur into the dangers, penalties and forfeitures ordained and

provided by the Statute of Provision and Præmunire, made in the sixteenth year of the Reign of King Richard the second.

And if any such offendor or offendors, at any time after the second conviction and attaindour, do the third time commit and do the said offences, or any of them, in manner and form aforesaid, and be thereof duly convicted and attainted, as is aforesaid; that then every such offence or offences, shall be deemed and adjudged high Treason, and that the offendor or offendors therein, being thereof lawfully convicted and attainted, according to the Laws of this Realm, shall suffer pains of death, and other penalties, forfeitures and losses, as in case of high Treason by the Laws of this Realm.

And be it Enacted, That no manner of person or persons shall be molested or impeached for any of the offences so committed or perpetrated only by preaching, teaching or words, unless he or they be thereof lawfully indicted within the space of one whole Year next after his or their offences so committed: And in case any person or persons shall fortune to be imprisoned for any of the said offences committed by preaching, teaching, or words only, and be not thereof indicted within the space of one half Year next after his or their such offence so committed and done, that then the said person so imprisoned shall be set at liberty, and be no longer detained in prison for any such cause or offence, Stat. 1 Eliz. 1. Par. 27.

And it was afterwards Enacted, That if any person and persons, dwelling, inhabiting, or resiant within this Realm, or within any other the Queens Dominions, Seigniories, or Countries, or in the Marches of the same, or elsewhere, within or under her obeysance and power, of what estate, dignity, preheminence, order, degree, or condition soever he or they be, after the first day of April, which shall be in the Year of our Lord God 1563. shall by writing, cyphering, printing, preaching or teaching, deed or act, advisedly and wittingly, hold or stand with, or extol, set forth, maintain, or defend the authority, jurisdiction, or power of the Bishop of Rome, or of his See, heretofore claimed, used, or usurped within his Realm, or in any Dominion or Country being of, within or under the Queens power or obeysance, or by any speech, open deed or Act, advisedly and wittingly attribute any such manner of jurisdiction, authority, or preheminence to the said See of Rome, or to any Bishop of the same See for the time being, within this Realm, or in any the Queens Dominions or Countries; that then every such person or persons so doing or offending, their Abetters, Procurors and Counsellors, and also their Aiders, Assistants, and Comforters, upon purpose, and to the intent to set forth, further, and extol the said usurped power, authority or jurisdiction of any of the said Bishops or Bishops of Rome, and every of them, being thereof lawfully indicted or presented within one year next after such offences by him or them committed, and being lawfully convicted or attainted at any time after, according to the Laws of this Realm, for every such default and offence, shall incur into the dangers, penalties, pains and forfeitures ordained and provided by the Statute of Provision and Præmunire, made in the sixteenth Year of the Reign of King Richard the second.

And it is also enacted by the Authority aforesaid, That as well Justices of Assise in their Circuits, as Justices of Peace within the limits of their Commission and Authorities, or two of every such Justices of Peace at the least, whereof one to be of the Quorum, shall have full power and authority by virtue of this Act, in their quarter or open Sessions, to enquire of all offences, contempts and transgressions, perpetrated, committed or done contrary to the true meaning of the premisses, in like manner and form as they may of

other

other offences against the Queens Peace, and shall certifie every presentment afore them or any of them had or made concerning the same, or any part thereof, before the Queen, her Heirs and Successors, in her or their Court commonly called the King's Bench, within fourty days next after any such presentment had or made, if the Term be then open; and if not, at the first day of the full Term next following the said fourty days, upon pain that every of the Justices of Assise, or Justices of the Peace before whom such presentment shall be made, making default of such Certificate contrary to this Statute, to lose and forfeit for every such default, one hundred pounds to the Queens Highnels, her Heirs and Successors.

And it is enacted by the Authority aforesaid, That the Justices of the King's Bench, as well upon every such Certificate, as by enquiry before themselves, within the limits of their authorities, shall have full power and authority to hear, order, and determine every such offence done or committed contrary to the true meaning of this present Act, according to the Laws of this Realm, in such like manner and form to all intents and purposes, as if the person or persons against whom any prelentment shall be had upon this Estatute, had been presented upon any matter or offence expressed in the said Estatute made in the said sixteenth Year of King Richard the second.

And for stronger defence and maintenance of this Act, it is further ordained, enacted and established as aforesaid, That if any such offender or offenders, as is aforesaid, of the first part or branch of this Estatute, that is to say, by Writing, Cyphering, Printing, Preaching or Teaching, Deed or Act, advisedly and wittingly hold or stand with, to extoll, set forth, maintain or defend the authority, Jurisdiction or Power of the Bishop of Rome or of his See, heretofore claimed, used, or usurped within this Realm, or in any Dominion or Countrey, being of, within or under the Queens power or obeysance: Or by any speech, deed or act, advisedly and wittingly attribute any such manner of jurisdiction, authority or preheminence of the said See of Rome, or to any Bishop of the same See for the time being, within this Realm, or in any the Queens Dominions or Countreys, or be to any such offender or offenders abetting, procuring or counselling, or aiding, assisting or comforting, upon purpose, and to the intent to set forth, further, and extoll the said usurped power, authority or jurisdiction, after such conviction and attainder, as is aforesaid, do eftsoons commit or do the said offences, or any of them, in manner and form aforesaid, and be thereof duly convicted and attainted, as is aforesaid.

That then every such offender or offenders, for the same second offence and offences, shall forfeit, lose, and suffer such like and the same pains, forfeitures, judgment and execution, as is used in cases of High Treason, 5 Eliz. c. 1. Par. 2.

Also it is enacted, That whosoever shall by Preaching, Teaching, Writing, or open Speech notify, that any eating of Fish, or forbearing of Flesh, mentioned in the Statute, is of any necessity for the saving of the Soul of Man, or that it is the service of God, otherwise than other publick Laws are, and be; that then such persons shall be punished as spreaders of false news, are and ought to be Stat. 5 Eliz. c. 5. Par. 40.

Note, The Canons of the Church which regulate the exercise of Preaching, are those whose Titles be here recited, and which may at large be easily consulted.

CAN. XLIII. *Deans and Prebendaries to Preach during their Residence.*

CAN. XLV. *Beneficed Preachers being Reſident upon their Livings, to preach every Sunday.*
CAN. XLVI. *Beneficed Men, not Preachers, to procure monthly Sermons.*
CAN. XLVII. *Abſence of beneficed Men to be ſupplied by Curates that are allowed Preachers.*
CAN. XLIX. *Miniſters, not allowed Preachers, may not expound.*
CAN. L. *Strangers not admitted to Preach without ſhewing their Licenſe.*
CAN. LI. *Strangers not admitted to Preach in Cathedral Churches without ſufficient Authority.*
CAN. LII. *The Names of ſtrange Preachers to be noted in a Book.*
CAN. LIII. *No publick Oppoſition between Preachers.*
CAN. LIV. *The Licenſes of Preachers refuſing Conformity to be void.*
CAN. LV. *The Form of a Prayer to be uſed by all Preachers before their Sermons.*
CAN. LVI. *Preachers and Lecturers to read Divine Service, and adminiſter the Sacraments twice a Year at the leaſt.*
CAN. LXXI. *Miniſters not to Preach or Adminiſter the Communion in Private Houſes.*

CHAP. XXXIV.

Diſturbances in the Church in time of Divine Service, or Striking, Brawling, &c. in the Church or Church-yard, how puniſhed.

AS an Incumbent of a Church is obliged to perform the Offices of a Miniſter to the people belonging thereunto, ſo the Law doth ſecure him from all diſturbance in the performance thereof, to which purpoſe it is enacted as followeth,---Becauſe that complaint is made to our Lord the King by the Clergy of his Realm of England, that as well diverſe Prieſts bearing the ſweet Body of our Lord Jeſus Chriſt to ſick people, and their Clerks with them, as otherwiſe divers perſons of holy Church, whiles they attend to Divine Services in Churches, Church-yards, and other places dedicated to God, be ſundry times taken and arreſted by Authority Royal, and commandment of other Temporal Lords, in offence of God, and of the liberties of holy Church, and alſo in diſturbance of Divine Services aforeſaid: The ſame our Lord the King, who would be ſore diſpleaſed, if any did in ſuch manner, will and granteth, and defendeth upon grievous forfeiture, that none do the ſame from henceforth; ſo that colluſion or feigned cauſe be not found in any of the ſaid perſons of holy Church in this behalf, Sat. 50 Ed. 3. c. 5.

And after it was enacted, Becauſe that Prelates do complain themſelves, that as well Beneficed people of holy Church, as other, be arreſted and drawn out, as well of Cathedral Churches, as of other Churches and their Church-yards, and ſometimes when they be intended to Divine Services; and alſo in other places, although they be bearing the body of our Lord Jeſus Chriſt to ſick perſons, and ſo arreſted and drawn out, be bound and brought to priſon againſt the liberty of Holy Church; it is ordained, that if any Miniſter of the King or other do arreſt any perſon of Holy Church by ſuch

such manner, and thereof be duly convict, he shall have imprisonment and then be ransomed at the King's Will, and make gree to the parties so arrested.

Provided always that the said People of holy Church, shall not hold them within the Churches or Sanctuaries by fraud or collusion in any manner, and therefore we command that thou cause all the said Statutes to be cryed and published, and firmly kept through thy Bayly-wick according to the form and tenour thereof, and that do not omit in any wise. Given under the witness of our great Seal the First day of February, in the first Year of our Reign, Stat. 1 R. 2. c. 15.

And *Coke* saith, that he saw a Report in the time of Queen *Mary* upon the aforesaid Statutes, where it was held, that they are but an affirmance of the Common Law and in maintainance of the liberties of Holy Church, as appears by the preamble of the same Statutes, and that *Eundo, red eundo, & morando* for to celebrate Divine Service, the Priest ought not to be arrested, nor any who aid him in it, and that the party grieved may have his Action upon the Statute, 50 *Ed.* 3. c. 5. For when any thing is prohibited by an Act of Parliament, the doing whereof would be prejudicial, and a damage to any particular person, there, an action doth lye upon such Statute by the party damnified, although no action be given by expres words of such Statute, 10 *Co.* 75. 12 *Co.* 100. 103. 2 *Mod. Rep.* 152. 162. 165,

And if an Arrest be made contrary to the said Statutes, and the person arresting doth presently discharge the person arrested, upon pretence of Ignorance, *&c.* this will not excuse the contempt in making the Arrest, *Hill.* 16. *Car. B. R. Prinsor's Case* 1 *Croke* 602.

And it is to be noted, That the aforesaid Statutes extend both to Priests, and Lay-men, *Pasch.* 7 *Jac. C. B. Brownlow and Gouldsborough* 2 p. 301. *Pasch.* 10 *Jac. B. R. Pit.* v. *Webley*, 2 *Bulstrode* 72. *Hill.* 16. *Car. B. R. Prinsor's Case*, 1 *Croke* 602. and it seems on Week-days as well as on Sundays, and Holy-days, *Pasch.* 11 *Jac. Pit.* v. *Webley*, 2 *Croke* 321. However, if such undue Arrest be made, the Arrest is good, so that if a Rescouse be made, and thereby any person killed, the killing is Murther, *Pasch.* 10 *Jac. B. R. Pit.* v. *Webley*, 2 *Bulstrode* 72. And Note, that one Dr. *B.* being Arrested and taken in Execution upon a Sunday in the Church-yard or Porch, in coming from Divine Service; and it appearing to the Court, that the said *B.* had absconded some time before, the Court would not discharge him from the Execution, nor punish the Bailiffs, but had he not so absconded they then would have punished the Contempt in the Bailiffs, *Trin.* 23. *Car.* 2. Dr. *Butler's Case*, 2 *Keble* 777.

He that doth offend against the aforesaid Statutes, may not only be Fined in the Temporal Court, but may be excommunicated by the Ecclesiastical Judge for so doing, and condemned in costs, *Pasch.* 10 *Jac. B. R. Pit.* v. *Webley* 2 *Bulstrode* 72. *same Case*, 2 *Croke* 321.

These Statutes do only prohibit Arrests betwixt party and party at such times, but not Arrests made when the King is a party, and therefore a person may be apprehended going or returning from Divine Service, by a Warrant from a Justice of the Peace, it being for breach of the Peace and for the King; and so in the like cases, *Hill.* 16 *Car. B. R. Prinsor's Case*, 1 *Croke* 602. *Pasch.* 11. *Jac. B. R. Pit.* v. *Webley*, 2 *Croke* 321. *and the same Case* 2 *Bulstrode* 72. *Mich.* 16 *Jac. B. R. Wait* v. *the Inhabitants of Stokes. Godbolt.*

Also it hath been enacted, That no person or persons upon the Lord's day, shall serve or execute, or cause to be served or executed, any Writ, Process, Warrant, Order, Judgment or Decree (except in cases of Treason, Felony or

or breach of the Peace) but that the ſervice of every ſuch Writ, Proceſs, Warrant, Order, Judgment or Decree, ſhall be void to all intents and purpoſes whatſoever. And the perſon or perſons ſo ſerving or executing the ſame, ſhall be as liable to the ſuit of the party grieved, and to anſwer Damages to him for doing thereof, as if he or they had done the ſame without any Writ, Proceſs, Warrant, Order, Judgment or Decree at all, Stat. 29. Car. 2. Intituled an Act for the better obſervation of the Lord's Day.

The Law hath not only provided for the puniſhing of Perſons, that arreſt any Prieſt in the Caſes aforeſaid, but alſo from being diſturbed by any other means in their performing of Divine Offices, and accordingly it hath been enacted as followeth.

Forasmuch as it is moſt neceſſary in every Chriſtian Common-wealth, to provide that tranquility and Peace may be preſerved and continued amongſt the people, and ſpecially in holy Church, in the time of Divine Service, and Adminiſtration of the Sacraments and Sacramentals, as before this time it hath been accuſtomed in holy Church within this Realm, and that all things being contrary thereunto, or that are, or may be in diſturbance thereof, may by foreſight be eſchewed and avoided, and remedy therefore in due time provided, as well for the preſervation of the Queens Highneſs peace, as for an univerſal quietneſs and order to be uſed within this Realm.

Be it therefore enacted by the Queen our Sovereign Lady, the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by the authority of the ſame, That if any perſon or perſons of their own power and authority, at any time or times after the twentieth day of December next coming, do, or ſhall willingly and of purpoſe, by open and overt word, fact act or deed, maliciouſly or contemptuouſly moleſt, let, diſturb, vex or trouble, or by any other unlawful ways or means, diſquiet or miſuſe any Preacher or Preachers that now is, or that at any time or times hereafter ſhall be licenſed, allowed or authoriſed to Preach by the Queens Highneſs, or by any Archbiſhop or Biſhop of this Realm, or by any other lawful Ordinary, or by any of the Univerſities of Oxford and Cambridge, or otherwiſe lawfully authoriſed or charged by reaſon of his or their cure, benefice, or other Spiritual promotion or charge, in any of his or their open Sermon, Preaching or Collation that he or they ſhall make, declare, preach or pronounce in any Church, Chappel, Church-yard, or in any other place or places, uſed, frequented or appointed, or that hereafter ſhall be uſed or appointed to be preached in.

Or if any perſon or perſons after the ſaid twentieth day of December next coming, ſhall maliciouſly, willingly, or of purpoſe moleſt, let, diſturb, vex, diſquiet, or otherwiſe trouble any Parſon, Vicar, Pariſh Prieſt or Curate, or any lawful Prieſt, preparing, ſaying, doing, ſinging, miniſtring or celebrating the Mals, or other ſuch Divine Service, Sacraments or Sacramentals, as was moſt commonly frequented and uſed in the laſt year of the reign of the late Sovereign Lord King Henry the Eighth, or that at any time hereafter ſhall be allowed, ſet forth or authoriſed by the Queens Majeſty.

Or if any perſon or perſons, at any time or times after the ſaid twentieth day of December, ſhall contemptuouſly, unlawfully or maliciouſly, of their own power or authority, pull down, deface, ſpoil, abuſe, break, or otherwiſe unreverently handle or order the moſt bleſſed, comfortable and holy Sacrament of the Body and Blood of our Saviour Jeſus Chriſt, commonly called the Sacrament of the Altar, being, or that ſhall be in any Church or Chappel, or in any other decent place, or the pix or canopy wherein the ſame Sacrament is or ſhall be; or unlawfully, contemptuouſly or maliciouſly of their

their own power and authority, pull down, deface, spoil, or otherwise break any Altar or Altars, or any Crucifix or Cross, that now or hereafter shall be in any Church, Chappel or Church-yard; that then every such offendor and offendors in any the premisses, his or their aidor, procuror or abettor, aidors, procurors or abettors, immediately and forthwith after any of the said Act or Acts, or other the said misdemeanors so committed, done or made, or any time or times after, shall be apprehended, arrested and taken by any Constable or Constables, Church warden or Church-wardens of the said Parish, Town or place where the said offence or offences shall be so committed, made or done, or by any other Officer or Officers, or by any other person or persons then being present at the time of the said offence or offences so unlawfully committed, made or done.

Which person or persons so apprehended, taken or arrested, with convenient speed, shall be brought and carried to any Justice of Peace within the said Shire, or within any City, Borough, Liberty or Town-corporate wherein Justices of Peace be, where the said offence or offences shall be so committed, done or made: And that the said Justice of Peace, upon due accusation thereupon had and made by the apprehendor or apprehendors, or other person or persons, of any of the said person or persons so offending, forthwith shall commit the said person or persons so apprehended, arrested and taken, to safe keeping and custody, as by the discretion of the said Justice shall be thought most meet and convenient, and that within six days next and immediately after the said accusation so had and made to the said Justice, with one other Justice of Peace in the said Shire, City, Borough, Liberty, or Town-corporate, shall diligently examine the Act or Acts, offence or offences aforesaid.

And if they the said two Justices of Peace, shall upon their said examination, find or perceive the said person or persons so accused, guilty of any the said offence or offences whereof he or they shall be so accused, and that by two sufficient witnesses, or by his or their own confession or confessions, that then and immediately with convenient speed, the said two Justices shall commit and award the said person or persons so accused, as is aforesaid, to the Goal of or for the said Shire, City, Borough, Liberty or Town-corporate where the said offence or offences was so committed, made or done, there to remain without Bail or Mainprise, by the space of three months then next ensuing, and further to the next Quarter-Sessions to be holden within the said Shire, City, Borough, Liberty or Town-corporate, next after the end of the said three Months; at which said Quarter-Sessions, the said person or persons so committed to the Goal, as is aforesaid, upon his or their reconciliation and repentance in that behalf, before the said Justice of Peace, at the said Sessions, shall be delivered and discharged out of Prison and Goal, upon sufficient surety of his good abearing and behaviour, to be then and there taken by the said Justices for one whole Year then next ensuing, as by the discretion or discretions of the said Justices then and there being, or of the more part of them, shall be thought meet and convenient: And if the said person or persons so in Goal, as is aforesaid, will not be reconciled and repent at the said Quarter-Sessions, that then the said person or persons immediately in time convenient shall be further awarded and committed to the said Goal by the said Justices, or by the more part of them, there to remain without Bail or Mainprise, until he or they so committed and awarded to Goal, as aforesaid, shall be reconciled, and be penitent for his or their said offence or offences.

And

And be it further enacted by the authority aforesaid, That if any person or persons at any time or times after the said twentieth day of December, of their own authority and power, willingly and unlawfully do rescue any offendor or offendors so apprehended, taken or arrested, as is aforesaid, or will disturb, hinder or let the said offendor or offendors so offending, as is aforesaid, to be apprehended, taken or arrested, that then every one of the said rescuers, or disturbers shall suffer like imprisonment, as is aforesaid, and further shall pay, forfeit and lose for a fine, for every of his or their said offences, five pounds to the Queens Majesty, her Heirs and Successors.

And be it further enacted by the authority aforesaid, That if any the said offendors aforesaid be not taken, apprehended or arrested immediately in time convenient, as is aforesaid, but do escape or go away, that then the said escape shall be lawfully presented before the Justices of Peace, in the said Shire, City, Borough, Liberty or Town-corporate, at the next Quarter-Sessions to be holden where the said escape was made and suffered, and that then the inhabitants of the Parish where the said escape was so suffered, shall forfeit and lose to the Queens Majesty, her Heirs and Successors, for every such offence five pounds, to be levied and taken as other like amerciaments before this time hath and been levied and taken upon any Village, Hundred or Town, for the escape of any murderer, or other felon, for not making pursuit upon Hue and Cry, according to the Estatute of Winchester, and the Estatute made and provided in the Third year of the worthy King Henry the Seventh.

And be it further enacted by the authority aforesaid, That all and singular Justices of Peace, Justices of Assise, Justices of Oyer and Determiner, and all and singular Mayors, Bayliffs, and Justices of Peace, within any City, Borough or Town-corporate, in any parts within this Realm, within the limits of their Commission or Commissions, shall have full power and authority by virtue of this Act, after the said twentieth day of December, to enquire of all and singular the offences and misdemeanours aforesaid, and to hear and determine the same, and to set the fines and amerciaments of the said offender or offenders, as is aforesaid.

Provided always, and be it further enacted by the authority aforesaid, That this Act, or any thing therein contained, shall not in any wise extend to abrogate and take away the authority, jurisdiction, power and punishment of the Ecclesiastical Laws now standing and remaining in their force, of or for the punishment of any the offences and misdemeanours aforesaid; but that the authority, power, jurisdiction and punishments of the said Ecclesiastical Laws, of and for any of the offences and misdemeanours aforesaid, shall stand in full power and strength, and to be used and exercised in all and in every thing, as though this Act had never been had and made; this present Act, or any thing therein contained to the contrary thereof in any wise notwithstanding.

Provided always, and be it enacted, That whatsoever person offending in the premisses, shall for any the offences afore recited, receive punishment of the Ordinary, having a testimonial thereof under the said Ordinaries Seal, shall not for the same offence eftsoons be convicted before the Justice; and in like wise receiving for the said offences punishment by the Justice, he shall not for the same offence eftsoons receive punishment of the Ordinary; any thing in this Act to the contrary notwithstanding, Stat. 1. Mar. c. 3.

First, As to this Statute it is to be noted, That so much of it as concerns the Mass, is repealed by *Stat.* 1 *Eliz.* c. 2. and so saith *Dodderidg* in *Creswick* and

and *Rokesby's Caſe*, *Hill.* 10 *Jac. B. R.* 2 *Bulſtrode* 51. But in other reſpects, as if Diſturbance be of a perſon in Preaching, *&c.* the Statute remains yet in force, *Hill.* 11 *Jac. B. R. Croſs* v. *Stanhop*, *Godbolt*, and in the ſaid Caſe of *Creskwick* v. *Rokesby* 2 *Bulſtrode* 51. But one being committed to Priſon upon this Statute, for diſturbing a Miniſter lawfully Authorized in his publick Prayer, and Preaching; it was agreed, that that part of the Statute which concerns diſturbance in Preaching, is not repealed by the Statute of 1 *Eliz.* but as to diſturbance in Prayer it is, and therefore the commitment being for both was naught, *Hill.* 23 *Car.* 2. *B. R.* Dr. *Bruce's Caſe*, *Aleyn* 50.

And for preſervation of the Peace of the Church at all times, and of the Miniſter in time of Divine Service, it hath been alſo enacted.

Forasmuch as of late divers and many outragious and barbarous behaviours and acts have been uſed and committed by divers ungodly and irreligious perſons, by quarrelling, brawling, fraying and fighting openly in Churches and Church-yards; therefore it is Enacted by the King our Sovereign Lord, with the aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, That if any perſon whatſoever, ſhall at any time after the firſt day of May next coming, by words only, quarrel, chide or brawl in any Church or Church yard, that then it ſhall be lawful unto the Ordinary of the place where the ſame offence ſhall be done, and proved by two lawful witneſſes, to ſuſpend every perſon ſo offending; that is to ſay, if he be a Layman, ab ingreſſu Eccleſiæ, and if he be a Clerk, from the miniſtration of his Office for ſo long time as the ſaid Ordinary by his diſcretion ſhall think meet and convenient, according to the fault.

And further be it Enacted by the authority aforeſaid, That if any perſon or perſons after the ſaid firſt day of May, ſhall ſmite or lay any violent hands upon any other, either in any Church or Church-yard, That then ipſo facto, **every perſon ſo offending ſhall be deemed excommunicate, and be excluded from the fellowſhip and company of Chriſt's Congregation.**

And alſo it is Enacted by the Authority aforeſaid, That if any perſon after the ſaid firſt day of May, **ſhall maliciouſly ſtrike any perſon with any weapon in any Church or Church-yard, or after the ſame firſt day of** May **ſhall draw any weapon in any Church or Church-yard, to the intent to ſtrike another with the ſame weapon, that then every perſon ſo offending, and thereof being convicted by verdict of twelve men, or by his own confeſſion, or by two lawful witneſſes, before the Juſtices of Aſſiſe, Juſtices of** Oyer **and** Determiner, **or Juſtices of Peace in their Seſſions, by force of this Act ſhall be adjudged by the ſame Juſtices before whom ſuch perſon ſhall be convicted, to have one of his Ears cut off: And if the perſon or perſons ſo offending have none Ears, whereby they ſhould receive ſuch puniſhment as is before declared, that then he or they to be marked and burned in the Cheek with an hot Iron, having the Letter** F. **whereby he or they may be known and taken for Fray-makers and Fighters, and beſides that every ſuch perſon to be and ſtand** ipſo facto **excommunicated, as is aforeſaid,** Stat. 5 and 6 Ed. 6. c. 4.

This Statute doth extend as well to Cathedral, as parochial Churches, and Church-yards, *per Curiam*, *Paſch.* 33. *Eliz. B. R. Dethick's Caſe* 3 *Croke* 224.

And although this Statute doth ſay, that he who ſmites an other, *&c.* ſhall be deemed excommunicate *ipſo facto*, &c. yet there ought to be a Declaration in the Eccleſiaſtical Court of the Excommunication, otherwiſe a perſon Excommunicated for an offence againſt this Statute, could not be abſolved from ſuch Excommunication, nor receive abſolution from the Ordinary, *Paſch.* 4 *Car. C. B. Viner* v. *Eaton*, *Hetley* 86. Alſo he that ſmites another doth not

ſtand excommunicate until he be convicted thereof at Law, and this tranſmitted to the Ordinary, *Trin.* 23 *Car.* 2. *Dyer* v. *Eaſt*, 1 *Ventris* 146.

When the proceedings for the offences againſt this Statute are in the Court Chriſtian, coſts may be given *pro expenſis litis*, but not *pro damnis*; for if ſo, a prohibition will lie, *Hill.* 15 *Jac. B. R. Large* v. *Alton*, 2 *Croke* 462. *Paſch.* 4. *Car. C. B. Viner* v. *Eaton*, *Hetley* 86.

And if any perſon is beaten in any Church, or Church-yard, it is an offence againſt this Law for him that is ſo beaten, or aſſaulted to give back any Blows or draw a Weapon, *&c.* in his own Defence, as he may do in other places, *Hill.* 12 *Jac. B. R. Frances* v. *Ley*, 2 *Croke* 367. *Mich.* 12. *Jac. Day* v. *Beddingfield*, *Noy* 104.

If the proceedings be in the Temporal Court by way of Indictment for drawing a Weapon in the Church, *&c.* it muſt be ſaid, with an intent to ſtrike ſuch a Perſon, otherwiſe the Indictment will not be good; and in the caſe upon ſuch an Indictment, (where it was not ſo ſaid) it being moved, that the Indictment might be good, as for an Aſſault only, ſo as the offender ſhould be fined for the ſame, yet by the whole Court, the Indictment was void in all, the concluſion of it being *contra formam ſtatuti*, ſo the offence laid as an offence againſt the Statute, the Jury cannot inquire and find an offence at the Common-Law, 33 *Eliz. B. R. Penhallo's Caſe* 3 *Croke* 231. *the ſame Caſe* 4 *Leonard* 49. *and Trin.* 42 *Eliz. Noy* 171. And alſo in an Indictment upon this Statute for ſtriking in the Church, it muſt be ſhewed that the ſtriking was with a Weapon, for to ſtrike only where no Weapon is uſed, is but Excommunication *ipſo facto*, *Trin.* 12 *Car. B. K. Cholmley's Caſe* 1 *Croke* 464. and if a man takes up a Stone in the Church-yard, and offers to throw it at another, or having a Hatchet or Ax in his hand, offers to ſtrike another therewith, this is not an offence within this Statute of 5 *&* 6 *Ed.* 6. by two Juſtices; for theſe are not ſuch Weapons as may properly be ſaid to be drawn, as a Sword and Dagger, *&c. Dalton Juſtice of Peace*, *Chap.* 23. *fol.* 49. So two perſons being committed to Priſon by Juſtices of the Peace, for diſturbance of a Miniſter licenſed during his Office, were diſcharged upon a *Hab' Corp'* by the Court of the *King's-bench*, for that their Commitment was too general, not ſhewing wherein they diſturbed, but only that they, *per apertum factum* diſturbed, *&c.* not ſhewing the particular fact whereby they did diſturb, *viz.* by Brawling, Fighting or otherwiſe, there being ſeveral puniſhments to each, but the Court bound them to their good Behaviour for a Year, *&c. Mich.* 29 *Car.* 2. *Dominus Rex.* v. *Nichols* and *Rabins*, 3 *Keble* 803.

And generally it is, that an Ordinary for the peace of the Church, may inhibit any perſon from making a diſturbance in the Church, where he foreſees a diſturbance is likely to be, and if his inhibition be diſobeyed, may excommunicate for the contempt, *Hutton's Caſe*, *Latch.* 116. So may the Churchwardens juſtify to appeaſe any Irreverence, or diſorder in the Church, or Church-yard in time of Divine Service, as to whip Boys, or take off the Hats of thoſe who Irreverently would keep them on, *Mich.* 18. *Car.* 2. *Hawe* v. *Planner*, 2 *Keble* 124. ſame Caſe, 1 *Sanders* 13. *&* 1 *Siderfin* 301. or a perſon may be Indicted for uſing indecent and Irreverent Behaviour in the Church during Divine Service, *Paſch.* 15. *Car.* 2. 1 *Keble* 491. or a *Supplicavit* may be granted againſt ſuch a Perſon, that is, a Writ whereby the party complained of, ſhall be bound to give ſurety, and be bound to keep the Peace, *Paſch.* 14 *Car.* 2. *the King* v. *Douglaſs*, 1 *Keble* 290.

And it ſeems that the Miniſter himſelf if he be guilty of any misbehaviour in his Preaching, or otherwiſe in the Church, may be bound to the good Behaviour, *Howſon's Caſe*, *Hetley* 104.

It is alſo Enacted, That if any perſon or perſons at any time or times after the tenth day of June, do and ſhall willingly, and of purpoſe maliciouſly, or contemptuouſly come into any Cathedral or Pariſh Church, Chappel or other Congregation permitted by this Act, and diſquiet or diſturb the ſame, or miſuſe any Preacher or Teacher, ſuch perſon or perſons upon proof thereof before any Juſtice of Peace, by two or more ſufficient Witneſſes, ſhall find two Sureties to be bound by Recognizance in the penal ſumm of fifty pounds; and in default of ſuch Sureties, ſhall be committed to Priſon, there to remain till the next General or Quarter Seſſions. And upon conviction of the ſaid offence, at the ſaid General or Quarter Seſſions, ſhall ſuffer the pains and penalty of twenty pounds to the uſe of the King and Queens Majeſties, their Heirs and Succeſſors, Stat. 1 W. and M cap. 18.

Beſides the Acts of Parliament which thus ſecure the Miniſter in his quiet Officiating, there be theſe three Canons which alſo reſtrain all diſturbance and moleſtation.

CAN. XVIII. A Reverence and Attention to be uſed within the Church in time of Divine Service.

In the time of Divine Service, and of every part thereof, all due reverence is to be uſed; for it is according to the Apoſtles Rule, Let all things be done decently and according to order. *Anſwerable to which Decency and Order, we judge theſe our Directions following: No Man ſhall cover his Head in the Church or Chappel in the time of Divine Service, except he have ſome infirmity, in which caſe let him wear a Night-cap or Coif. All manner of Perſons then preſent, ſhall reverently kneel upon their Knees, when the general Confeſſion, Litany and other Prayers are read; and ſhall ſtand up at the ſaying of the Belief, according to the Rules in that behalf preſcribed in the Book of Common Prayer; and likewiſe when in time of Divine Service, the Lord Jeſus ſhall be mentioned, due and lowly reverence ſhall be done by all Perſons preſent, as it hath been accuſtomed, teſtifying by theſe outward Ceremonies and Geſtures, their inward Humility, Chriſtian Reſolution, and due acknowledgment, that the Lord Jeſus Chriſt, the true eternal Son of God is the only Saviour of the World, in whom alone all the Mercies, Graces, and Promiſes of God to Mankind, for this Life and the Life to come, are fully and wholly compriſed. None either Man, Woman, or Child, of what calling ſoever, ſhall be otherwiſe at ſuch times buſied in the Church, than in quiet attendance to hear mark and underſtand that which is read, Preached, or miniſtred: Saying in their due place, audibly with the Miniſter, the Confeſſion, the Lord's Prayer, and the Creed: And making ſuch other Anſwers to the Publick Prayers as are appointed in the Book of Common Prayer; neither ſhall they diſturb the Service or Sermon by walking or talking, or any other way, nor depart out of the Church during the time of Service or Sermon, without ſome urgent or reaſonable cauſe.*

CAN. XIX. Loyterers not to be ſuffered near the Church in time of Divine Service.

The Church-wardens or Queſt-men and their Aſſiſtants ſhall not ſuffer any idle Perſons to abide, either in the Church-yard or Church-porch, during the time of Divine Service or Preaching, but ſhall cauſe them either to come in or to depart.

CAN. CXI. Diſturbers of Divine Service to be preſented.

In all Viſitations of Biſhops and Archdeacons, the Church-wardens or Queſt-men and Side-men, ſhall truly and perſonally preſent the names of all thoſe which behave themſelves rudely and diſorderly in the Church, or which by untimely ringing of Bells, by Walking, Talking, or other noiſe ſhall hinder the Miniſter or Preacher.

CHAP. XXXV.

Contents. The Duty of Miniſters in reading ſome particular Acts of Parliament, and Proclamations of the King: As likewiſe Briefs, Citations, &c.

THe legiſlative Authority of this Kingdom for the better promulgation of ſome good and wholſom Laws, has thought fit to require the publick reading of them in the Church after Morning Prayer, or Preaching: To the end that all Chriſtian People may have the more eaſie, and more perfect knowledge of them, and be more inclined to pay their obedience to them. The firſt Statute appointed to be read in Churches was (I think) *Anno* 3 *Jac.* 1. c. 1. *An Act for a Publick Thanksgiving to Almighty God every Year on the Fifth day of* November, as before recited, *Chap.* 32. the Annual Reading preſcribed in theſe Words: **And becauſe all and every Perſon may be put in mind of his Duty, and be then better prepared to the ſaid Holy Service, be it enacted by the authority aforeſaid, that every Miniſter ſhall give warning to his Pariſhioners publickly in the Church at Morning Prayer, the Sunday before every ſuch Fifth day of** November, **for the due obſervation of the ſaid day; and that after Morning Prayer or Preaching upon the ſaid Fifth day of** November, **they read publickly, diſtinctly, and plainly this preſent Act.**

The next Statute appointed to be read in Churches, was (I think) *An.* 12. *Car.* 2. *cap.* 14. *An Act for a perpetual Anniverſary Thanksgiving on the nine and twentieth day of* May, as recited in the foregoing *Chap.* 32. and the publick Reading of it enjoyned in theſe words. **And to the end that all perſons may be put in mind of their Duty thereon, and be the better prepared to diſcharge the ſame, with that Piety and Devotion as becomes them; be it further enacted, that every Miniſter ſhall give notice to his Pariſhioners publickly in the Church at Morning Prayer, the Lord's day next before every ſuch twenty ninth day of** May, **for the due obſervation of the ſaid Day, and ſhall then likewiſe publickly and diſtinctly read this preſent Act to the People.**

Where Note, that although theſe two Acts of Parliament be equally enjoined to be read in Churches, yet the time and manner of reading them are indeed different. For 1*ſt.* as to the time of Reading, the Act for the 5*th.* of *November*, is to be read *upon the ſaid Day*, and not when the notice of it was given the Sunday before. Whereas the Act for the 29*th.* of *May* is to be read, not on the Feſtival it ſelf, but on *the Lord's day next before every ſuch twenty ninth day of* May. Then 2*dly* in a differing manner, the Act for the 5*th.* of *November*, to be read *after Morning Prayer or Preaching*; but the Act for the 29*th.* of *May* at *Morning Prayer*, when notice is publickly given in the Church for the due obſervation of the ſaid Day, that is, immediately after the Nicene Creed.

The Third and laſt Statute appointed to be read in Churches for the terror of evil Doers, is the Statute made *Anno* 6 and 7 *Gul.* 3. *cap.* 11. *An Act for the more effectual ſuppreſſing prophane Curſing and Swearing*, whereby it is enacted.

Whereas it is found by experience, that an Act of Parliament made in the one and twentieth year of the Reign of King James **the Firſt, Entituled,** An Act to prevent and reform Prophane Curſing and Swearing, **hath proved ineffectual to the ſuppreſſing of thoſe deteſtable Sins, by reaſon of ſome deficiencies in the ſaid Act; Be it therefore enacted by the King's moſt excellent Majeſty, by and with**

with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, that if any person or persons shall after the four and twentieth day of June, in the year of our Lord, One thousand six hundred ninety five, prophanely swear or curse in the presence or hearing of any Justice of Peace of the County, Riding or Division, or of the Mayor or other Head Officers or Justice of Peace for any City or Town Corporate, where such Offence is or shall be committed, or that shall be thereof convicted by Oath of one Witness, or by the confession of the Party offending before any Justice of Peace of the County, or Mayor, or Bailiff, or other chief Officers or Justice of the Peace of such City or Town Corporate, where the said Offence shall be committed, that then for every such Offence, the party so offending shall forfeit and pay to the use of the Poor of the Parish, where such Offence or Offences shall be committed, the respective Sums herein after mentioned, (that is to say) Every Servant, Day Labourer, Common Soldier and Common Seaman one Shilling; and every other person two Shillings; and in case any of the persons aforesaid shall, after Conviction offend a second time, such person shall forfeit and pay double; and if a third time, treble the Sum respectively, by him or her to be paid for the first Offence.

And it is hereby further Enacted, That upon neglect or refusal of payment of the said Forfeiture, any Justice of Peace of the County, Riding or Division, or Mayor, or other Head Officer or Justice of Peace of any City, or Town Corporate, where the said Offence shall be committed, shall, and are hereby authorized and required to direct and send his Warrant to the Constable, Tythingman, Churchwarden, or Overseer of the Poor of the Parish where the Offence shall be committed, or where the Offender shall inhabit, thereby commanding them, or some one or more of them, to levy by Distress and Sale of of the Goods of the Offender, the Sum so forfeited for the use of the Poor of the Parish, as aforesaid; And in case no such Distress can be had, then every such Offender, being above the age of sixteen years, shall, by Warrant under the Hand and Seal of the said Justice of Peace or other Officer, as aforesaid, be publickly set in the Stocks for the space of one hour for every single Offence, and for any number of Offences, whereof he shall be convicted at one and the same time, then two hours; And if the party offending be under the age of sixteen years, and shall not forthwith pay the said Forfeitures, then he or she shall by Warrant, as aforesaid, be whipped by the Constable, or by the Parent, Guardian or Master of such Offender in the presence of the Constable.

And be it farther Enacted, That if any Justice of the Peace, or Chief Magistrate, shall wilfully and wittingly omit the performance of his duty in the Execution of this Act, he shall forfeit the Sum of five pounds, the one Moiety to the use of the Informer, to be recovered by Action, Suit, Bill or Plaint, in any of his Majesty's Courts at Westminster, wherein no Essoign, Protection or Wager of Law shall be allowed, nor any more than one Imparlance.

And it is hereby further Enacted, That if any Action or Suit shall be commenced or brought against any Justice of Peace, Constable or other Officer or person whatsoever, for doing or causing to be done any thing in pursuance of this Act, concerning the said Offences, the Defendant in such Action may plead the General Issue, and give the special Matter in Evidence; And if upon such Action, Verdict be given for the Defendant, or the Plaintiff become Nonsuit, or discontinue his Action, then the Defendant shall have treble Costs.

Provided always, and it is hereby Enacted, That no person shall be prosecuted or troubled for any Offence against this Statute, unless the same be moved or prosecuted within ten days next after the Offence committed.

And

And it is further Enacted by the Authority aforesaid, That this Act shall be publickly read four several times in the Year in all Parish Churches, and all publick Chappels, by the Parson, Vicar or Curate of the respective Parishes or Chapples, immediately after Morning Prayer on four several Sundays, (that is to is say) the Sunday next after the four and twentieth day of June, **the nine and twentieth day of** September, **the five and twentieth day of** December, **and the five and twentieth day of** March, **under the pain of twenty Shillings for every such Omission or Neglect.**

And be it further Enacted by the authority aforesaid, That the Justice of Peace, Mayor or other Head Officer, shall Register in a Book, to be kept for that purpose, all the Convictions made before him upon this Act, and the time of making thereof, and for what Offence, and shall certifie the same to the next General Quarter Sessions of the Peace, for the said County or Place, where the Offences are committed, to be there kept upon Record by the respective Clerks of the Peace, to be seen without Fee or Reward. 6 & 7 W. 3. cap. 11.

Note, The publick reading of the former Acts was enjoned by Precept only; This alone by Penalty, on the Minister omitting or neglecting his Duty herein. But observe, the duty being made personal and extending to the Parson, Vicar or Curate, the Penalty shall be levied not on the Benefice, nor on the Incumbent if he be not himself Resident; but on the Curate, or other Person allow'd to officiate. Note further, there is this difference in a Justice of Peace, and a Minister becoming obnoxious to penalties in this Act; the Justice of Peace or chief Magistrate, shall incur no forfeiture, unless he *willfully and wittingly omit the performance of his Duty.* But the Minister shall be liable to forfeiture, for the bare omission of his Duty, though such omission were not willful, but casual and undesigned.

The diligent reading of this Act was expresly recommended by the Archbishop of *Canterbury*, in his Letter to the right Reverend the Lords Bishops of his Province, *July 16th.* 1695. in these words, *In the first place, it is the King's Pleasure, that you take especial care concerning the late Act against prophane Cursing and Swearing, not only that it be publickly read, as the Law has in that case provided, but that the Clergy be directed, both in their Catechizing and Sermons, to insist often upon those Points, to the end that by God's blessing upon their faithful Endeavours, a stop may be put to those execrable Wickednesses, which, if they be suffer'd to continue, will bring down God's heavy Judgments upon this Church and Nation.* Secondly, *There are also other Acts to be read publickly in Churches, which yet are not read (as I understand) in many places. I desire you to remedy that Neglect.*

The same Honourable Prelate has given this good Advice in his circular Letter, *A. D.* 1699. *Which Information and Request, especially in the case of such incorrigible Offenders, can be made by none so properly as by the Clergy, who may best be supposed to understand the necessity there is of having recourse to the Civil Magistrate. And since our Law-givers have enacted these Temporal Punishments, on purpose to assist us in the discharge of our Ministry, it would be a great failing in us, not to make use of them, when all other Methods have been tried to little or no effect.*

Every pious Person of the Laity, should, if need be, be put in mind by the Clergy, that he ought to think himself obliged to use his best Endeavors to have such offenders punished by the Civil Magistrate, as can no otherwise be amended. And that when he hears his Neighbour Swear or Blaspheme the Name of God, or sees him offend in Drunkenness or Prophanation of the Lord's day, he ought not to neglect to give the Magistrate notice of it: In such a case to be called an Informer, will be so far from making any Man odious in the judgment of sober Persons, that it will tend

to

to his Honour, when he makes it appear by his unblameable behaviour, and the care he takes of himself and his own family, that he doth it purely for the Glory of God, and the good of his Brethren.

Altho' no other Statutes of this Realm are enjoined to be read in Churches, but ſuch only as have been before mentioned. Yet if we conſider the good uſe and benefit of ſuch publick Reading. As, 1*ſt*. That by this means many of the poor and ordinary People come to the notice of the Law, and the knowledge of their Duty, of which they might otherwiſe have remain'd Ignorant, or at leaſt Inadvertent. 2*dly*, That ſuch ſolemn way of Reading, after Divine Service in the Church, does raiſe more attention, and leave a better impreſſion, than if the ſame Law were promulg'd in any other place, at any ordinary Time. 3*dly*, That looſe and wicked People by hearing ſentence openly pronounc'd upon them, may be the more afraid to offend; and may be reſtrain'd by *Terror*, when they would not have obey'd for *Conſcience Sake*. 4*thly*, That good Magiſtrates and conſcientious Informers may be the more encourag'd to diſcharge their Duty, when the powers committed to them, and the Excution preſs'd upon them, are openly declar'd in the face of the Congregation. 5*thly*, That Miniſters may with greater Zeal rebuke Vice and Profaneneſs, when they can argue from humane as well as Divine Laws, and can threaten a preſent Vengeance, as well as a future Judgment. 6*thly*, That all Chriſtian Subjects may be the better diſpoſed to *lead a quiet and peaceable life in all Godlineſs and Honeſty*; when they hear the Civil Government concern'd for the Honour of Religion, and finding the Magiſtrate ſo becoming the proper *Miniſters of God*. I ſay, conſidering theſe and many other advantages of penal Statutes againſt Immorality and Profaneneſs, being read in Churches, it were to be wiſhed, that the like Proviſo had been made for thoſe other Acts of Parliament that condemn and puniſh the more notorious ſins; ſuch, ſuppoſe, as Anno 5. Eliz. *cap.* 9. *An Act for puniſhment of ſuch Perſons as ſhall procure or commit any willful Perjury.* Anno 4. Jac. 1. cap. 5. *An Act for repreſſing the odious and loathſom ſin of Drunkenneſs.* Anno 21. Jac. 1. cap. 7. *An Act for the better repreſſing of Drunkenneſs, and reſtraining the inordinate haunting of Inns, Ale-houſes, and other Victualling Houſes.* Anno 29. Car. 2. cap. 7. *An Act for the better Obſervation of the Lord's day, commonly called Sunday.* Anno 9 and 10. Gul. III. *An Act for the more effectual ſuppreſſing of Blaſphemy and Profaneneſs.* And (to be read within the Cities of *London* and *Weſtminſter*, and the Liberties of the ſame) *Anno* 3 *Jac.* 1. *cap.* 21. *An Act to reſtrain the Abuſes of Players:* If theſe and the like wholſom Laws made, or to be made were enjoin'd to be read in Churches upon ſeveral ſtated Sundays, it would ſoon teach our common People the more readily to underſtand their Duty, and the more cautiouſly to practiſe it.

But there is one thing to be wiſhed for in this matter; which is, that when Acts of Parliament are enjoined to be read in Churches, there might be ſome Proviſo added, that the Church-wardens ſhould be obliged to procure ſuch Acts at the charge of each Pariſh, and preſerve them as Goods of the Church, for ſucceſſive uſe and application of them. Leſt for want of ſuch Proviſion, it ſhould come to paſs, (what I doubt has already often hapned) that in remote Villages and poor Benefices, the Miniſters have no due notice of ſuch Acts to be read, or be not ſo able to purchaſe them; and the two Acts for the 5*th*. of *November*, and 29*th*. of *May* have been very often neglected to be read in Country Churches: And even in Cities Towns, and Corporations, Miniſters were forc'd to read them out of a large Statute Book brought into the Desk, in not ſo decent and reverent a manner, becauſe thoſe Acts were not in ſufficient numbers ſingly Printed, and becauſe the Clergy could not ſo well procure them.

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This miſchief has been in great meaſure remedied by the vigilant and pious care of the moſt Reverend Father in God, *Thomas*, Lord Archbiſhop of *Canterbury*, who for the better *accommodation of the Clergy, and the Good of the Publick*, has cauſed to be Printed and Publiſhed in a ſmall and cheap Volum, *Octavo. A Collection of Articles, Canons, Injunctions*, &c. *Together with ſeveral Acts of Parliament concerning Eccleſiaſtical Matters, ſome whereof are to be read in Churches*, London, MD CXCIX.

The Pariſh Prieſt is likewiſe to obſerve, that beſide the expreſs Acts of Parliament before mentioned, His Preſent Majeſty, *being thereunto moved by the pious Addreſs of the Commons in Parliament aſſembled*, has *by the Advice of his Privy Council*, iſſued out two ſucceſſive Proclamations, *for preventing and puniſhing Immorality and Prophaneneſs*; and *has charged and commanded every Miniſter in his reſpective Pariſh or Chappelry, to read or cauſe to be read the ſaid Proclamations at leaſt four times in every Year*, immediately *after Divine Service.*

The firſt Proclamation for preventing and Puniſhing Immorality and Profaneneſs.

William R.

WHereas We cannot but be deeply ſenſibly of the great Goodneſs and Mercy of Almighty God, in putting an End to a long bloody and expenſive War, by the concluſion of an honourable Peace; ſo we are not leſs touched with a Reſentment, that notwithſtanding this and many other great Bleſſings and Deliverances, Impiety, Prophaneneſs, and Immorality, do ſtill abound in this our Kingdom: And whereas nothing can prove a greater diſhonour to a well ordered Government, where the Chriſtian Faith is profeſſed, nor is likelier to provoke God to withdraw his Mercy and Bleſſings from us; and inſtead thereof, to inflict heavy and ſevere Judgments upon this Kingdom, than the open and avowed practice of Vice, Immorality, and Prophaneneſs, which amongſt many Men has too much prevailed in this Our Kingdom of late Years, to the high diſpleaſure of Almighty God, the great ſcandal of Chriſtianity, and the ill and fatal Example of the reſt of Our Loving Subjects, who have been ſoberly Educated, and whoſe Inclinations would lead them to the exerciſe of Piety and Vertue, did they not daily find ſuch frequent and repeated Inſtances of Diſſolute living, Prophaneneſs, and Impiety, which has in a great meaſure been occaſioned by the neglect of the Megiſtrates, not putting in execution thoſe good Laws, which have been made for ſuppreſſing and puniſhing thereof, and by the ill example of many in Authority, to the great diſhonour of God, and reproach of our Religion: Wherefore, and for that, We cannot expect increaſe or continuance

nuance of the Bleſſings We and Our Subjects enjoy, without providing Remedies to prevent the like Evils for the future; We think our ſelves bound by the Duty we owe to God, and the Care we have of the People committed to our Charge, to proceed in taking effectual Courſe, that Religion, Piety, and good Manners may, according to our hearty deſire, flouriſh and encreaſe under our Adminiſtration and Government; and being thereunto moved by the pious Addreſs of the Commons in Parliament aſſembled, We have thought fit by the Advice of our Privy Council, to iſſue this our Royal Proclamation, and do declare our Royal Purpoſe and Reſolution to Diſcountenance and Puniſh all manner of Vice, Immorality, and Prophaneneſs in all Perſons, from the higheſt to the loweſt Degree within this our Realm, and particularly in ſuch who are imployed near our Royal Perſon; and that for the greater incouragement of Religion and Morality, We will upon all occaſions diſtinguiſh Men of Piety and Virtue, by Marks of our Royal Favour. And we do expect, that all perſons of Honour, or in place of Authority, will to their utmoſt contribute to the diſcountenancing Men of diſſolute and debauched Lives, that they being reduced to Shame and Contempt, may be enforced the ſooner to Reform their ill Habits and Practices, that the diſpleaſure of Good Men toward them, may ſupply what the Laws (it may be) cannot wholly prevent. And for the more effectual reforming theſe Men, who are a Diſcredit to our Kingdom, Our further Pleaſure is, and we do hereby ſtrictly charge and command all our Judges, Mayors, Sheriffs, Juſtices of the Peace, and all other our Officers and Miniſters, both Eccleſiaſtical and Civil, and other our Subjects, whom it may concern, to be very vigilant and ſtrict in the Diſcovery and the effectual proſecution and puniſhment of all Perſons, who ſhall be guilty of exceſſive Drinking, Blaſphemy, Prophane Swearing and Curſing, Lewdneſs, Prophanation of the Lord's Day, or other Diſſolute, Immoral or Diſorderly Practices, as they will anſwer it to Almighty God, and upon pain of our Higheſt Diſpleaſure. And for the more effectual proceedings herein, we do hereby direct and command our Judges of Aſſizes and Juſtices of Peace to give ſtrict Charges, at the reſpective Aſſizes and Seſſions, for the due Proſecution and Puniſhment of all Perſons that ſhall preſume to offend in any the kinds aforeſaid; and alſo of all perſons that, contrary to their Duty, ſhall be remiſs or Negligent in putting the ſaid Laws in Execution; and that they do at their reſpective Aſſizes and Quarter Seſſions of the Peace, cauſe this our Proclamation to be publickly read in open Court immediately before the Charge is given. And we do hereby further Charge and Command

every Minister in his respective Parish or Chapel, to read or cause to be read this our Proclamation, *at least four times in every Year, immediately after Divine Service, and to incite and stir up their respective Auditories to the practice of* Piety *and Vertue, and the avoiding of all Immorality and* Prophaneness. *And to the end, that all Vice and Debauchery may be prevented, and Religion and Vertue practised by all Officers, private Soldiers,* Mariners *or others, who are imployed in Our Service, either by Sea or Land; We do hereby strictly Charge and Command all our Commanders and Officers whatsoever, that they do take care to avoid all Prophaneness, Debauchery, and other Immoralities, and that by the Piety and Virtue of their own Lives and Conversations, they do set good Examples to all such as are under their Authority, and likewise to take care and inspect the Behaviour and Manners of all such as are under them, and to punish all those who shall be guilty of any the Offences aforesaid. And whereas several wicked and prophane Persons have presumed to Print and Publish several pernicious Books and Pamphlets, which contain in them impious Doctrines against the Holy Trinity, and other fundamental Articles of our Faith, tending to the subversion of the Christian Religion; therefore for the punishing the Authors and Publishers thereof, and for the preventing such impious Books and Pamphlets, being Published or Printed for the future, We do hereby strictly charge and prohibit all Persons that they do not presume to Write, Print or Publish any such pernicious Books or* Pamphlets, *under the pain of incurring our High Displeasure, and of being punished according to the utmost Severity of the Law. And We do hereby strictly Charge and Require all our loving Subjects to Discover and Apprehend such Person and Persons whom they shall know to be Authors or Publishers of any such Books or Pamphlets, and to bring them before some Justice of Peace or chief Magistrate, in order that they may be proceeded against according to Law.*

Given at our Court at *Kensington* the four and twentieth day of *February*, 1697. in the Tenth year of our Reign.

A Second

A Second Proclamation, for Preventing and Puniſhing Immorality and Prophaneneſs.

William R.

WHereas nothing can prove a greater Diſhonour to a well Ordered Government, where the Chriſtian Faith is profeſſed, nor is likelier to provoke God to withdraw his Mercy and Bleſſings from Us, &c. *We do hereby ſtrictly Charge and Command all our Commanders and Officers whatſoever, that they do take care to avoid all Prophaneneſs, Debauchery, and other Immoralities, and that by the Piety and Virtue of their own Lives and Converſations, they do ſet good Examples to all ſuch as are under their Authority; and likewiſe take care, and inſpect the Behaviour and Manners of all ſuch as are under them, and to puniſh all thoſe who ſhall be guilty of any of the Offences aforeſaid.*

Given at our Court at *Kenſington* the ninth day of *December*, 1699. in the Eleventh year of our Reign.

Note, This ſecond Proclamation is only a new Edition of the Former, a further Publication or Reinforcement of it, only leaving out the Preface of the Firſt, which related to that juncture of Time, *the concluſion of an Honourable Peace*; and likewiſe omitting the laſt Paragraphs of it, concerning the *Wicked and prophane Perſons who have preſumed to print and publiſh ſeveral pernicious Books and Pamphlets*, this being now provided for by Act of Parliament made 9 *and* 10 *W.* 3. So as this latter Proclamation was only publiſhed to ſuperſede thoſe parts of the former, which were eſpecially adapted to that Seaſon, *Feb.* 24. 1697. and not ſo proper to the preſent time, *Decem.* 9. 1699.

The Clergy are alſo obliged to read in their Churches the Royal Briefs or Letters Patents, to ask and receive the Charitable Benevolence of well diſpoſed Perſons, upon occaſion of great Sufferings and Loſſes by Fire, or other Caſualty. Though ſome have cenſured ſuch Briefs as Arbitrary and more than Legal, eſpecially becauſe of the *Non Obſtante* Clauſe, *Any Act or Statute to the contrary in any wiſe notwithſtanding.*

Beſide Acts of Parliament, Proclamations, and Briefs, the Parochial Miniſter is by Canonical Obedience obliged to read all *Citations* and *Forms of Excommunication*, and other regular Precepts and Orders that are enjoyned by the Dioceſan or other Ordinary of the Place. And yet when any Forms of Admonition, Cenſure or Enquiry, do iſſue out of the Spiritual Court drawn up in Latin; it may be a juſt Queſtion, whether the Miniſter is bound to read ſuch Original Writing, or not rather a Tranſlation or familiar Explication of it. For I think it is not agreeable to the Rules of our Church, nor indeed to the nature of our Reformed Religion, to have any thing read in our Congregations in a *Tongue not underſtood by the People.*

There is one Abuſe and Innovation brought in to ſome Country Churches, of cauſing the Pariſh Clerk or Sexton to proclaim in the Church, the *keeping of Courts, the Pariſh Meetings*, and other occaſional Summons: Nay ſometimes to publiſh Hues and Cries, and Enquiries after loſt Goods, *&c.* all which are unſuitable to the Place, and irregular in the Perſon. If in Country Villages, it may be convenient to notifie ſuch things when the People are moſt aſſembled together: Yet ſuch notice ſhould be given in the Church-yard or Porch, not in the Body of the Church, or at leaſt not there by any Lay-Officer. For the Rubrick does expreſly declare, that *nothing ſhall be proclaimed or publiſhed in the Church, during the time of* Divine Service, *but by the Miniſter: Nor by him any thing but what is preſcribed in the Rules of this Book, or enjoined by the King, or by the Ordinary of the place.*

CHAP. XXXVI.

Spiritual Perſons not to take Farms, or buy or ſell for Lucre or Profit, &c.

THat a Miniſter may yet the better perform his Duty, *viz.* without diſtraction (as far as may be) it hath been Enacted as followeth: **For the more quiet and vertuous increaſe and maintenance of Divine Service, the preaching and teaching the word of God, with godly and good example giving, the better diſcharge of Curates, the maintenace of hoſpitality, the relief of poor people, the increaſe of devotion, and good opinion of the lay ſort toward the ſpiritual perſons: Be it enacted, ordained and eſtabliſhed by the King our Sovereign Lord, with the aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by authority of the ſame, that no ſpiritual perſons, ſecular or regular, of what degree ſoever he or they be, ſhall from henceforth take to farm to himſelf, or to any perſon or perſons to his uſe of the Leaſe or Grant of the King our Sovereign Lord, nor of any other perſon or perſons, by Letters Patents, Indentures, Writings, by word or otherwiſe, by any manner of means, any Manors, Lands, Tenements, or other Hereditaments for term of life, for term of years, or at will, upon pain to forfeit ten pound for every Month that he, or any other to his uſe, ſhall occupy any ſuch Farm, by reaſon of any ſuch Leaſe or Grant hereafter to be made: The one half of which forfeiture to be to the King our Sovereign Lord, and the other half thereof to every ſuch perſon that will ſue for the ſame by Original Writ, Bill, or Plaint of Debt, or by any any information in any of the King's Courts: in which action and ſuit no wager of Law ſhall be admitted for the defendant, nor any eſſoin, or protection allowed.**

And be it alſo enacted by the authority aforeſaid, That all and every ſuch ſpiritual perſon or perſons which now have, or occupy in farm by themſelves, or by any other to their uſe, any Manors, Lands, Tenements or Hereditaments of the Leaſe or Grant of the King our Sovereign Lord, or any other perſon or perſons, for term of life, or for years, or at will, by any writing or otherwiſe, or that now have any annual Rents, or other annual advantage or profit, by occaſion or colour of any ſuch leaſe or farm, ſhall clearly bargain, ſell, give or grant away on this ſide the Feaſt of St. Michael the Arch-

Archangel next coming, to any ſuch lay perſon or perſons, as they will at their own nominations and appointment, all ſuch leaſe, term, intereſt, and profit as any ſuch ſpiritual perſon, or any other to his uſe now hath or have, in or by reaſon of any ſuch farm: So that in no wiſe any ſuch ſpiritual perſon or perſons at any time after the ſame Feaſt, by themſelves, or any other to their uſe, by any manner of means, fraud or male engine, ſhall have, uſe or occupy in farm any Manors, Lands, Tenements, or Hereditaments of the demiſe, leaſe or grant of any perſon or perſons heretofore made, or hereafter to be made, to themſelves, or to any other to their uſes: Nor from the ſaid Feaſt ſhall take any annual rent, or other annual advantage or profit, by occaſion or colour of any ſuch leaſe or farm by any manner of means, upon pain to forfeit for every month ſo occupying any ſuch farm, at any time after the ſaid Feaſt contrary to this preſent Act, ten pound, and upon pain to forfeit ten times as much as any ſuch ſpiritual perſon, or any to his uſe, ſhall take in any annual rent, advantage or profit, by occaſion or colour of any ſuch leaſe, at any time after the ſaid Feaſt: The one half of which forfeitures to be to the King our Soveriegn Lord, and the other half to him that will ſue for the ſame, by original writ, bill, or plaint of debt, or by information, in any of the King's Courts; in which action or ſuit no wager of Law ſhall be admitted for the defendant, nor any eſſoin or protection allowed.

And be it alſo enacted, That all ſuch Leaſes made, or hereafter to be made unto any ſuch ſpiritual perſon or perſons, or to any other to their uſe, for term of life, term of years, or at will, of any manors, lands, tenements, or hereditaments, whereof they or any of them ſhall take any profit or medling by themſelves, or by any to their uſe, after the ſaid Feaſt of Saint Michael, by colour of any ſuch leaſe or grant, and not by them bargained, granted and ſold away before the ſaid Feaſt, as is before limited, ſhall from thenceforth be utterly void and of none effect, as well againſt the leaſor or leaſors, grantor or grantors, their heirs and aſſigns, and againſt every of them, as againſt the leaſee or leaſees, and their executors and aſſigns, and every of them.

Provided alway, That this preſent Act ſhall not extend to any ſpiritual perſon or perſons in and for taking to farm any temporalities, during the time of vacations of any the Archbiſhopricks, Biſhopricks, Abbeys, Priories, or other Collegiate, Cathedral or Conventual Churches, nor to any ſpiritual perſon or perſons, that ſhall tender or make any traverſe upon any offices or office, concerning his or their freehold.

And be it alſo enacted by the authority aforeſaid, That no ſpiritual perſon or perſons, ſecular or regular, of what eſtate or degree ſoever they be, ſhall from henceforth by himſelf, nor by any other for him, nor to his uſe bargain, and buy to ſell again for any lucre, gain or profit, in any markets, fairs, or other places, any manner of Cattle, Corn, Lead, Tin, Hides, Leather, Tallow, Fiſh, Wool, Wood, or any manner of Victual or Merchandiſe, what kind ſoever they be of, upon pain to forfeit treble the value of every thing, by them or by any to their uſe, bargained and bought to ſell again, contrary to this Act. And every ſuch bargin and contract hereafter to be made by them, or by any to their uſe, contrary to this Act, ſhall be utterly void and of none effect. And the one half of every ſuch forfeiture to be to the King our Sovereign Lord, and the other half to him that will ſue for the ſame by original writ of debt, bill, plaint or information, in any of the King's Courts: In which action or ſuit no wager of Law for the defendant ſhall be admitted, nor any eſſoin nor protection allowed.

Provided alway, That if any ſuch ſpiritual perſon or perſons ſhall happen hereafter without fraud or covin to buy any horſes, mares or mules, to the only

only intent to occupy for himself or his servants, to ride to and fro upon his necessary business, or any other cattels or goods to the only intent and purpose at the buying thereof to be imployed and put in and about his necessary apparel or his own house, or of his person and servants, or in, for and about the only occupying, manuring, or tillage of his own glebe or demean lands annexed to his Church, or for the necessary expences of his own houshold-keeping: and after the buying of any such horses, cattel or goods, or exercise of them, or any of them, happeneth to mislike any of them, that they should not be good, profitable, nor convenient for any of the purposes abovesaid, for the which they were bought; that then every such spiritual person or persons may lawfully bargain and put away such things so by him bought, without fraud or covin, for any of the purposes abovesaid, at his pleasure and advantage; this Act or any thing therein contained notwithstanding.

Provided alway, That all Abbots, Priors, Abbesses, Prioresses, Provosts, Presidents, Masters of Colleges and Hospitals, and all other spiritual Governors and Governesses of any spiritual Monasteries, or Houses of Religion, by what name or names soever they be called, having Manors, Lands, Tenements and Hereditaments, and other yearly Profits in the right of their Monasteries, or Houses of the yearly value of viii C marks, or under, and not above, may use and occupy as much and as many of their demean Lands, Fee-farms, and Farms to their most advantage, commodity and profit, to and for the only maintenance of their Houses and Hospitalities, in as ample and large manner as they or any of them or their predecessors, or the predecessors of any of them, at any time by the space of one hundred years last past, before the making of this Act, have done, used and occupied; any thing in this present Act to the contrary notwithstanding.

Provided also, That every other spiritual person or persons, not having sufficient Glebe, or demean Lands in their own hands, in the right of their Churches, Monasteries, and houses for pasturage of Cattel, or for increase of Corn, to and for the only expences of their households, or for their carriages or journeys, may take in farm other Lands, and buy and sell Corn and Cattel for the only manurance, tillage and pasturage of such farms, so that the increase thereof be alway employed and put to, and for the only expences in their houshoulds and hospitalities, and not in any wise to buy and sell again, for any other commodity, lucre or advantage, any corn or cattel, renewing, coming or growing in and upon any such farm, or otherwise, but only the remain and overplus above their expences of their households, if any such shall happen to the breed and increase thereof, without fraud or covin; any thing in the Law to this present Act to the contrary hereof notwithstanding.

And be it further enacted by the authority aforesaid, That no spiritual person, secular or regular, beneficed with cure, as is afore rehearsed, from the Feast of St. Michael the Archangel next coming, by authority of any manner license, dispensation, or otherwise, shall take any particular stipend or salary to sing for any Soul, nor have, or occupy by himself, or by any other to his use, any Parsonage or Vicarage in farm, of the Lease or Grant of any person or persons, nor take any profit or rent out of any such farm, upon pain to forfeit xl s. for every such week that he, or any to his use shall occupy, or have any such stipend or farm contrary to this present Act, and upon pain to lose ten times the value of such profit or rent as he shall take out of any such farm after the said Feast. The one half of which forfeitures to be to the King our Sovereign Lord, and the other moiety to him that will sue for the same by original writ, bill, plaint of debt, or by information in any of the King's

King's Courts, in which ſuit and action no wager of Law ſhall be admitted for the Defendant, nor any eſſoin or protection allowed.

Provided always, That every ſpiritual perſon or perſons, having Lands, Tenements, or other poſſeſſions in the right of their houſes, above the yearly value of eight hundred marks, may keep and retain in their occupation and manurance, as much of their ſaid Lands and Tenements, and other poſſeſſions, as ſhall be neceſſary and ſufficient for paſturage of their cattel, and for tillage of corn to be imployed and ſpent for the only maintenance, ſuſtentation and keeping of his or their houſholds and hoſpitalities, without fraud or covin: Any thing in this preſent Act to the contrary thereof notwithſtanding.

Provided alway, That it may be lawful to every ſpiritual perſon or perſons to take in Farm any Meſes, Manſions or Dwelling-houſes, having but only Orchards or Gardens in any City, Borough and Town, for their own habitation or dwelling: Any thing in this Act to the contrary notwithſtanding. So that no perſon ſpiritual, other than be above provided for, for their non-reſidence, have any liberty of non-reſidence by colour of this Proviſo. Stat. 21 H. 8. c. 13.

In an Action brought upon this Statute againſt a Parſon for taking Farms, it is a good plea for the Defendant to plead, *Non habuit ſeu tenuit ad firmam contra formam ſtatuti*; and the Defendant may upon ſuch plea give in Evidence, that the Farm was for the maintenance of his Houſe, *&c.* according to the Proviſo in the Statute, by *Fitz* and *Shelley*. But *Baldwin* Chief Juſtice *contra*, that he ought to plead that matter ſpecially, elſe cannot give it in Evidence, *Bro. action ſur leſtatute* 2. And the Writ grounded on this Statute ought to be *Qui tam* for the King and Party, *&c.* therefore a Writ being brought which demanded the whole penalty for the Party, was ruled not to be good. The Statute need not be mentioned in the Writ, *Bro. action ſur leſtatute.* 4.

CHAP. XXXVII.

Of Reſidence and Non-reſidence.

AS the Law doth oblige every beneficed perſon to attend the Cure, and perform the duty of the Incumbent thereof, and doth provide for the puniſhing of all Perſons diſturbing him doing the ſame, or breaking the peace of the Church, and doth reſtrain him from diſtracting himſelf unneceſſarily with other affairs; ſo for the better and more conſtant performance of his duty, Reſidence upon his Benefice by Law is enjoyned him, for it hath been Enacted, That as well every ſpiritual perſon now being promoted to any Archdeaconry, Deanry, or Dignity in any Monaſtery or Cathedral Church, or other Church conventual or collegiat, or being beneficed with any Parſonage or Vicarage, as all and every ſpiritual perſon and perſons, which hereafter ſhall be promoted to any of the ſaid Dignities or Benefices, with any Parſonage or Vicarage, from the Feaſt of St. Michal the Archangel next coming, ſhall be perſonally reſident, and abiding in, at and upon his ſaid Dignity, Prebend or Benefice, or at one of them at the leaſt. And in caſe that any ſuch ſpiritual perſon at any time after the ſaid Feaſt,

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keep not residence at one of his said Dignities, Prebends or Benefices, as is aforesaid, but absent himself wilfully by the space of one month together, or by the space of two months, to be accompted at several times in any one year, and make his residence and abiding in any other places, by such time, that then he shall forfeit for every such default x li. sterling; the one half thereof to the King our Sovereign Lord, and the other half of the same to the party that will sue for the same in any of the King's Courts by original Writ of Debt, Bill, Plaint or Information: In which Action and Suit, the Defendant shall not wage his Law, nor have any Essoin or Protection allowed.

And if any person or persons procure or obtain at the Court of Rome, or elsewhere, any manner of license or dispensation, to be non resident at their said Dignities, Prebend or Benefices, contrary to this Act, that then every such person or persons putting in execution any such dispensation or license for himself, from the said first day of April, in the year of our Lord God, M. D. and xxx. shall run and incur the penalty, damage and pain of xx li. sterling, for every time so doing, to be forfeited and recovered, as is abovesaid, and such license or dispensation so procured, or to be put in execution, to be void and of none effect.

Provided always, that this Act of non-residence shall not in any wise extend, ne be prejudicial to any such spiritual person as shall chance to be in the King's service beyond the Sea, nor to any person or persons going to any pilgrimage or holy place beyond the Sea, during the time that they shall so be in the King's service, or in the pilgrimages going and returning home; Nor to any Scholar or Scholars being conversant and abiding for study, without fraud or covin, at any University within this Realm or without, nor to any of the Chaplains of the King's or Queen's, daily or quarterly attending and abiding in the King's or Queen's most honourable households; nor to any of the Chaplains of the Prince or Princess, or any of the King's or Queen's Children, Brethren or Sisters, attending daily in their honourable households, during so long as they shall attend in any of their said households; nor to any Chaplain of any Archbishop or Bishop, or of any spiritual or temporal Lords of the Parliament, daily attending, abiding and remaining in any of their honourable households; nor to any Chaplain of any Dutchess, Marquess, Countess, Vicountess or Baroness attending daily and abiding in any of their honourable households; nor to any Chaplain of the Lord Chancellor or Treasurer of England, the King's Chamberlain, or Steward of his household for the time being, the Treasurer and Controller of the King's most Honourable household for the time being, attending daily in any of their honourable households; nor to any Chaplain of any of the Knights of the honourable Order of the Garter, or of the chief Justice of the King's Bench, Warden of the Ports, or also of the Master of the Rolls; nor to any Chaplain of the King's Secretary and Dean of the Chappel, or Amner for the time being, daily attending and dwelling in any their households, during the time that any such Chaplain or Chaplains shall abide and dwell, without fraud or covin, in any of the said honourable households; nor to the Master of the Rolls, or Dean of the Arches, nor to any Chancellor or Commissary of any Archbishop or Bishop; nor to as many of the twelve Masters of the Chancery, and twelve Advocates of the Arches, as be or hereafter shall be spiritual men, during so long time as they shall occupy their said rooms and offices; nor to any such spiritual persons as shall happen by injunction of the Lord Chancellor, or the King's Council, to be bound to any daily appearance and attendance to answer to the Law, during the time of such Injunction.

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Provided also that it shall be lawful to the King's Highness to give license to every of his own Chaplains for non-residence upon their Benefices; any thing in this present Act contained to the contrary notwithstanding.

Provided always, That every Dutchess, Marchioness, Countess, Baronels, Widows, which have taken, or that hereafter shall take any Husbands under the degree of a Baron, may take such number of Chaplains, as is above limited to them being Widows; and that every such Chaplain may purchase Licence to have and take such number of Benefices with Cure of Soul, and have like liberty of Non-residence, in manner and form as they might have done if their said Ladies and Mistresses had kept themselves Widows; any thing in this present Act contained to the contrary notwithstanding. Stat. 21 H. 8. cap. 13.

And afterwards it was Enacted as followeth, Where in the Parliament holden at Westminster in the twenty first year of the Reign of our Sovereign Lord King Henry the Eighth, it was among other things ordained and provided, that certain honourable persons, as well Spiritual as Temporal, shall have Chaplains beneficed with Cure, to serve them in their honourable Houses, which Chaplains shall not incur the danger of any penalty or forfeiture made or declared in the same Parliament for Non-residence upon their said Benefices, or for obtaining Licences or Dispensations of Pluralities. In the which Act no Provision was made for any of the King's Judges of his High Courts, commonly called the King's Bench and the Common Place, except only for the Chief Judge of the King's Bench, nor for the Chancellor, nor the chief Baron of the King's Exchequer, nor for any other inferior persons, being of the King's most honourable Council, as by the said Act may appear.

Wherefore it is ordained and enacted by authority of this present Parliament, That as well every Judge of the said high Courts, and every of the Chancellor and chief Baron of the said Exchequer, the Kings General Attorney, and General Solicitor, which for the time is, be, or shall be, shall and may from henceforth at his Liberty retain and have singularly to every of them in his house, or attendant to his person, one Chaplain having one Benefice with Cure of Souls, which may be absent from his said Benefice, and not resident upon the same: The said Statute made in the said one and twentieth year, or any other Statute, Act or Ordinance made to the contrary in any wise notwithstanding. Stat. 25 H. 8. c. 16.

And it was farther Enacted, Whereas in the Parliament begun at London on the third day of November in the twenty first year of the Reign of our Sovereign Lord King Henry the Eighth, and from thence adjourned and prorogued to the Palace of Westminster, the seventeenth day of December then next ensuing, amongst other good Acts and Ordinances then and there by the authority of the said Parliament, it was established, ordained and enacted, That as well every spiritual person, then being promoted to any Archdeaconry, Deanry or Dignity in any Monastery or Cathedral Church, or other Church conventual or collegial, or being beneficed with any Parsonage or Vicarage, as all and every spiritual person and persons, which should after the Feast of Saint Michael the Archangel, which was in the foresaid one and twentieth year of the Reign of our Sovereign Lord King Henry the Eighth, be promoted to any of the said Dignities or Benefices with any Parsonage or Vicarage, should from the said Feast of Saint Michael the Archangel, be personally resident and abiding at and upon his said Dignity, Prebend or Benefice, or at one of them at the least. And in case any such spiritual person at any time after the said Feast, kept not residence at one of his said Dignities, Prebend

or Benefices (as is aforesaid) but absent himself wilfully by the space of one Month together, or by the space of two Months, to be accounted at several times in any one year, and make his residence and abiding in any other places by such time, that then he shall forfeit for every such default 10 l. sterling, as in the same Act more plainly doth appear. In which Act among other Provisions contained and specified in the same, it was provided, That the said Act of Non-residence should not in any wise extend, ne be prejudicial to any Scholar or Scholars, being conversant and abiding for study without fraud or covin at any University within this Realm, or without, as by the same Provision doth also appear more at large. Sithence the making of which good Act and Statute, divers and many persons being beneficed with Cure of Souls (as is aforesaid) and being not apt to study by reason of their age or otherwise, ne never intending before the making of the said Act, to travel in study within any the said Universities for the increase of Learning, but rather minding and intending their own ease, singular lucre and pleasure, by the same Provision colourably to defraud the same good Statute and Ordinance, do daily and commonly resort and repair to the said Universities of Oxford and Cambridge, and to either of them, where they under the said pretence and colour of study, do continue and abide, living dissolutely, nothing profiting themselves by study at all in Learning, but consume the time in idleness and in other pastimes and insolent pleasures, giving occasion and evil example thereby to other young Men and Students within the said Universities, little or nothing regarding their cure and charge of Souls, contrary to the minds and intent of the makers of the foresaid good Statute and Ordinance. And also divers and many old beneficed men have and do continually remain there, never exercising nor practising their Learning to the example of virtue and maintenance of the Commonwealth, in discharge of their conscience, according to their duty, having nevertheless, and occupying such rooms and commodities as were instituted and ordained for the maintenance and relief of poor Scholars, to the great hindrance and detriment of the same.

Be it therefore enacted by the King our Sovereign Lord, with the assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, That all and singular spiritual person and persons, which now be, or hereafter shall be to any Benefice or Benefices promoted as is aforesaid, being above the age of forty years, (the Chancellor, Vice-Chancellor, Commissary of the said Universities, or any of them, Wardens, Deans, Provosts, Presidents, Rectors, Masters, Principals and other Head Rulers of Colleges, Halls and other houses or places corporate within the said Universities, or any of them, Doctors of the Chair, Readers of Divinity in the Common Schools of Divinity in any of the said Universities only excepted) shall be resident and abiding at, and upon one of their said Benefices, according to the intent and true meaning of the said former Act upon such pain and penalties as be contained in the said former Act made and appointed for such beneficed persons for their Non-residence. And that none of the said beneficed persons being above the age aforesaid, except before except, shall from henceforth be excused of their Non-residence upon the said Benefices, for that they be Students or resiant within the said Universities or any of them; any Proviso, or any other Clause or Sentence specified or contained in the said former Act of Non-residence, or any other thing or things to the contrary hereof in any wise notwithstanding.

And over this, be it enacted by the authority aforesaid, That all and singular such beneficed persons being under the age of forty years, resiant and abiding within the said Universities, or any of them, shall not enjoy the Privilege

vilege and Liberty of Non-Residence, contained in the Proviso of the said former Act, made for the Scholars of the said Universities, or any of them, unless he or they be present at the ordinary Lecture and Lectures, as well at home in their houses, as in the common School or Schools, and in their proper person keep Sophisms, Problems, Disputations and other Exercises of Learning, and be Opponent and Respondent in the same, according to the Ordinances and Statutes of either of the said Universities, where he or they shall be so abiding or resiant; any thing contained in the said Proviso or former Act to the contrary notwithstanding.

Provided alway, That this Act shall begin to take effect at the Feast of St. Michael the Archangel next coming, and not before.

Provided alway, That this Act nor any thing therein contained, shall extend to any person or persons, which now is, or hereafter shall be Readers of any publick or common Lecture in Divinity, Law Civil, Physick, Philosophy, Humanity, or of any of the liberal Sciences, or publick or common Interpreters or Teachers of the Hebrew Tongue, Caldy or Greek, in whatsoever College or place of any of the said Universities the said persons for the time being, shall read the said common or publick Lectures: nor yet to any person or persons, after or above the age of forty years, which shall resort to any of the said Universities, to proceed Doctors in Divinity, Law Civil or Physick, for the time of their said proceedings, and executing of such Sermons, Disputations or Lectures, which they be bound by the Statutes of the Universities there to do for the said degrees so obtained. Stat. 28 H. 8. c. 13.

And after it was Enacted, Where in the Parliament holden at Westminster in the one and twentieth year of your most gracious Reign, it was amongst other things ordained and provided, That certain honourable persons, and other of your Highness Councellors and Officers, as well spiritual as temporal, should and might have Chaplains beneficed with Cure, to serve and attend upon them in their Houses, which Chaplains shall not incur the danger of any penalty or forfeiture made or declared in the same Parliament, for Non-residence upon their said Benefices, or for obtaining Licences or Dispensations of Pluralities, in which Act no Provision is made for any the Head Officers of your Graces several Courts of your Dutchy of Lancaster, the Courts of Augmentations of the Revenues of your Highness Crown, the First-fruits and Tenths, the Master of your Majesty's Wards and Liveries, the general Surveyors of your Graces Lands, and other your Graces Courts.

In consideration whereof, it may please your Majesty, That it may be enacted by your Highness, with the assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, That the Chancellor of the said Court of the Dutchy of Lancaster, the Chancellor of your Highness Court of Augmentations, the Chancellor of your Graces Court of First-fruits and Tenths, the Master of your Highness Wards and Liveries, and every of your Graces general Surveyors of your Highness Lands, the Treasurer of your Graces Chamber, the Treasurer of your Highness Court of Augmentations, and the Groom of your Graces Stole, and every of them for the time being, shall and may retain singularly to every of them in his House, or attendant upon his Person, one Chaplain having one Benefice with Cure of Souls, which may be absent from the said Benefice, and non-resident upon the same; the said Statute made in the said one and twentieth year of your most gracious Reign or any other Statute, Act or Ordinance made to the contrary in any wise notwithstanding.

Provided alway, and be it enacted by authority aforesaid, That every of the said Chaplains so being beneficed as is aforesaid, and dwelling with any the Officers aforenamed, shall personally repair two times in every year at the least, to his said Benefice and Cure, and there to tarry and abide by the space of eight days, at every such time at the least, to visit and instruct his said Cure, upon the pain to forfeit for every time so failing, forty shillings; the one Moiety thereof to the King our Sovereign Lord, the other to such as will sue for the same by Action of Debt, Bill, Plaint or Information in any of the Kings's Courts of Record, in which Suit no Essoign, Protection or Wager of Law shall be allowed. Stat. 33 H. 8. cap. 28.

By the Statute of the 21 *H.* 8. c. 13. every Spiritual person qualified to hold two Benefices, is to be Resident upon one of his Dignities, Prebends or Benefices, *&c.* and if he be resident upon one of them, it suffices; but if a man be chosen Gospeller in a Cathedral Church, and be there Resident, this will not be to the discharge of his residence upon any Dignity, or Benefice with cure that he shall possess therewith, as was held by *Popham* and *Clinch*. So if a Vicar in a Cathedral Church hath a Benefice with Cure, he ought to be Resident upon it, for he is not properly a Vicar, although he be so called, he having neither Vicaridge nor cure of Souls, *Pasch.* 41 *Eliz. B. R. Broughton* v. *Gousley* 3 *Croke* 663. but the Cause was adjourned, the other Judges being absent, and after compounded, 27 *H.* 8. 10. *Broke Action sur le Stat.* 2. *per Cur.* 27 *H.* 8. 10. *Broke, surmise and suggestion* 24. And it is said, that to be Resident on a Prebend, is a sufficient residence, and thereby that a Prebendary is excused from being Resident on a Benefice with Cure, 27 *H.* 8. 10. *Broke Action sur le Stat.* 2. 27 *H.* 8. *Broke surmises and suggestion* 24. So in *Acton's Case, Hill* 45 *Eliz. C. B.* 4 *Coke* 119. If a Baron hath three Chaplains, and each of them hath two Benefices, and afterwards the Baron dieth, they shall enjoy their Benefices with cure, if lawfully setled in them before, but although each of them be Resident, and dwelling upon one of their respective Benefices, yet they shall be punished for not being Resident upon the other, as was Parson *Boyton*'s Case, *Coke* 4. *fol.* 119. and they ought to have of the King a *non obstante* in the dispensations for their Pluralities; see *Mich.* 4 *Car. B. R. Green* v. *Guy* 1 *Croke* 146.

As to which matter, I conceive, that although by the Statute of the 21 *H.* 8.c. 13. there is no express provision made to excuse any person from being Resident upon any of his Benefices, by having been a Chaplain to any person, after his attendance is determined, nor to excuse other persons enabled thereby, to hold more than one Benefice by Dispensation; yet he that is duly qualifyed, and dispensed with to hold more than one Benefice, if he be duly Resident upon any one of his Dignities, or Benefices with Cure, is not punishable by the said Act; because, this Act doth only require, that he shall be Resident in, at and upon his Dignity, or Benefice, or at one of them at the least, such interpretation is to be made of that Act as shall make the same practicable, that is, that the Liberty and Benefit given thereby to persons qualified by Birth, Degree, or Service for holding more than one Benefice, may be enjoyed, which is impossible, if by reason of the same Act, persons having more Benefices than one, be restrained from being absent from any one of them by the space of one Month together, or by the space of two Months to be accounted at several times in any one year. And I suppose, that if a pluralist though duly Resident upon one of his Benefices be punishable by this Act for not being Resident upon his other, that a *non obstante* had of the King before spoken of, will not save him from the penalty thereof, because, all Licenses, and dispensations to be Non-resident contrary to the said Act, are thereby

by made void, and of none effect, with a proviſion, that it ſhall be lawful to the King to give Licence to every of his own Chaplains to be Non-reſident, but no proviſion for his Licenſing of others.

And it is alſo declared and enacted, **That no Diſpenſation by** Nonobſtante **of or to any Statute, or any part thereof, ſhall be allowed, but that the ſame ſhall be held void and of no effect, Except a Diſpenſation be allowed of in ſuch Statute; and except in ſuch Caſes as ſhall be ſpecially provided for by one or more Bill or Bills to be paſſed during this preſent Seſſion of Parliament.** And it is alſo declared, **That the pretended Power of ſuſpending of Laws, or the Execution of Laws by Regal Authority without Conſent of Parliament is illegal.** Stat. 1 W. & M. *Declaring the Rights and Liberties of the Subject, &c. Seſs. 2. Cap. 2.* But I conceive, that if any Perſon having more than one Benefice (eſpecially with Cure) by ſufficient Diſpenſation, be puniſhable (being reſident upon one of them) for not being alſo reſident upon his other, he is only puniſhable in the Eccleſiaſtical Court, and as an Offender againſt the Eccleſiaſtical Law, and not againſt the aforeſaid Statute of 21 *H.* 8. and that chiefly by reaſon of the uſual Proviſo in the Arch-Biſhops Diſpenſation to hold two Benefices with Cure, which is this, *Proviſo ſemper in qualibet prædictarum Eccleſiarum tum ea qua majorem ob partem te abeſſe contigerit, tum altera in qua perpetuam & perſonalem reſidentiam feceris treſdecim quotannis Conciones juxta Ordinationes Eccleſiæ Anglicanæ editas, in ea parte habeas ipſique ſacrum Dei verbum ſincere, religioſe & reverenter tractes ubique in eodem Beneficio a quo te magis abeſſe contigerit per duos tamen menſes quotannis Hoſpitalitatem exerceas, eoque tempore pro illius beneficii fructibus & commodis Parochiæ ejus indolas præſertim egenos & pauperes (quantum poteris) ſuſtentes & releves.* (*Quære.*)

It may be a Queſtion, whether Biſhops for their being not reſident upon their Biſhopricks are puniſhable by the Statute of 21 *H.* 8. *c.* 13. and I conceive that they are not puniſhable thereby, for that the ſaid Statute enjoyns Reſidence to perſons promoted to any Archdeaconry, Deanry or other Dignity in any Cathedral Church; which other Dignity is to be conſtrued to extend only to Dignities of like or inferior nature, and not to Biſhopricks, which are of a ſuperiour Nature. But though an Arch Biſhop or Biſhop be not tyed to be reſident upon his Biſhoprick by the Statute of 21 *H.* 8. yet they are thereto obliged by the Eccleſiaſtical Law, and may be compelled to keep Reſidence by Eccleſiaſtical Cenſures. And if a Biſhop hold in *Commendam* an Archdeaconry, Deanry or like inferior Dignity, Parſonage or Vicarage with his Biſhoprick, he is puniſhable by the ſaid Statute, if according to the ſame, he be not reſident upon ſuch Dignity, Parſonage or Vicarage, and that though he be conſtantly reſident upon his Biſhoprick he ſhall not be excuſed thereby.

The Reſidence required in the Statute of 21 *H.* 8. *c.* 13. is to be underſtood to be in the Houſe belonging to the Dignity or Benefice of which a Parſon is the Incumbent; and therefore, if a Parſon be reſident in the ſame Pariſh, in any other than the Parſonage Houſe, he is not free from the Penalty of this Law. *Per Curiam, Paſch.* 40 *Eliz. B. R. Butler* and *Godal's Caſe*, 6 *Co.* 21. and by *Coke Hill.* 8 *Jac. C. B. Cannye* v. *Dr. Newman*, 2 *Brownl.* and *Gouldsborough* 54. and by *Gawdy* and *Popham contra Clinch* and *Fenner*, *Mich.* 39 & 40 *Eliz. Godal* v. *Butler*, 3 *Cro.* 590. *ſame Caſe*, *Gouldsborough* 54. and *Moor* 540. And if the Incumbent doth demiſe his Houſe to another, and reſerve one Chamber, this doth not better his Caſe, *Hill.* 43 *Eliz. Goodal* v. *Butler*, *Gouldſborough* 169. no, though he doth keep the whole Houſe in his hands and occupy it, *Hill.* 8 *Jac. Carriage* v. *Doctor Newman*, 2 *Brownl.* & *Gouldsborough* 54.

54. But if there be not any Houſe belonging to his Benefice, wherein he may dwell, he is excuſed; and ſo I ſuppoſe, if by reaſon of its meanneſs and ſmalneſs it be unfit to entertain his Family; So lawful Impriſonment without Covin is a good excuſe of Non-reſidency; and it is ſaid, that it was holden in the Exchequer, *Trin.* 39 *Eliz.* that Sickneſs without Fraud was alſo a good Excuſe, *viz.* if the Patient remove by the advice of his Phyſitian, *bona fide*, for better Air, and for the Recovery of his Health, *Paſch.* 40 *Eliz. B. R. Butler* and *Goodal's Caſe*, 6 *Co.* 21. And generally to make a perſon liable to the Penalties of the Statute, his Non-reſidence muſt be voluntary, and not by compulſion or reſtraint, *Per Curiam*, *Trin.* 30 *Eliz. B. R. William Collins* v. *Edward Vaughan*, 3 *Cro.* 100. and by *Popham Hill.* 43 *Eliz. Goodal* v. *Butler*, *Gouldsborough* 169. for the words of the Statute are, **If he abſent himſelf wilfully.**

The other Caſes wherein a beneficed perſon may be excuſed if Non-reſident, are expreſſed in the Statutes before ſet down, only this is to be noted, that if a Baroneſs, *&c.* retaineth two Chaplains according to the Statute, and afterwards taketh one of the Nobility to Husband, the retainer of theſe two Chaplains remaineth in force, and therefore ſo long as they attend upon ſuch Baroneſs, *&c.* they ſhall not be adjudged non-reſident, *Hill.* 43 *Elez. C.B. Acton's Caſe*, 4 *Co.* 118. *b.*

Alſo note, although in the Statute of 21 *H.* 8. *c.* 13. it is only ſaid, that the ſame Statute ſhall not extend to any Spiritual Perſons as ſhall chance to be in the King's Service beyond the Sea; that before the ſaid Statute it was Enacted as followeth:

Alſo all Barons of the King's Exchequer claiming by their Privilege, that they ought to make anſwer to no complaint out of the ſame place, extend the ſame Privilege unto Clerks abiding there, called to Orders or unto Reſidence, and inhibit Ordinaries that by no means, or for any cauſe, (ſo long as they be in the Exchequer, or in the King's Service) they ſhall not call them to Judgment. The Anſwer. **It pleaſeth our Lord the King, that ſuch Clerks as attend in his Service, if they offend, ſhall be corrected by their Ordinaries, like as other; but ſo long as they are occupied about the Exchequer, they ſhall not be bound to keep reſidence in their Churches.** This is added of new by the King's Council. **The King and his Anceſtors ſince time out of mind have uſed that Clerks which are imployed in his Service, during ſuch time as they are in Service, ſhall not be compelled to keep reſidence at their Benefices. And ſuch things as be thought neceſſary for the King and the Commonwealth, ought not to be ſaid to be prejudicial to the liberty of the Church.** Stat. 9 Ed. 2. cap. 8. See *Regiſter fol.* 58. *b.*

If an Information upon this Statute of 21 *H.* 8. *c.* 13. be to be brought for Non-reſidence, it may not be brought before the Juſtices of Aſſize, and *Oyer* and *Terminer*; for the Statute doth not give it, but only in the King's Courts, where there may be Eſſoin, Gager of Law or Protection, and that notwithſtanding the Statute of 21 *Jac. cap.* 4. *Mich.* 4 *Car. B. R. Green* and *Guy's Caſe*, 1 *Cro.* 146. and ſee the ſame Book for this Matter *fol.* 112. And note, that in the Information it muſt be alledged, that the Party willingly abſented himſelf, *&c.* or it will not be good, *Trin.* 30 *Eliz. B. R. Collins* v. *Vaughan*, 3 *Cro.* 100. and if there be two Informations brought at the ſame time, for the ſame thing, the Party need not anſwer to either, *Mich.* 11 *Jac. Pye* v. *Coke*, *Moor* 864. 2 *Rolls Abr.* 576.

Note alſo, that when an Action of Debt was brought againſt one as Rector of *T.* in the County of *B.* and the Defendant pleaded, that before the Writ brought he was dwelling at *B.* in the County of *N.* it was not allowed as a ſuf-

a ſufficient Plea to abate the Writ; for a Parſon ſhall be intended in Law to be reſident upon his Benefice, becauſe of the Cure of Souls which he hath there. The Caſe of *the Maſters and Fellows of Magdalen College in Cambridge, Paſch.* 13 *Jac.* 11 *Co.* 70. And if in this caſe he doth plead alſo that he hath another Benefice, yet the Plea ſhall not be allowed, 10 *H.* 6. 8. 7 *H.* 6. 1. 8 *H.* 6. 37.

CHAP. XXXVIII.

Of Corporations Sole and Aggregate, and of the Statutes concerning Mortmain.

HAving ſpoken of the ſeveral Duties of a Miniſter as the Effect of his being inſtituted to a Benefice with Cure, or otherwiſe charged with the Cure thereof, and of things relating thereunto: I am now to ſhew what are the Effects of his legal Poſſeſſion, which is that by which a Clergyman doth become a complete Incumbent of an Eccleſiaſtical Preferment againſt all perſons whatſoever, *Hill.* 11 *Jac. Needler* v. *Winton* and *Needham*, 1 *Brownl. & Gouldsborough* 163. 38 *E.* 3. 4. 13 *Jic. Hitchins* and *Glover's Caſe*, 1 *Rolls* 191. 4 *Eliz. Dyer* 217. 33 *H.* 6. 24. 6 *Co.* 49. *b.* 7 *Co.* 26. Whether the Poſſeſſion be by a formal Induction, Inſtallation, or otherwiſe.

Firſt then of a Clergyman's being legally entituled to an Eccleſiaſtical Benefice or Promotion, there follows this immediate Effect, that ſuch Clergyman is at leaſt thereby an Eccleſiaſtical Secular Body Politick, or Corporation ſole, or a Member of an Eccleſiaſtical Secular Body Politick, or Corporation aggregate, or both, 3 *Inſt.* 202. (for Eccleſiaſtical regular Bodies Politick are extinguiſhed within this Realm, ſuch were Abbot and Covents) A Clergyman by being made a Biſhop, Prebend, Parſon, Vicar, or the like, becomes a Corporation ſole, 1 *Rolls Abr.* 512. *a.* By being made Member of a Chapter, he is a Member of a Corporation aggregate, for ſuch is a Dean and Chapter, and all other Corporations conſiſting of many, 1 *Rolls Abr.* 512. *a.* And indeed by being made a Dean or Prebend of a Church, if he holds his Poſſeſſions ſingly he is a Corporation ſole, and yet with others he doth make a Chapter, and thereby is a Member of a Corporation aggregate, and ſo the ſame perſon by being Incumbent of the ſame Preferment, may be both a Corporation ſole, and a Member of a Corporation aggregate. A Corporation aggregate is ſaid to be inviſible, immortal and to reſt only in intendment and conſideration of Law, and therefore can have neither Predeceſſor nor Succeſſor, nor can they commit Treaſon, be outlawed or excommunicated, 45 *E.* 3. 2, 3. *b. fits Corporations, &c.* 11. They cannot appear in perſon, but by Atturnies, nor do Fealty, becauſe being an inviſible Body cannot appear in perſon, 13 *H.* 8. 12. And the continuance of either ſort of Corporation doth not depend upon the preſervation of their Poſſeſſions, as is ſaid, *Paſch.* 40 & 41 *Eliz. the Dean and Chapter of Norwich Caſe*, 3 *Co.* 75. for a Corporation may be created without Lands, and though a Dean and Chapter ſhould part with all their Poſſeſſions, yet they remain ſtill a Corporation to the purpoſes for which they were inſtituted, they have *Vocem in Capitulo, &c. Hill.* 3 *Car. B. R. Hayward* v. *Fulcher*, *Jones* 168. And if the Corps of a Prebend be a Mannor, and nothing elſe, and the Mannor be recovered from him by a Title paramount

paramount, yet this Corporation remains, he is a Prebendary ſtill, and hath *Stallum in Choro & Vocem in Capitulo*, though he hath no Poſſeſſions, 15 *Aſſize* 8. And ſo it is, becauſe by the Biſhop's conſent they were incorporated before they had Poſſeſſions, and after had Poſſeſſions aſſigned to them out of ſome of the Poſſeſſions of the Biſhoprick, which before were in common, *Mich.* 40 & 41 *Eliz.* the Caſe of the *Dean and Chapter of Norwich*, 3 *Co.* 75. *b.* 10 *Co.* 28. 25 *Aſſ.* 28. 3 *Cro.* 79.

This Effect of a legal Title, *viz.* of being thereby a Body Politick or Corporate brings with it another Effect, *viz.* that the Corporation may purchaſe or receive to it ſelf and its Succeſſors, any Gift of any Mannors, or other Inheritances, whether corporeal, as Lands and the like, or incorporeal, as Advowſons, Tythes, Rents, Commons, Eſtovers; but a Chapter is not a Body that hath a capacity of its ſelf, to take by Purchaſe, or by Gift without the Dean, who is the Head of their Body, *Eires Caſe*, *Moor* 51. 4 *Leon.* 223. 1 *Inſt.* 263, 264. 13 *H.* 8. 12. 14 *H.* 8. 30. Yet there may be a Chapter without any Dean, as the Chapter of the Collegiate Church of *Southwel*, and Grants by or to them are as effectual as other Grants by Dean and Chapter, and they are reſtrained by the Statute of 13 *Eliz.* though the words of that Statute be, **Deans and Chapters**, *Trin.* 27 *Car.* 2. *C. B. the Chapter of the Collegiate Church of Southwell* v. *the Biſhop of Lincoln and J. S. Mod. Rep.* 204. And a Corporation aggregate may alſo take any Chattel, Bond, Leaſe or the like in its politick Capacity, becauſe it always is in being; but otherwiſe it is, as to Corporations ſole, for regularly as to them no Chattel can go in Succeſſion, 1 *Rolls Abr.* 515. *b.* 4 *Co.* 65. Nor can they take Bond to them and their Succeſſors, *Mich.* 32 *H.* 8. *Dyer* 48. *a. contra* by *Shelley*. Therefore, if a Leaſe for years be made to a Biſhop, or to a Parſon and his Succeſſors it ſhall go to his Executors or Adminiſtrators, for it is as a Leaſe made to a Man and his Heirs, which ſhall go to the Executors, 1 *Inſt.* 46. *b.* accordingly, when a Chantery Prieſt incorporate took a Leaſe to him and his Succeſſors for an hundred years, and after took a Releaſe from the Leſſor to him and his Succeſſors, it was adjudged, that by the Releaſe he had but an Eſtate for Life, for he had the Leaſe at firſt in his natural Capacity, for that it could not go in Succeſſion, and the words (*his Succeſſors*) could not give him an Eſtate of Inheritance in the ſame Capacity he had the Leaſe for want of the words (*his Heirs.*) If the King by his Letters Patents giveth Lands *Decano & Capitulo habendum ſibi & Hæredibus & Succeſſoribus ſuis*; In this caſe albeit they be perſons capable to take in their natural Capacity to them and their Heirs, yet becauſe the Grant is made to them in their politick Capacity, it ſhall enure to them and their Succeſſors; and ſo if the King do grant Lands to *J. S. habendum ſibi & Succeſſoribus ſive Hæredibus ſuis*, this Grant ſhall enure to him and his Heirs, 1 *Inſt.* 9. *a.* But if the King grant to *J. S.* Parſon of *D.* and his Succeſſors, and to *J. S.* Clerk, and his Heirs, in this caſe he is Tenant in Common with himſelf, 1 *Inſt.* 190. *a.*

As to a Corporation receiving or purchaſing Lands or the like, theſe things are to be noted. Firſt, that a Corporation cannot be ſeiſed in Tail, for that every Eſtate in Tail ought to limit of what Body their Heirs ſhall be, but it may have an Eſtare in Fee determinable upon the death of a Perſon without Iſſue, *&c.* Secondly, A ſole Corporation may be ſeiſed of a Freehold for its own Life, but not a Corporation aggregate, becauſe it never dies. Thirdly, A Corporation cannot be ſeiſed to the uſe of another, and therefore if one by Licenſe without a valuable conſideration makes a Feoffment, levieth a Fine, or ſuffers a Recovery or the like to a Corporation, and no uſe is limited the Corporation ſhall be ſeiſed to their own uſe; or if an Uſe be limited

to

to ſome certain perſon, yet the Corporation ſhall be ſeiſed to their own uſe, and not to the uſe of him to whom the Uſe is declared, 1 *Co. fol.* 122, 126. Fourthly, If Lands be given to a Corporation aggregate of many, it muſt be by Deed; but to a ſole Corporation they may be granted without Deed, and ſo may all other things that will paſs without Deed to a Perſon in his natural capacity, 1 *Inſt.* 94. *b.* Fifthly, If Lands be granted to, or purchaſed by a Corporation aggregate, as Dean and Chapter *&c.* they have a Fee Simple without the word, *Succeſſors*, for that the Body never dies, 19 *H.* 6. 74. 20 *H.* 6. 36. 1 *Inſt.* 94. *b.* But if they be given to, or purchaſed by a ſole Body Politick or Corporate, as Biſhop, Parſon or the like, who after their deceaſes have a Succeſſion; there to give him an Eſtate of Inheritance in his Politick or Corporate Capacity, he muſt have theſe Words, *his Succeſſors*; for as the Heir doth inherit to the Anceſtor, and the Executors ſucceed to the Teſtator, ſo doth the Succeſſor ſucceed to the Predeceſſor; and yet even in the Caſe of a ſole Corporation a Fee Simple ſhall ſometimes paſs without this word, *Succeſſors*, as if a Feoffment in Fee be made of Land to a Biſhop or the like, to have and to hold to him *in libera Eleemoſyna*, a Fee Simple doth paſs without the word, *Succeſſors*; for ſuch Grants in Frankalmoign are ancient Grants, and therefore ſhall be allowed, as the Law was taken when ſuch Grants were made, *Plowd. Com.* 242. *Lord Berkley's Caſe*, 1 *Inſt.* 94. *b.* Sixthly, Although a Corporation hath a Capacity to purchaſe, and receive any manner of Inheritance as is ſaid, yet can they not retain it unleſs a due Licence of Mortmain be obtained for the ſecuring it to them, that is, both of the King, the Lords mediate and immediate. And if the King and all the Lords mediate and immediate do grant a Diſpenſation of the Statute of *Quia emptores terrarum*, 18 *E.* 1. this ſhall ennure to two intents, *viz.* to a Diſpenſation both of the ſaid Statute, and of the Statutes of Mortmain, becauſe their Deeds ſhall be taken moſt ſtrongly againſt themſelves; But it is a ſafe and good Policy in the King's Licence to have a *Non obſtante* alſo of the Statutes of Mortmain, and not only a *Non obſtante* of the Statute of *Quia Emptores terrarum*, 18 *E.* 1. But it appeareth by *Littleton*, that there needeth not any *Non obſtante* of the Statutes of Mortmain, for the King ſhall not be intended to be miſconuſant of the Law, and when he licenſeth expreſly to alien to an Abbot, *&c.* which is in Mortmain, he needs not make any *Non obſtante* of the Statutes of Mortmain, for it is apparent to be granted in Mortmain, and the King is the Head of the Law, and therefore *Præſumitur Rex habere omnia Jura in ſcrinio pectoris ſui* for the Maintenance of his Grant to be good according to the Law, 1 *Inſt.* 99 *a.*

And as to the King's Licence it hath been Enacted, **That if Prelates, Clerks beneficed, or religious People which have purchaſed Lands, and the ſame have put to Mortmain, be impeached upon the ſame before our Juſtices, and they ſhew our Charter of Licence, and Proceſs thereupon made by an Inqueſt of** Ad quod damnum, **or of our Grace, or by Fine, they ſhall be freely let in peace without being further impeached for the ſame purchaſe. And in caſe they cannot ſufficiently ſhew, that they have entred by due Proceſs after Licence to them granted in general or in ſpecial, that they ſhall be well received to make a convenient Fine for the ſame, and that the Enquiry of this Article ſhall wholly ceaſe, according to the accord compriſed in this Parliament,** Stat. 18 E. 3. cap. 3. And if the King who gave the Licence doth dye before Execution thereof, yet it may be executed after, 1 *Inſt.* 52. *b.* If an Eccleſiaſtical perſon hold Lands by Fealty and certain Rent, the Lord may confirm his Eſtate to hold to him and to his Succeſſors in Frankalmoign, for the former Services

be extinct, and nothing is reserved, but that he holds of him, and so he did before, 1 *Inst.* 99. *a.* and this it seems without other Licence.

And as to this Matter divers other Statutes have been made; the first upon which all the rest are built and have dependance, is, *Stat.* 9 *H.* 3. *c.* 36. The words of which are, **It shall not be lawful from henceforth to any to give his Lands to any Religious house, and to take the same Land again to hold of the same house. Nor shall it be lawful to any house of Religion to take the Lands of any, and to lease the same to him of whom he received it: If any from henceforth give his Lands to any Religious house, and thereupon be convict, the gift shall be utterly void, and the Land shall accrue to the Lord of the Fee.**

But Religious Men found out divers ways to avoid this Statute, as by purchasing Land held of themselves, or to take long Leases for years, and many other devices to escape out of this Statute; and besides, all others except only Ecclesiastical Persons regular, as Abbots, *&c.* thought themselves to be out of this Statute. Therefore to meet with these Evasions was made this Statute, 7 *Ed.* 1. which is as followeth: **Where of late it was provided, that Religious men should not enter into the Fees of any without Licence and Will of the chief Lord of whom such Fees be holden immediately: And notwithstanding such Religious men have entred as well into their own Fees, as in the Fees of other men, appropying and buying them, and sometime receiving them of the gift of others, whereby the Services that are due of such Fees, and which at the beginning were provided for defence of the Realm, are wrongfully withdrawn, and the chief Lords do leese their Escheats of the same: We therefore to the profit of our Realm, intending to provide convenient remedy, by the advice of our Prelates, Earls, Barons, and other our Subjects, being of our Council, have provided, made and ordained, that no person, religious or other, whatsoever he be, that will buy or sell any Lands or Tenements, or under the colour of gift or lease, or that will receive by reason of any other title, whatsoever it be, Lands or Tenements, or by any other Craft or Engine will presume to approve to himself, under pain of forfeiture of the same, whereby such Lands or Tenements may any wise come into Mortmain. We have provided also, that if any person, religious or other, do presume either by craft or engine to offend against this Statute, it shall be lawful to us and other chief Lords of the Fee immediate to enter into the land so aliened, within a year from the time of the alienation, and to hold it in Fee, and as inheritance. And if the chief Lord immediate be negligent, and will not enter into such Fee within the year, then it shall be lawful to the next chief Lord immediate of the same Fee, to enter in the same land within half a year next following, and to hold it as before is said; and so every Lord immediate may enter into such land, if the next Lord be negligent in entring into the same Fee, as is aforesaid. And if all the chief Lords of such Fees being of full age, within the four Seas, and out of Prison, be negligent or slack in this behalf, We immediately after the year accomplished from the time that such purchases, gifts or appropriations hap to be made shall take such lands and tenements into our hand, and shall infeoff other therein by certain services to be done to us for the defence of our Realm; saving to the chief Lords of the same fees their Wards and Escheats, and other services thereunto due and accustomed. And therefore we command you, that ye cause the foresaid Statute to be read before you, and from henceforth to be kept firmly and observed. Witness my self at Westminster, the fourteenth day of** November, **the seventh year of our Reign.**

This

This Statute is to be underſtood of ſuch Inheritances as may be holden, for of ſuch Inheritances as are not holden, as Villains, Rents Charges, Commons and the like, the King ſhall have them preſently by a favourable Interpretation of the Statute; and this Statute doth extend as well to temporal Corporations ſole or aggregate, as Eccleſiaſtical; but an Annuity granted to them is not Mortmain, becauſe it chargeth the Perſon only, not the Land, 1 *Inſt. fo.* 2. *b.*

But this Statute extending only to Gifts, Alienations, and other Conveyances, made between them and others, they gave over that way; but then pretending a Title to the Land (that they meant to get) brought a feigned Action againſt the Tenant of the Land, and he by Conſent and Colluſion ſhould make default, and thereupon they ſhould recover the Land and enter by Judgment at Law, but this Evaſion was provided againſt in theſe words, **When Religious men and other Eccleſiaſtical perſons do implead any, and the party impleaded maketh default, whereby he ought to leeſe the Land, foraſmuch as the Juſtices have thought hitherto, that if the party impleaded make default by colluſion, that where the Demandant, by occaſion of the Statute, could not obtain ſeiſin of the Land by title of gift, or other alienation, he ſhall now by reaſon of the default, and ſo the Statute is defrauded. It is ordained by our Lord the King, and granted, that in this caſe, after the default made, it ſhall be inquired by the Country, whether the Demandant had right in the thing demanded or no; and if it be found that the Demandant had right in his demand, the Judgment ſhall paſs with him, and he ſhall recover ſeiſin; and if he hath no right, the Land ſhall accrue to the next Lord of the Fee, if he demand it within a year from the time of the Inqueſt taken. And if he do not demand it within the year, it ſhall accrue to the next Lord above, if he do demand it within half a year after the ſame year. And ſo every Lord after the next Lord ſhall have the ſpace of half a year to demand it ſucceſſively, until it come to the King, to whom at length, through default of other Lords, the Land ſhall accrue. And to challenge the Jurors of the Inqueſt, every of the chief Lords of the Fees ſhall be admitted, and likewiſe for the King, they that will ſhall challenge. And after the Judgment given, the Land ſhall remain clear in the King's hands, untill it be dereigned by the Demandant, or ſome other chief Lord, and the Sheriff ſhall be charged to anſwer therefore at the Exchequer.** Stat. 13 Ed. 1. cap. 32.

Nothwithſtanding all theſe Statutes they after procured Lands to be conveyed to divers perſons and their Heirs to the uſe of them and their Succeſſors, by reaſon whereof they took the Profits; but a ſtop was put to this Practice by another Statute as followeth, **Whereas it is contained in the Statute** De religioſis, **that no religious, nor other whatſoever he be, do buy or ſell, or under colour of gift, or term, or any other manner of title whatſoever, receive of any man, or in any manner by gift or engine, cauſe to be appropriated unto him any Lands or Tenements, upon pain of Forfeiture of the ſame, whereby the ſaid Lands and Tenements in any manner might come to** Mortmain. **And if any religious, or any other, do againſt the ſaid Statute by art or engine in any manner, that it be lawful to the King, and to other Lords upon the ſaid Lands and Tenements to enter, as in the ſaid Statute doth more fully appear. And now of late by ſubtil imagination, and by art and engine, ſome religious perſons, Vicars and other ſpiritual perſons, have entred in divers Lands and Tenements, which be adjoyning to their Churches, and of the ſame by ſufferance and aſſent of the Tenants have made Churchyards, and by Bulls of the Biſhop of Rome, have dedicated and hallowed the ſame, and in them do make continually Parochial burying without licence**

of the King and of the Chief Lords: therefore it is declared in this Parliament, That it is manifestly within the compass of the said Statute. And moreover it is agreed and assented, that all they that be possessed by feoffment, or by other manner, to the use of religious people, or other spiritual persons, of Lands and Tenements, Fées, Advowsons, or any manner other possessions whatsoever, to amortise them, and whereof the said religious and spiritual persons take the profits, that betwixt this and the Feast of St. Michael next coming, they shall cause them to be amortised by the licence of the King and of the Lords, or else that they shall sell and alien them to some other use between this and the said Feast, upon pain to be forfeited to the King, and to the Lords, according to the form of the said Statute of Religious, as Lands purchased by religious people. And that from henceforth no such purchase be made, so that such religious or other spiritual persons take thereof the profits, as afore is said, upon pain aforesaid. And that the same Statute extend and be observed of all Lands, Tenements, Fees, Advowsons, and other Possessions purchased, or to be purchased to the use of Guilds or Fraternities. And moreover it is assented, because Mayors, Bailiffs, and Commons of Cities, Boroughs, and other Towns which have a perpetual Commonalty, and others, which have Offices perpetual, be as perpetual as people of Religion, that from henceforth they shall not purchase to them, and to their Commons or Office, upon pain contained in the said Statute De Religiosis. And whereas others be possessed, or hereafter shall purchase to their use, and they thereof take the profits, it shall be done in like manner as is aforesaid, of people of Religion, Stat. 15 R. 2. cap. 5.

And after all these, then was made the Statute of 23 H. 8. cap. 10. as followeth, Where by reason of Feoffments, Fines, Recoveries, and other Estates and Assurances, made of Trust, of Manors, Lands, Tenements and Hereditaments, to the use of Parish Churches, Chapels, Churchwardens, Guilds, Fraternities, Commonalties, Companies or Brotherheads erected and made of devotion, or by common assent of the people without any Corporation, and also by reason of Feoffments, Fines, Recoveries, Wills and other Acts made to any uses aforesaid, or to the uses and intents to have Obites perpetual, or a continual service of a Priest for ever, or for threescore or fourscore years, founden of the Issues and Profits of the Manors, Lands, Tenements and Hereditaments, whereof such Feoffments, Fines, Recoveries, Wills and other Acts been made, or that the Feoffees, Conisees, Recoverers, or other persons and their Heirs thereof seized, shall take, levy, receive and perceive, or cause or suffer to be taken, levied and perceived the Issues, Revenues and Profits thereof, and the same to dispose, pay, convert or otherwise imploy or suffer, or cause to be disposed, paid, converted or employed to any such uses, intents or purposes, as been above specified, or to any other like uses or intents: there groweth and issueth to the King our Sovereign Lord, and to other Lords and Subjects of the Realm, the same like losses and inconveniencies, and is as much prejudicial to them, as doth and is in case where Lands be alienes to Mortmain.

Be it therefore enacted by the King our Sovereign Lord, the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by authority of the same, that all and every such uses, intents and purposes, of what name, nature or quality they shall be called, that shall be devised, covenanted, made, declared or in any wise ordained, after the first day of March, in the three and twentieth year of the Reign of our Sovereign Lord King Henry the Eighth, by any Feoffee, Recoverer or Conisee, or by any other person or persons to whose use any such Feoffee, Recoverer or

Conisee

Conisee shall be seized of any Manors, Lands, Tenements or Hereditaments, or of the Issues, Revenues and Profits of them or any of them, shall be utterly void and of no strength, virtue nor effect in the Law.

Provided alway, That it shall be lawful to every person being seised of any Manors, Lands, Tenements or Hereditaments, to his own proper use, or having Feoffees, Recoverers or Conisees to his use, to make or ordain, or devise, or cause to be made, ordained or devised any of the uses, intents or purposes above specified, in such manner as they might have done before the making of this Act, and as if this Act had never been had ne made; So that no such uses, intents or purposes to be so made, ordained or devised after the said first day of March, be not in any wise made, ordained, devised or appointed to endure, continue or abide by any craft, colour, terms, sentences, clauses, words or other means above the term of twenty years next after the first making and beginning of any such uses, intents or purposes.

And it is farther enacted, That if any person or persons in defraud of this Statute, bind or ordain any their Heirs or Successors, or any other person or persons, that they shall suffer such uses, intents or purposes to endure and continue, contrary to this Act, upon pains or penalties of losses of any other Lands, Tenements, Hereditaments, or of any other thing or things: or do attempt or devise by any colour, craft or means, any thing or things, to make any such uses, intents or purposes to be declared, contrary to the true meaning of this Act, to continue or abide for any longer time or season than is above limited for the same, that then every such pain, penalty, craft, colour, and every other thing and things, of what kind, nature or quality soever it be that shall be so made, ordained or devised in defraud of this Act, shall be utterly void in the Law to all intents. And that this Statute shall be always interpreted and expounded as beneficially as may be, to the destruction and utter avoiding of such uses, intents and purposes therein above remembred, and of all other like uses and intents, otherwise than only after such manner as is afore by this present Act provided.

Provided alway, That in such Cities and Towns corporate, where by their ancient customs they have good and lawful authorities to devise into Mortmain the Lands, Tenements and Hereditaments within the same Cities or Towns corporate, that this Act shall not be in any wise prejudicial or hurtful to any such custom, 23 *H.* 8. c. 10.

But notwithstanding this or any of the before mentioned Statutes, any Man at this day may give Lands, Tenements, or Hereditaments to any person or persons and their Heirs, for the finding of a Preacher, maintainance of a School, relief and comfort of maimed Soldiers, sustenance of poor People, reparations of Churches, High-ways, Bridges, Cawsies, discharging of poor Inhabitants of a Town of common Charges, for making of a Stock for poor Labourers in Husbandry and poor Apprentices, and for the Marriage of poor Virgins, or for any other charitable uses; see the several Statutes of 31 *Eliz.* c. 7. 39 *Eliz.* c. 5. 43 *Eliz.* c. 4. And it is good Policy upon any Feoffment, *&c.* to such charitable uses, to reserve a small Rent to the Feoffor and his Heirs, or to express some such consideration of some small sum, for then the Feoffees shall be seised to their own use, and not to the use of the Feoffor, and so will be put out of doubt, that the Statute of 23 *H.* 8. cannot make void the use, *Mich.* 34 and 35 *Eliz. the Queen and Porter's Case,* 1 *Coke* 24 *b. Pasch.* 13 *Jac. the Case of the Master and Fellows of Magdalen Colledge* 11 *Coke* 70. Also notwithstanding any of the aforesaid Statutes, by the custom of the City of *London,* any Citizen being a Freeman of *London,* by his Will in Writing, may devise all his Leases, and Lands, or any part thereof in the said City

City in Mortmain without Licenſe, *Dr. and Student Ch.* 10. *Mich.* 14 *Jac. Standiſh* v. *Short*, *Bridgman* 103. *Paſch.* 28 *and* 29 *H.* 8. *Dyer* 33. but then the Citizen muſt be reſident there, and taxable to Scot and Lot, *Roll's Abr.* 1 556. 45 *Ed.* 3. 26 *Br. Cuſtoms* 7. 38 *Aſſ.* p. 18. upon an Alienation in Mortmain an entry is given to the Lord of whom the Land is holden, and the King can hold of none, but all Lands ought immediately or mediately to be held of him; yet if it appear in any Conveyance, that an Eſtate is granted to the King with an intent to convey it in Mortmain, it is not good, 17 *Ed.* 3.

And for the Augmentation of poor Benefices with Cure it hath been Enacted, That every Owner or Proprietor, Owners or Proprietors of any Impropriation, Tythes, or portion of Tythes, in any Pariſh or Chappelry within the Kingdom of England, or Dominion of Wales, is, are, and ſhall be by vertue of this Act, inabled and impowred to give or beſtow, unite and anner the ſame, or any part thereof, unto the Parſonage or Vicarage of the ſaid Pariſh Church or Chappel where the ſame do lie, or ariſe, or ſettle the ſame in Truſt for the benefit of the ſaid Parſonage or Vicarage, or of the Curate and Curates there ſucceſſively, where the Parſonage is Impropriate, and no Vicar indowed according to his or their reſpective Eſtates, without any Licence of Mortmain; any Law or Statute to the contrary notwithſtanding.

And be it further enacted, That if the ſettled maintenance of ſuch Parſonage, Vicarages, Churches and Chappels ſo united, or of any other Parſonage or Vicarage with Cure in the Kingdom of England, or Dominion of Wales, ſhall not amount to the full ſum of one hundred pounds per annum, clear and above all charges and repriſes, That then it ſhall be lawful for the Parſon, Vicar and Incumbent of the ſame, and his ſucceſſors, to take, receive, and purchaſe to him and his ſucceſſors, Lands, Tenements, Rents, Tythes, or other Hereditaments, without any Licenſe of Mortmain; any Law or Statute to the contrary notwithſtanding, Stat. 17 Car. 2 c. 3.

It is alſo Enacted, That whereas it would be a great hinderance to Learning and other good and charitable Works, if perſons well inclined, may not be permitted to found Colleges or Schools for Encouragement of Learning, or to augment the revenues of Colleges and Schools already founded, by granting Lands, Tenements, Rents, or other Hereditaments to ſuch Colleges or Schools, or to grant Lands or other Hereditaments to other bodies Politick or Incorporated now in being, or hereafter to be Incorporated for other good and publick Uſes. Be it therefore Enacted, by the King's moſt Excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by Authority of the ſame, that it ſhall and may be lawful to and for the King, our moſt gracious Sovereign Lord, and for his Heirs and Succeſſors, when and as often, and in ſuch caſes as his Majeſty his Heirs or Succeſſors ſhall think fit to grant to any perſon or perſons, bodies Politick or Corporate, their Heirs and Succeſſors, licenſe to alien in Mortmain. And alſo to purchaſe, acquire, take, and hold in Mortmain in perpetuity or otherwiſe, any Lands, Tenements, Rents, or Hereditaments, whatſoever of whomſoever the ſame ſhall be holden. And it is hereby declared, that Lands, Tenements, Rents or Hereditaments, ſo alienedor acquired, and licenſed, ſhall not be ſubject to any forfeiture for or by reaſon of ſuch alienation or acquiſition, Stat. 7 and 8 W. 3. cap. 37.

CHAP.

CHAP. XXXIX.

Freehold of the Church and Church-yard in whom. Intereſt in and diſpoſing Seats in the Church, &c. *Endowment of Vicaarges, and of the diſtinct Rights of the Parſon and Vicar.*

A Second effect of a Clergyman's being a complete Incumbent of an Eccleſiaſtical Benefice, is, That the Church and profits of the Church, are actually veſted in him, ſo that he may enter upon, and convert the profits to his proper uſe, but yet he may not have right to all the profits that do belong to his Church.

As to which to ſpeak particularly, it muſt be known, that after a Rector hath poſſeſſion of a Rectory (eſpecially where there is no Vicar) the Soil, and Free-hold of the Church it ſelf, and Church-yard belonging to the Rectory, is in the Rector, 11 *H.* 4. 12. *Hill.* 12 *Jac. B. R. Frances* v. *Ley*, 2 *Croke* 367. but the Fee-ſimple of the Glebe, *&c.* are ſaid to be in Abeyance, 1 *Inſt.* 341 *a.* And by his Leaſe of the Parſonage, the Church and Church-yard do paſs; and if the Walls, Windows or Doors of the Church be broken, by any perſon, or the Trees in the Church-yard be cut down, or Graſs there be eaten up by a Stranger, the Inumbent of the Rectory (or his Tenant if they be let) may have his Action for the Damage, 21 *H.* 7. 21. *Br. Treſpaſs* 210. 38 *H.* 6. 19. 11 *H.* 4. 12. *Br. Dean and Chapter* 3. 12. *and ſee* 8 *H.* 6. *fol.* 9. where the Leſſee at will of a Parſon brought his Action of Treſpaſs for breaking his Cloſe and Houſe, which was the Church and Church-yard, and admitted to be maintainable: And ſaith *Rolls*, it ſeems by the Book, that it was for coming there, not in time of Divine Service, *&c.* but at ſome other time, *Roll's Abr.* 2. p. 337.

And becauſe the Soil and Free-hold of the Church, is in the Parſon alone, and that the Church is not, as the Church-yard is, a common Burial place for all the Pariſhioners, the Church wardens, or Ordinary himſelf, cannot grant Licenſe of burying to any perſon within the Church, but only the Rector, or Incumbent thereof, *Hill.* 12 *Jac. B. R. Frances* v. *Lee*, 2 *Croke* 366. *Mich.* 12 *Jac. Day* v. *Beddingfield*, *Noy* 104. yet the Church-wardens by cuſtom may have a Fee for every Burial within the Church, by reaſon the Pariſh is at the charge of repairing the Floor, *Mich.* 27 *Car.* 2. *Andrews* v. *Symſon*, 3 *Keble* 504. 523. 527. 1 *Ventris* 274. and though the Church and Church-yard be the Parſons and be Conſecrated, yet a man may preſcribe to have a Way through the Church or Church yard, *Roll's Abr.* 2. 265.

And concerning the Parſons Right to Trees growing in the Church-yard, it hath been Eſtabliſhed as followeth, which *Coke* ſays is but a Declaration of the Common Law, 11 *Co.* 49. **Becauſe we do underſtand, that controverſies do oft times grow between Parſons of Churches and their Pariſhioners, touching Trees growing in the Church yard, both of them pretending that they do belong unto themſelves: We have thought it good rather to decide this controverſie by writing than by Statute; foraſmuch as a Church yard that is dedicated, is the ſoil of a Church, and whatſoever is planted belongeth to the ſoil, it muſt needs follow that thoſe Trees which be growing in the Church-yard, are to be reckoned amongſt the goods of the Church, the which Lay-men have no authority to diſpoſe: but as the Scripture doth teſtifie, the charge of them is committed only to Prieſts to be diſpoſed of.**

And

And yet seeing those Trees be often planted to defend the force of the wind from hurting of the Church; We do prohibit the Parsons of the Church, that they do not presume to fell them down unadvisedly, but when the Chancel of the Church doth want necessary reparations. Neither shall they be converted to any other use, except the body of the Church doth need like repair: In which case the Parsons of their charity shall do well to relieve the Parishioners with bestowing upon them the same Trees: which we will not command to be done, but we will commend it when it is done, Stat. 35. Ed. 1. An. 1307.

If the Trees be cut down by any but the Incumbent, he may sue such Trespasser in the Spiritual Court to have him punished there, but not for damage, *Mich.* 13 *Jac. Bellamies Case*, *Roll's* 1 *Rep.* 255.

Though it doth generally hold true, that the Soil and Free-hold of the Church is in the Incumbent thereof, yet if any Inhabitant and his Ancestors only, and none other, have used time out of mind to repair an Isle of the Church, and to sit there, with his Family to hear Divine Service, and to bury there, this makes the Isle proper and peculiar to his House, and he cannot be displaced, or interrupted by the Parson, Church-wardens, or Ordinary himself. But the constant sitting, and burying there without using to repair it, doth not gain any peculiar property, or preheminence therein, so that such Isle being repaired by the Parishioners in common, the Parsons, Parishioners, and Ordinaries Rights remain to them, *Corven's Case*, 12 *Coke* 105, *Hil.* 12 *Jac. B. R. Frances* v. *Ley*, 2 *Croke* 366, *Bootley* and *Bayly's Case*, *Hobart* 69, *Trin.* 10 *Jac. C. B. Garven* v. *Pim*, *Godbolt* 200 *Mich.* 11 *Jac. May* v. *Gilbert*, 2 *Bulstrode* 150, *Mich.* 12 *Jac. Day* v. *Beddingfield &c. Noy* 104 *Mich.* 17 *Jac. Dawtree* v. *Dee*, *Palmer* 46. For the reason of any persons propriety in an Isle, is from the prescription to repair and use it alone, because it is from thence presumed, that the Isle was Erected, by him whose Estate he hath, with the assent of the Parson, Patron, and Ordinary, to the intent to have it only to himself, as is said in *Corven's Case* 12 *Coke* 105. *Mich.* 10 *Jac. Prin.* v. *Gorvin Moor* 178.

When any person hath good title to an Isle adjoning to a Church, if the Ordinary doth place another person in a Seat therein with the Proprietor, the Proprietor may have his Action upon the Case against the Ordinary, and if he be impleaded in the Spiritual Court for such Seat, a Prohibition will lye, by *Coke*, *Trin.* 10 *Jac. C. B. Garven* v. *Pin*, *Godbolt* 200. or if any private person doth sit in such Seats, or keep out him that hath the Right, or doth bury his dead there without his consent, an Action upon the Case doth well lye for the Proprietor, *Trin.* 10 *Jac. Dawney* v. *Dee and others*, 2 *Croke* 604. And yet it seems that the Free-hold of such Isle is only in the Incumbent, *Dawtree* and *Dee's Case*, *Trin.* 18. *Jac. Palmer* 46.

Though the Free-hold of the Body of the Church be in the Incumbent thereof, and the Seats therein be fixed to the Free-hold; yet because that the Church is dedicated to the Service of God, and is for the use of the Inhabitants, and the Seats are erected for their more convenient attending upon Divine Service, the use of them is common to all the people that pay to the repair thereof: And for this reason, if any Seat though affixed to the Church be taken away by a Stranger, the Church-Wardens (and not the Parson) may have their Action against the wrong doer, 8 *H.* 7. 12. But the authority of appointing what persons shall sit in each Seat, is in the Ordinary, who is to take care, to order all things appertaining to Divine Service, so that the Service of God may be best Celebrated, that there be no contention in the Church, and that all things be done Decently and in Order; for he having the

the cure of Souls, is preſumed by the Law, to be a perſon that will have a prudent regard to the qualities of men in this caſe, and to give precedence to ſuch as ought to have it, and with this agrees 8 *H.* 7. 12. *and Corven's Caſe* 12 *Coke* 105. and by *Hutton Paſch.* 4 *Car. C. B. Eaton* v. *Ayliff, Hetley* 94. and by *Coke, Brownlow* and *Gouldsborough* 1 p. 45. and by *Coke* in *Garven* and *Pim's Caſe, Trin.* 10 *Jac. Godbolt* 200. *Mich.* 11 *Jac. B. R. May* v. *Gilbert* 2 *Bulſtrode* 150. *Boothly* and *Bayly's Caſe, Hobart* 69. 'Tis ſaid indeed in *Pim* and *Gorwin's Caſe, Mich.* 10 *Jac. Moor* 878. to be held by the Juſtices, that Seats in the body of the Church are diſpoſable by the Parſon and Church-wardens. But this may be underſtood in ordinary Caſes, when no contention, or diſſatisfaction is about this matter, and the Ordinary will not interpoſe becauſe none complain, or elſe this caſe is miſreported For all the Books are, that generally ſpeaking, the power of diſpoſal of Seats in the body of the Church is in the Ordinary, and ſo it is ſaid to be held by the Juſtices in this very Caſe, according to *Coke's* Report of it, where it is called *Corven's Caſe,* 12 *Coke* 105. and according to *Godbolt's* Reports 200. where it is called *Garven* and *Pim's* Caſe. But by cuſtom the Church-wardens may have the ordering of the Seats, as in *London,* which by the like cuſtom may be in other places, as was admitted in *Langley* and *Chute's* Caſe, *Hill.* 30 *and* 31. *Car.* 2 *C. B. Raymond* 246. *Brabin* v. *Tredennick Paſch.* 16 *Jac. B. R. Roll's* 2 *Abr.* 288. *N.* 7. *Poph.* 140. *ſame caſe Roll's* 2 *Rep.* 24.

If a Lay-man by the diſſolution of Monaſteries hath a Monaſtery in which is a Church parcel of it, and he ſuffer the Pariſhioners for 60 Years to come thither to hear Divine Service, and to uſe it as their Pariſh Church, that ſhall give Juriſdiction to the Ordinary to diſpoſe of the Seats, becauſe, in fact by the conſtant uſage and ſufferance of the Proprietor, it is become the Pariſh Church, although before it was not ſubject to the Juriſdiction of the Ordinary, *Quære.* But if the Proprietor, or Patron himſelf, hath uſed to diſpoſe of and order the Seats, by placing Perſons therein, in ſuch Caſe the Ordinary cannot diſplace ſuch Perſons, becauſe, the Proprietor, or Patron hath uſed during all the time that it hath been uſed as a Pariſh Church to have the placing in the Seat. *Trin.* 12 *Jac. Buzard's Caſe, Roll's* 2 *Abr.* 288.

But the great queſtion is, whether all the Seats in that part of the Church which is common to all the Pariſhioners, and repaired by them, be at the diſpoſal of the Ordinary, or whether ſome may not belong to private Perſons ſo that the Ordinary may not diſplace them if he ſee cauſe. Some caſes are, that the Biſhop may diſpoſe of all ſuch Seats; and Firſt, it is ſaid to be held by the Juſtices, that a perſon cannot preſcribe for a Seat in the body of a Church, *Mich.* 10 *Jac. Pim.* and *Gorwin's Caſe Moor* 878. And after when a Prohibition to the Eccleſiaſtical Court was ſued for upon ſurmiſe of a Title by preſcription to a Seat in the common part of the Church, all the Juſtices are ſaid to anſwer, that for the Title, they were not there to meddle with it, this being for a Seat in the Church; And again being further preſſed in the matter, all of them ſaid, that they would not meddle with the deciding of ſuch Controverſies for Seats in the Church, but would leave the ſame to them to whom it more properly belonged; but if the Seat be in an Iſle peculiar to any perſon, the Iſle and Seat being repaired and uſed time out of mind, or the Seat being built in ſuch Iſle by any perſon with the conſent of all *Quorum* Intereſt, remedy for diſturbance ſhall be at Common-Law, *Mich.* 11 *Jac. B. R. May* v. *Gilbert* 2 *Bulſtrode* 150. And it is ſaid, that a Pew cannot belong to an Houſe, *Brownlow* and *Goldsborough* 1 p. 45.

Contrary to this, it is ſaid to be held by the whole Court, that if a perſon hath uſed time out of mind, at his own coſts only to maintain a Pew in re-

pair, and had therefore had the ſole uſe of it, the preſcription is a Warrant for a Prohibition, in caſe ſuch perſon be ſued in the Eccleſiaſtical Court to be diſplaced, though the Pew be Situated in the body of the Church, and that no Man can challenge a Seat as peculiar to himſelf without ſuch ſpecial reaſon, although one Perſon or Family hath uſed time out of mind to ſit in the ſame, and none others, *Boothly* and *Bayly's Caſe*, *Hobart* 69. and by *Coke* in *Garven* and *Pim's Caſe*, *Trin.* 10 *Jac. C. B. Godbolt* 200. *Roll's* 2 *Abr.* 288. *N.* 3. Yet contrary to all the aforeſaid Caſes, it is ſaid by *Coke* to be reſolved generally in the Star-Chamber, *Paſch.* 10 *Jac.* betwixt *Huſſey* and *Cartkarine Leyton* and others, that if a man hath an Houſe in any Pariſh, and that time out of mind, he and all thoſe whoſe Eſtate he hath, have uſed to have a certain Pew in the Church, and the Ordinary will diſplace him, he ſhall have a Prohibition, for if he hath it by Preſcription, he hath as good right in the Seat, as he hath in his Houſe, *Corven's Caſe* 12 *Coke* 106. and this ſeems to be now reſolved and ſetled, *Trin.* 14 *Car.* 2 *and Paſch.* 16 *Car.* 2 *in Buxton and Bateman's Caſe*, 1 *Siderfin* 88. 201. *Raymond* 52. 1 *Keble* 345. *and in the Caſe of Crook and Uxor* v. *Samſam*, *Mich.* 18 *Car.* 2 *B. R.* 2 *Keble* 92. and a difference made between an action of the Caſe for a Diſturbance, and a Prohibition; for in an action of the Caſe, the Plaintiff may intitle himſelf without alledging any Reparations. But to have a Prohibition which is to out the Ordinary of his Juriſdiction, there, reparation ought to be ſhewed: See *Paſch.* 28 *Car.* 2 *B. R. Marchant* v. *Whitpain* 3 *Keble* 754. *Trin.* 23. *Car.* 2 *C. B. Bradbury* v. *Burch*, Sir *Thomas Jone's Reports* 3. 3 *Inſt.* 202.

And it hath been further adjudged, that a perſon may not only claim by Preſcription a Seat as peculiar to him, but the upper part of a Seat, and in the Chancel as well as in the body of the Church, and an Action upon the Caſe lyeth for it at the Common-Law, *Noy* 129. But if there be any contention about the Priority, the Biſhop may inhibit them from making a Diſturbance, until the Controverſie be tryed, *viz.* in the Temporal Court, and excommunicate the Diſturber, *Hatton's Caſe*, *Latch.* 116 *and Hill.* 22 *Jac. Carlton* v. *Hutton*, *Noy* 78 *and Palmer* p. 424. *See Trin.* 14 *Car.* 2 *B. R. Buxton* and *Bateman's Caſe*, 1 *Siderfin* 89.

Now after this to ſpeak my own thoughts, I conceive that the Ordinary had anciently the power of placing the Pariſhioners in ſuch Seats at leaſt as are ſet in that part of the Church repaired by the Pariſhioners, according to 8 *H.* 7. 12. and that Preſcriptions to have Seats as belonging to Houſes, and the Ordinaries power to give Titles (which are the riſe of ſuch Preſcriptions) are but lately talked of; for I cannot find in the old Books any mention of ſuch Titles by Preſcription, or power in the Ordinary. And it ſeems to me, that the Ordinary hath no ſuch power, and that ſuch Preſcriptions are not reaſonable; for firſt, it hath been adjudged, that if an Ordinary doth make a grant of a Seat to one and his Heis, it is not good, and the reaſon given is, That a Seat cannot belong to a perſon but to an Houſe, for otherwiſe when a perſon goes out of a Town to dwell in another place, yet he ſhall retain the Seat, which is unreaſonable, *Paſch.* 16 *Jac. B. R. Brabin and Tradum's Caſe*, *Popham* 140. the ſame Caſe, *Roll's* 2 *Abr.* 288. *N.* 7. So the Queſtion being, whether a Preſcription be good to an Iſle in a Church, as belonging to a Manor where the party had no Dwelling-houſe but only Land? this Queſtion was not reſolved, but the Court inclined that ſuch a Preſcription was not good, *Hill.* 29 *and* 30. *Car.* 2 *C. B. Shambrok* v. *Fettiplace*, 2 *Modern Rep.* 283. And if the Ordinary may not make a grant of a Seat to a Perſon and his Heirs, I ſee not how he can make any ſuch grant to bind Poſterity, for he cannot make a grant to an Houſe (not things but perſons only being capable of grants)

See

See *Haine's Caſe* 12 *Coke* 113. If it be ſaid that the grant may be good to the preſent poſſeſſor of an Houſe, and to the perſons that in after time ſhall be the poſſeſſors of ſuch Houſe, as a priviledge annexed to that Houſe; yet this grant appears to be as unreaſonable, as if it had been made to a Perſon and his Heirs, for if by the Ordinaries grant, it may belong to an Houſe, it muſt belong to the owners of the Houſe, and muſt go with the Houſe, to a perſon and his Heirs; and ſo a grant to the preſent and future poſſeſſors of an Houſe, and to a perſon and his Heirs will have the ſame inconvenience. For the owner of an Houſe may remove into another Pariſh, and have no Tenant, and yet retain the Seat, if it may by ſuch grant belong to an Houſe. And if the Ordinary may appropriate one Seat to an Houſe, he by the ſame reaſon may appropriate all the Seats in a Church to ſeveral Houſes, and ſo no room would be left for the other Inhabitants. And if the beſt and upper Seats only be appropriated, perſons of greater quality could not be ſeated but in inferior and remote places of the Church the beſt Seats by ſuch means being taken up, and it may be only by mean Tenants or Servants living in ſuch Houſes unto which they are ſaid to belong, which are ſhameful inconveniences. Alſo it is ſaid, that though the Free-hold of the Church be in the Incumbent, yet the uſe of the Church to hear Divine Service is common to all the Pariſhioners, *Corven's Caſe* 12 *Coke* 105. And therefore, I ſee no reaſon why the Ordinary ſhould have power to appropriate the uſe of any part thereof to the poſſeſſors of any particular Houſe, (to wit) either by Licenſing any perſon to build a Seat therein for himſelf and the poſſeſſors of his Houſe only, or by granting in ſuch manner any Seat formerly built, ſuch Seat being preſumed to be built at the charge of the Pariſhioners in common, and for their benefit in common. And if the Biſhop hath not ſuch power of granting, I ſee not how a Preſcription to have a Seat as belonging to an Houſe can have any juſt commencement; and if there be no means by which a Title to a Seat can have a legal beginning, it ſeems ſtrange that preſcription ſhould be admitted as the Evidence of that which never could have a legal beginning or being, *viz.* a legal Title; And therefore in my Opinion, according to the firſt ſort of the beforementioned Caſes, it is moſt conſonant to reaſon, that a perſon ſhould not preſcribe for to have a Seat in the common part of the Church as peculiar to his Houſe, and that the Temporal Courts are not ſo proper to meddle with the deciding of Controverſies about ſuch Seats, but that the Ordinary only ought to determine them, and to place the Inhabitants of every Pariſh within his Juriſdiction according to his Diſcretion. Yet if a perſon with his Family only, have uſed time out of mind to ſit in a Seat, and to repair the ſame at his proper coſts, and being ſued in the Spiritual Court to be removed, doth ſurmiſe their ſitting, and repairing; no doubt but that he may obtain a Prohibition, and that ſuch Preſcription will be allowed to be a good Title. But the ſurmiſe of ſitting alone in a Seat, time out of mind, without a ſurmiſe of repairing, will not be ſufficient for a Title to have a Prohibition, as hath been before ſhewed.

But if a Suit be commenced in the Eccleſiaſtical Court for a Seat upon the account of Preſcription, a Prohibition will lye for the party ſued, becauſe, whether the Preſcription be good or not, is not in the Spiritual Court to judge, *Hill.* 5 *Jac. B. R. Noy* 129. and by *Coke* in *Garven* and *Pim's Caſe*, *Godbolt* 200. And it is ſaid, that the Plaintiff in the ſame Suit, if it go againſt him, may, as it ſeems, have a Prohibition as to the coſts, becauſe, the Suit is *Coram non Judice* as to the principal, *Paſch.* 4 *Jac. C. B. Eaton* v. *Ayliff Hetley* 94. But I cannot be ſatisfied with this laſt Opinion, *viz.* that where the Plaintiff Libels in the Spiritual Court upon a Cuſtom or Preſcription, and it be found a-

gainſt him that there is no ſuch Cuſtom or Preſcription, and Coſts given; That he ſhall have a Prohibition to free and diſcharge himſelf from thoſe Coſts, for the Spiritual Court may in ſeveral Caſes proceed upon Libels grounded on Preſcriptions, where the Preſcription is not denied, ſo that ſuch Suits, are not abſolutely *Coram non Judice*. The reaſon why a Prohibition ſhall be granted where the Preſcription or Cuſtom is denied, I take to be, that the notion of Cuſtoms and Preſcription is different by the Eccleſiaſtical Law from what it is at the Common Law as to the time in which ſuch Cuſtom or Preſcription may be created, for the Eccleſiaſtical Law allows of different times in creating Cuſtoms or Preſcriptions, and generally of leſs time than is allowed of by the Common Law, which owns no time in ſuch Caſe, but that whereof there is no memory of man to the contrary. Therefore the Common Law will not ſuffer the Spiritual Courts to try Preſcriptions whereby they might affect and charge perſons Inheritances by adjudging them to be good which by the Common Law are no Preſcriptions. But where the Cauſe doth proceed to Sentence, and the Spiritual Judge doth Decree that there is not any Preſcription ſufficient in their Law, and by conſequence can be none of an elder date allowed by the Common-Law; The reaſon the Common Law proceeds upon in granting Prohibitions in ſuch Suits, totally fails in this caſe, and the Plaintiff ought not to be aided by a Prohibition to diſcharge himſelf from thoſe coſts given againſt him for his groundleſs and vexatious proſecution, and the prohibition can in ſuch caſe be of no other uſe, or to any other purpoſe, than to diſcharge the Plaintiff of thoſe coſts, which both in Law and Conſcience he ought to pay.

Alſo this Title to a Seat is triable at Common Law by Action upon the Caſe, *Hutton*'s *Caſe*, *Latch* 116. and *Hill.* 22 *Jac. Carlton* v. *Hutton Noy* 78. and *Buxton* and *Bateman*'s *Caſe*, 1 *Siderfin* 88 201. and *Bradbury* v. *Burch*, Sir *Tho. Jone*'s *Rep.* 3 and *Marchant* and *Whitpain* 3 *Keble* 754. And it is agreed that the Plaintiff need not ſhew any Reparation in his Declaration, yet he ought to prove Reparation in Evidence, by *Hales Ch. Baron in Stephen*'s *Caſe*, 16 *Car.* 2. 1 *Siderfin* 203. But if a man with the aſſent of the Ordinary doth ſet up a Seat in *Navi Eccleſiæ* for himſelf, and another doth pull down or deface it, Treſpaſs *vi & armis* doth not lye againſt him, becauſe the Free-hold is in the Parſon, and ſo the only remedy is in the Eccleſiaſtical Court, by *Coke* in *Garven* and *Pim*'s *Caſe*, *Trin.* 10 *Jac. Godbolt* 200. ſee *May* and *Gilbert*'s *Caſe*, *Mich.* 11. *Jac. B. R.* 2 *Bulſtrode* 151 *and Mich.* 17 *Jac. B. R. Dawtrie* v. *Dee Palmer* 46. *Roll*'s 2 *Rep.* 139. And yet when an Action of Treſpaſs was brought againſt Church-wardens for a Seat broken down by them, becauſe it was ſet up by a private perſon without the Licenſe of the Ordinary; it was adjudged; that though Church-wardens might well remove Seats in the Church at their pleaſure, yet they cannot cut the Timber of them, and therefore the Actions lyes, *Trin.* 2 *Jac. Gibſon* v. *Wright*, &c. *Noy* 108. I ſhall not queſtion the Law of this Caſe, but thus much is to be ſaid againſt it, that the Free-hold being in another perſon, the annexing of a Seat thereto, ſeems to make the Seat to be a part of the Free-hold, and ſo to be in him in whom the Free-hold is, and the uſe of it in them that have the uſe of the Church; and if ſo, then the breaking the Timber could be no wrong to him that had no legal right in them after they were faſtned to the Free-hold, and became as other Seats of common uſe, and at the diſpoſal of the Ordinary, *vid.* 8 *H.* 7. 12.

If two pretend to have Title to a Seat by Preſcription, and thereupon jointly bring an Action upon the Caſe for a Diſturbance, and declare upon a joint Right and Preſcription, if upon the Evidence it ſhall appear, that they

they are not Joint-tenants, but Tenants in Common; they cannot recover, but muſt be Non-ſuited, for that ſuch Evidence doth not maintain the Title upon which they bring their Action, and as Tenants in common they cannot make a joint Preſcription, but ought to preſcribe ſeverally, by *Lea Haughton* and *Chamberlain* againſt *Croke* and *Dodderidg*, *Paſch.* 19 *Jac. B. R.* Sir *Henry Snelgrave* v. *Brograve*, *Palmer* 161 and *Bendlows* 89.

Another Queſtion may be, whether the Ordinary may place in the Seats erected in the Chancel, which is uſually repaired by the Rector or Proprietor? As to which, 'tis reported, that *Coke* ſaid, That for the body of the Church the Ordinary is to place and diſplace; but the Chancel is the Free-hold of the Parſon, and is parcel of his Glebe, 1 *Brownlow* and *Gouldsborough* 45. By which he ſeems to intend, that the power of placing and diſplacing, as to the Seats in the Chancel, is in the Parſon, and yet no ſuch thing may be collected from his ſaying, that the Free-hold of the Chancel is in the Parſon and is part of his Glebe, for the Free-hold of the Church is alſo in the Parſon, and yet the Ordinary hath the Authority of ſeating therein. Nor is the Parſons repairing the Chancel any reaſon of outing the Ordinary of his Juriſdiction there, as in Iſles or Chancels built by perſons of Quality; becauſe, the Chancels repaired by Rectors, Impropriators, or Appropriators, were with the body of the Church at firſt erected for the uſe of the Pariſhioners; and ſo we ſee they have the uſe of them in Common; the others are for private uſe. And the Parſon by repairing doth no more than what he is bound to do of common Right, nay, by the Canon or Common Law of the Church, the perſon that receives the profits of any Church, is bound to repair the whole Church; and ſo is the practice in all Countreys but in *England*, where cuſtom only doth transferr the Burthen of repairing the body of the Church and fencing of the Church-yard upon the Pariſhioners. The Church-wardens of *Denford's Caſe*, *Noy* 41. and in ſome places (as in *London*) of repairing the Chancels alſo, to which *Lindwood* gives Teſtimony, *De officio Archidiachoni C. Archdiachoni* v. *reparatione & de Eccleſiis Edificandis C. ſi Rector* v. *defectus Eccleſiæ*. And therefore, unleſs it might (as it may not) be truly ſaid, that the Incumbents of Churches in other Countries where they repair the whole, have ſolely the authority of placing, and diſplacing in all Seats that be, or may be in thoſe Churches, there is no reaſon to think, that they are to Seat in the Chancel with us, becauſe, they repair the ſame by the ſame Law and upon the ſame Conſideration, that the Incumbents in Foreign Parts repair the whole Churches, *viz.* of receiving the profits of the Church: Or unleſs it might be truly ſaid, that becauſe the Pariſhioners with us repair the body of the Church, the Biſhop may not meddle to place or diſplace them therein, I ſee no reaſon, but that he may place in the Chancel, although that it be repaired by the Parſon; nay, the reaſon from the Pariſhioners repairing is ſtronger againſt the Ordinary, than from the Parſons repairing: For the Parſon, Appropriator, or Impropriator repair of Common Right (for *opus ibit cum Emolumentis*, is the Canon Law in this Caſe) but Pariſhioners by preſcription only, which might more plauſibly be alledged as the conſideration, or firſt reaſon of ſuch liberty, eſpecially if the Parſon had repaired what they do, ſuch power ſhould have been in him, as it muſt be ſuppoſed to be, if he from repairing hath the right of ſeating in the Chancel; but it appears to be otherwiſe as to the body of the Church: For that if it was originally and of common right in the Parſon, the peoples undertaking that Burthen that would otherwiſe have been on Incumbents, could not place this authority in a third party, *viz.* the Biſhop; and therefore one might conclude, notwithſtanding the Parſons repairing, *&c.* that the Ordinary hath this authority

thority and Juriſdiction of common right, as to both Church, and Chancel, though the Free-hold of both be in the Incumbent, or Incumbents, and the repair of the Chancel be upon the Parſon, and of the body of the Church upon the Pariſhioners; yet the Law as I take it is ſetled to the contrary, that unleſs a Seat be in the body of the Church, the Ordinary hath nothing to do with it, *Buxton* and *Bateman*'s *Caſe*, 1 *Siderfin* 88. However, it is ſaid, that if there be an Impropriator, he, and in conſequence his Farmer of common Right, ſhall have the chief Seat in the Chancel, becauſe, he ought to repair it, but by Preſcription another perſon may have it, as belonging to his Houſe, *Trin.* 7 *Jac.* Sir *Will. Hall.* v. *Ellis*, *Noy* 129. the priviledge of an Impropriator in the Chancel, being by reaſon of his repairing, it is to be known what remedy there is by Law to compell him to repair, if he neglect or refuſe to do it; as to this, I find it ſaid to be the opinion of the Court of Common Pleas, that the Spiritual Court may grant Sequeſtration upon an Impropriate Parſonage for not repairing the Chancel, *Mich.* 29 *Car.* 2. 3 *Keble* 829. yet by another Book 'tis ſaid, that the Court of Common Pleas did incline that there could be no Sequeſtration; for being made Lay-Fee, the Impropriation was out of the Juriſdiction of the Court Chriſtian, and they were only to proceed againſt the Perſon, as againſt another Lay-man for not repairing the Church, *Trin.* 22 *Car* 2 *C. B. Anonimus*, 2 *Ventors* 35. and by the ſame Caſe as reported, 2 *Modern Rep.* 257. 'tis ſaid, that the whole Court beſides *Atkins* were of that opinion, See 1 *Modern Rep.* 258.

As to the repairing of the body of the Church, the Spiritual Court may compel the Pariſhioners to do it, and may excommunicate every one of them till it be repaired, and thoſe that are willing to contribute muſt be abſolved till the greater part agree to make a Tax, but the Spiritual Court cannot Aſſeſs them towards it; neither can the King's Court, or the Juſtices of Peace, or the Church-wardens alone, impoſe a Tax for it, but the Pariſhioners ought to be ſummoned by the Church-wardens to meet and agree to lay a Tax to do it, and if they refuſe or neglect to meet, or to make a Rate, the Church-wardens then, may make a Rate alone if needful; and if a Rate be illegally impoſed, as by a Commiſſion from the Biſhop, *&c.* without the Pariſhioners conſent, yet if it be after aſſented to, and confirmed by the major part of the Pariſhioners that will make it good, *Hill.* 26. *and* 27 *Car.* 2 *C. B. Rogers* v. *Davenant*, 1 *Mod. Rep.* 194 *and* 1 *Ventris* 167. the Church-wardens in ſummoning the Pariſhioners need not do it from Houſe to Houſe, but a general publick Summons at the Church is ſufficient, and the major part of them that appear upon ſuch Summons, will bind the whole Pariſh. If the Church and Chancel be out of Repair, the Pariſhioners are only chargeable to the Repairs of the Church But a libel in the Spiritual Court, or a Tax *pro reparatione Eccleſiæ* is well enough, though the word *Eccleſia*, may include the Chancel as well as the body of the Church, yet ſhall be intended for the Church only; but if any Money raiſed for repairing the Church be laid out upon the Chancel, the Pariſh ought not to allow it to the Church-wardens in their accounts, nor ſhall they be compelled to pay any Tax for the repairs of the Church and Chancel. If the Church be down, and the Pariſh increaſed, ſo that of neceſſity there ought to be a larger Church, the major part of the Pariſh may lay a Tax for the enlarging it, as well as the repairing of it, ſee for theſe matters *Paſch.* 29 *Car.* 2 *C. B.* 1 *Mod. Rep.* 236. 2 *Modern Rep.* 222. *Paſch.* 5 *Car.* 1. *C. B. Webb*'s *Caſe*, *Littleton Rep.* 263. *Poph.* 137.

Though it be before ſaid, fol. 295 that the Free-hold of the Church is in the Incumbent, and that if the Windows of the Church be broken, the Parſon may have his Action for it at the Common Law, yet the Ordinary may deface

face any ſuperſtitious Pictures, as is ſaid by *Wray* Chief Juſtice to have been done in *Pricket*'s Caſe. And if any other do it without the Ordinaries Licenſe, he may be bound to his good behaviour, *Mich.* 12 *Jac. Day* v. *Beddingfield*, *Noy* 104. And this I ſuppoſe is to be extended to the Parſon himſelf; ſo if any Coats of Arms be placed in any Windows, or Graveſtone, or Monument in any Church or Church-yard, neither Parſon, Church-wardens, or Ordinary may break down or deface the ſame; and if any of them do, the Heir by deſcent intereſted in the Coat may have his Action upon the Caſe againſt them, 9 *Ed.* 4. 14. *Mich.* 10 *Jac. B. Pym*'s *Caſe*, *Roll*'s *Abr.* 1 p. 625. *Mich.* 12 *Jac. Day* v. *Beddingfield*, &c. *Noy* 104. *Hill.* 12 *Jac.* B. *R. Frances* v. *Leys*, 2 *Croke* 367. or ſo may the party that ſet them up, being the Executor, although they be fixed to the Free hold of the Parſon, 9 *Ed.* 4. 14. *Corven*'s *Caſe* 12 *Coke* 105. 1 *Inſt.* 18. *b.* But as to Monuments ſet up in the Church, the caſe is to be underſtood of ſuch only, as are ſet up in the Iſles belonging to particular Perſons, according as it is explained by *Coke* in *May* and *Gilbert*'s *Caſe*, *Mich.* 11 *Jac.* B. *R.* 2 *Bulſtrode* 151. *Trin.* 10 *Jac. C. B. Garven* and *Pym*'s *Caſe*, *Godbolt* 200. or if ſet up in any other part of the Church, I ſuppoſe, 'tis to be underſtood, that they were placed there with the Incumbents conſent, but the reaſon given in the caſe aforeſaid, for the ſaid Action, *viz.* becauſe the Church is free to all the Inhabitants to bury in, is not true, for none can bury in the Church without the Parſons conſent, *per curiam Hill.* 12 *Jac.* B. *R. Frances* v. *Ley* 2 *Croke* 367. *Mich.* 12 *Jac. Day* v. *Beddingfield*, *Noy* 104.

However, the Goods of the Church, as Chalice, Surplice, *&c.* do not belong to the Incumbent, but to the Pariſhioners, 11 *H.* 4. 12. and if they be taken away, or broken, the Church-wardens ſhall have their Action of Treſpaſs at the Common Law, *Bellamie*'s *Caſe*, *Rolls* 1 *Rep.* 255. 31 *Ed.* 3. 3. *Br. Corporations*, &c. 55, 73, 84. 11 *H.* 4. 12. 37 *H.* 6. 30. Therefore, when the Parſon ſued in the Spiritual Court for the Organs taken out of the Church, a Prohibition was awarded, *Trin.* 12 *Jac. Bucksale*'s *Caſe*, *Rolls* 1 *Rep.* 77. *Kitchin*'s *Juriſdiction of Courts*, *Title Wardens of Churches*, fol. 387. And if the Church-wardens for the time being neglect to bring an Action for any of the Goods of the Church taken away, their Succeſſors may bring Treſpaſs for them in reſpect of their Office, as was reſolv'd *per Curiam*, *Hill* 31. *Eliz. C. B. Church-wardens of Fotherſton*'s *Caſe*, 1 *Leonard* 177. But then the new Church-wardens muſt ſay, *ad damnum parochianorum*, and not *ipſorum*, tho' the old Church-wardens in whoſe time the goods were taken might ſay either, *Paſc.* 32. *Eliz. B. R. Hadman and Green* v. *Ringwood* 3 *Crooke* 179. 8 *Ed.* 4. 6. *Br. Corporations*, &c. 55. but by *Frowick* 12 *H.* 7. 28. the new Church-wardens ſhall not have the Action for ſuch Treſpaſs done to their Predeceſſors, contrary by *Yaxly*; and it is ſaid by *Newton*, and *Paſton*, that the Executors of the Church-wardens in whoſe time the Treſpaſs was done, ſhall have the action. But the Caſe in 1 *Leonard* 177, is moſt to be relied upon.

If the Goods of the Church be ſtoln, it is Sacriledge and Robery, and the Church-wardens ſhall have an Appeal of Robery, Br. *ab. Appel* 31, 45. 37 *H.* 6. 39. and a Libel may be alſo in the Spiritual Court againſt the Offender, *pro ſalute animæ & reformatione mor' Paſch.* 18. *Car.* 2. 1 *Welcombe* v. *Lake*, 2 *Keble* 23. 1 *Siderfin* 281. but not to recover Damages, 2 *Inſt.* 492. 1 *Kebl.* 743. *See Regiſter of Writs* 57. And if a Perſon doth in the Night break the Church, and Enter, he is guilty of, and indictable for Burglary, as *Bromley* ſaid, *Paſc.* 1 *Ma. Dyer* 99. *a.* 3 *Inſt.* c. 14.

Though

Though the Church-wardens may have their Action for ſuch the Pariſh Goods, yet they cannot diſpoſe of them without the conſent of the Pariſh, and a gift of ſuch Goods by them without the conſent of the Side-men or Veſtry is void, as was ſaid in *Methold* and *Winn*'s *Caſe*, 3 *Bulſtrode* 264. And though as hath been ſaid, the Goods of the Church do belong to the Pariſhioners, yet they cannot have an Action of account againſt the Church-wardens for waſting any of them, but muſt make new Church-wardens, and thoſe new Church-wardens may bring an Action of Account againſt the former, *Br. Account* 71. 8 *Ed.* 4. 6. *Br. Corporations*, &c. 55. 4 *Ed.* 4. 6 *Br. Garden* 7. And though a Pariſh preſcribe to chooſe two Church-wardens, and that the Perſons ſo choſen ſhall continue in that Office for two years; yet the Pariſh may notwithſtanding the Preſcription, remove ſuch Church-wardens at their pleaſure, and chooſe new ones; for as it is ſaid, the Pariſh might ſuffer great loſs, if the Church-warden ſhould continue ſo long in their Office contrary to their will, for in that time they might waſt all the Pariſh Goods belonging to the Church, 26 *H.* 8. 5. *b. Paſc.* 8. *Jac. C. B.* 13 *Coke* 70.

If any evil Perſon ſhould dig up the Grave of a deceaſed Body, and take from the Corps the winding Sheet wherein 'tis wrapped, neither Rector nor Church-wardens may have their Action for it, for the property doth remain in him to whom it belonged when the dead Body was wrapped therein; and the wrapping the dead Body therewith could be no gift thereof, for a Man cannot relinquiſh the right which he hath to Goods, unleſs they be veſted in another, of which a dead Body is uncapable; and the taking thereof is Felony, reſolved by the Juſtices at *Serjeant's-Inn*, *Fleet-ſtreet*, *Haine's Caſe*, 12 *Coke* 113.

As other perſons may have intereſt in the Church with the Parſon, and in the Goods belonging thereunto, as is before ſhewed; ſo others may ſhare with the Rectors of Churches, both in the Church it ſelf, and alſo in the profits thereof; of which Vicars of Churches are the great Inſtance, who by endowments, or preſcription, do ſhare with Appropriators, or Impropriators, (who are perpetual Rectors of Churches) both in the Churches themſelves, and the profits thereof.

And firſt, I conceive, that (although that the Free-hold, and Soil of the Chancel, may be in the Appropriator, or Impropriator, eſpecially where they repair the ſame, either by Compoſition, or Preſcription, which is in moſt places in *England*, except in *London*) the Free-hold and Soil of the Body of the Church is in the Vicar, as a part of his Glebe, for thereof he takes poſſeſſion at his Induction, by which he is ſeized of all the profits of the Vicarage; which way of taking poſſeſſion would be very ſtrange, if the Church it ſelf was not a part of that to which he hath a Right by Inſtitution, and of which he is ſeized by his Induction; alſo this appears from the Vicars being obliged of common right to repair the Church, *Rolls Abr.* 2. p. 337. Alſo the Trees in a Church-yard are ſaid to belong to the Vicar, ſo that if they be cut down by the Parſon, or any other, and a Suit be in the Court Chriſtian not only to puniſh the fact, but alſo for damages, a Prohibition lyeth, becauſe, the Vicar may have Treſpaſs at Common Law; but if the Suit be not for Damages, no Prohibition ſhall be, *Mich* 13 *Jac. B R. Bellamie's Caſe*, *Rolls* 1 *Rep.* 255. But generally ſpeaking, the Compoſition made betwixt the Parſon and Vicar of a Church, doth ſhew, what of the Glebe, Tythes, or other profits thereof, do belong to the Rector, and what to the Vicar, and without a preſcription to the contrary, the Vicar, as well as the Parſon is bound thereby, *Paſch.* 4. *Car. in the Exchequer*, *Llen* v. *Seymore*, *Palmer* 525. and becauſe ſeveral Compoſitions may be loſt, preſcription and uſage is much to be regarded, for the

the ſetling of their ſeveral Rights, *Litt. Rep.* 263. I ſhall therefore add ſome Caſes, to the end that Compoſitions may be the better underſtood, and to ſhew the force of Preſcription as to this matter.

Firſt, *De Jure communi* all Tythes and Profits of the Church do belong to the Parſon, although that there be a Vicar conſtituted, and therefore the Vicar muſt make his Claim, either by ſhewing that he is endowed out of the Parſonage of that to which he pretends a Right, or by Preſcription, *March* 11. *Mich.* 10 *Jac. B. R. Reynolds* v. *Green*, 2 *Bulſtr.* 27. *Mich.* 28 *&* 29 *Eliz. B. R. Godbolt*, *Mich.* 40 *Eliz. Burſdale* v. *Smith*, 3 *Cro.* 633. *Paſch.* 2 *Car. B. R. Cope* v. *Bedford*, *Palmer* 427. But though the Vicar cannot produce any Endowment, yet if he can prove a conſtant Uſage and Payment, that is ſufficient Evidence of an Endowment, *Hill.* 22 *&* 23 *Car.* 2. *Brigham* v. *Robſon*, 2 *Keb.* 729. Or though the Indowment do not mention any Glebe or Tithes to be aſſigned to the Vicar, yet if the Vicar by a conſtant Uſage hath injoyed them, he ſhall not be concluded by their not being mentioned in the Endowment of the Vicarage, (as it has often been adjudged;) for it ſhall be preſumed by reaſon of a long poſſeſſion of ſuch Glebe or Tythes, that the Vicarage hath at ſome time or other been augmented therewith, and that, though there be no power reſerved to the Biſhop by the Endowment to augment or diminiſh, *&c.* For the Biſhop may notwithſtanding augment with the conſent, or upon citing all Parties, tho not without notice or citation, as he may do, when he hath a power to augment, *&c.* reſerved to him by the Endowment, *Trin.* 15 *Car.* 2. *Scaccar. Henry Twiſs* v. *Brazen-Noſe College in Oxford*, *Blount & al. Hardres* 328. And ſo it is, though no Land is mentioned in the valuation of the Church in the time of *H.* 8. becauſe many particulars were omitted in that valuation, *Coynes Caſe*, *Clayton's Rep.* And where no proof of an Endowment could be made, yet becauſe of long poſſeſſion, the Church being preſentative, what was enjoyed was decreed to the Vicar, 9 *Car. Neat* v. *Liſter*, and 39 *Eliz. in the Exchequer Chamber*, *Grimes* v. *Smith*, *Tothil* 238.

If a Compoſition be made betwixt the Parſon and Vicar, that the Parſon ſhall have all the Tythe of Corn and Hay, and the Vicar all other Tithes within a Pariſh; and after the Pariſhioners ſow certain Lands arable with Saffron, or the like, as Woad, *&c.* the Parſon ſhall not have the Tythes of the Saffron or Woad, *&c.* but the Vicar, *Hill.* 1 *Car. Tindal's Caſe*, *Bendloes* 159. *Trin.* 7 *Jac. per Coke* ſaid to be adjudged, 2 *Rolls Abr.* 335. So if the Vicar by Endowment or Preſcription be to have the minute Tythes, and the Land which time out of mind hath been arable is not tilled, the Vicar ſhall have the minute Tythes ariſing upon the ſame, for his Endowment doth not go to the Land, but to the Tythes in any part of the Pariſh, *Paſch.* 38 *Eliz. B. R. Bedingfield* v. *Freak*, 2 *Rolls Abr.* 335. And ſo it is although the Land had been ſowed with Corn for the ſpace of forty years next before, although it be ſaid by the Statute of 2 *Ed.* 6. **That Tythes ſhall be paid as they had been paid forty years before.** The like Law if arable Land be converted to an Orchard, for then the Vicar ſhall have the Apples; and if an Orchard be turned to arable the Parſon ſhall have the Corn, *Paſch.* 38 *Eliz. B. R. the Dean and Chapter of Norwich's Caſe*, *Owen* 74. *Paſch.* 38 *Eliz. B. R. Bedingfield* v. *Freak*, 3 *Cro.* 467. *and* 43 *Eliz. Gouldsb.* 149. *and More* 909. Or if a Vicar by Endowment hath the minute Tythes, and hath for long time uſed by force of this Endowment to have Tythes of Wood of the annual value of Six Shillings and Eight Pence, by reaſon of the ſmall value of the Wood and the uſage, Tythe of the Wood ſhall be to the Vicar as a ſmall Tythe, although that the Tythe of Wood in its nature be accounted amongſt great Tythes,

Mich. 10 *Jac. B. R. Reynols* v. *Green*, *per Curiam*, 2 *Rolls Abr.* 335. Note alſo that Woad growing in the nature of an Herb, Saffron and Weild, which are a kind of Graſs, are minute Tythes, and go to the Vicar, when he is to have minute Tithes, 1 *Car. C. B. Udal* v. *the Vicar of Alton*, and the ſame Caſe *Hutt.* 77. 1 *Cro.* 28. *Hill.* 1 *Car. Tindal's Caſe*, *Bendloe* 159. *Paſch.* 38 *Eliz. Beddingfield* v. *Freak*, 1 *Rolls Abr.* 643. The like is to be ſaid of Flax and Hops, *Mich.* 14 *Car. B. R. Web's Caſe*, 1 *Rolls Abr.* 643. So was it ruled in the Caſe of *Crouch* v. *Riſden*, *Hill.* 21 & 22 *Car.* 2. And that a Preſcription to pay ſo much in lieu of all ſmall Tithes ſhall extend to Hops, Oad, *&c.* 1 *Sid.* 443. 2 *Keb.* 612. 1 *Ventris* 61. But the Tithes of Clover Graſs ſhall go to him that hath the Tithe Hay, *Darrel* v. *Withers*, 3 *Keb.* 479. So if Tobacco be planted here, the Tithes thereof be minute Tithes; but if all the profit of a Pariſh doth conſiſt of things, which in their own nature are minute Tithes, it is ſaid that they thereby become great Tithes, as if a great part of a Pariſh be ſowed with Hemp, *&c.* they are ſaid to be great Tithes, otherwiſe not; and in this reſpect Wool and Lamb may be ſaid to be great Tithes, and for this reaſon Hops in *Kent* were adjudged great Tithes, but Hops in Orchards or Gardens, remain minute Tithes, and a Field of forty Acres planted with Saffron was adjudged a ſmall Tithe, *Hill.* 1 *Car. Udal* v. *Tindal*, *Hutton* 78. But *Quære* whether Hemp, Flax, *&c.* be not in their nature to be accounted ſmall Tithes, if ſo, then the quantity of Land within any Pariſh ſowed with Hemp, *&c.* cannot make the Tithe of another nature; and what we call ſmal Tithes ſeems to me to be in reſpect of the thing it ſelf, and not from the ſmall quantity of Land ſowed therewith within any Pariſh, whereby the Tithes thereof are but ſmall and of little value; for if that were to be the Rule to determine what ſhall be ſaid ſmall Tithes, then Corn, Hay, *&c.* muſt in many Pariſhes be accounted ſmall Tithes, which will not be affirmed.

If the Vicar be endowed *de Decimis Garbarum* growing within a certain Hamlet within a Pariſh, and the Endowment be made a long time ſince, as in the time of *H.* 3. and the Vicar hath uſed time whereof *&c.* to have the Tithe as well of the Hay, as of the Corn; although that now at this day *Garba* doth ſignifie a Sheaf of Corn; and as the Civilians ſay, ſignifies ſuch thing which is bound together by a Band, and in their Books is uſed for Corn, and not for Hay; yet becauſe it is an ancient Endowment, and the Uſage hath been ſo, that the Vicar hath had the Tithe of the Hay, the Tithe thereof ſhall be to the Vicar; for it ſhall be preſumed, that in ancient time Tithe Hay might be compriſed under the word *Garba*, and that the uſe might be then to bind Hay in Bundles; for ſuch ancient Grants are not to be expounded according to the Law uſed at this day, but according as it might be intended to be at the time of the Grant made, *Mich.* 40 & 41 *Eliz. B. R. Barksdale* v. *Smith and Blinco*, 2 *Rolls Abr.* 335. *Mich.* 40 *Eliz. Barksdale* v. *Smith*, 3 *Cro.* 633. *Littl. Rep.* 263. *March* 87. And all Compoſitions for the Endowment of Vicarages ſhall be expounded by the Judges of the Common Law, and if the Spiritual Court meddle with that Matter, they are to be prohibited, *Littleton Rep.* 263. *March* 87.

If a Vicar hath uſed by Preſcription time out of mind, to have all Tithes within a Pariſh (except Corn which the Parſon appropriate was wont to have) *viz.* of Hay, and Hops, from the time of *H.* 8. when they came into *England*, and of Woad (which is a dying Plant) *&c.* After Rape Seed is ſowed within the Pariſh, there being not any ſuch Seed ſowed there, nor in *England* till of late time, yet the Vicar, and not the Parſon appropriate ſhall have the Tithes of the Rape Seed; for that it is within the Preſcription, although that it be a new thing, for which he cannot preſcribe ſingly, foraſmuch as the Parſon

Parſon is barred of all Tithes but of Corn by the Preſcription, and this is within the general Preſcription to have all Tithes but of Corn, *Paſch. 7 Car. B. R.* Reſolved *per Curiam* upon Evidence at the Bar, in a Caſe that concerned a Parſon and Vicar of a Pariſh in *Kent*, and that there was not any difference as to this, betwixt ſuch Endowment which was the Grant of the other Party, and ſuch Preſcription, in that the Preſcription doth preſume an Endowment precedent, 2 *Rolls Abr.* 134.

Alſo if a Vicar be endowed of the third part of all the Tithes growing and coming due within the Mannor of *D.* he ſhall have the Tithes of the Free Tenants, as well as of the Copyholders, for all make the Mannor, *Paſch. 38 Eliz. B. R. Higham & Beſt's Caſe*, 2 *Rolls Abr.* 335. *the ſame Caſe*, *Owen* 74. *and* 3 *Cro.* 462. But if the firſt Endowment be to be ſhewed, whereby the Vicar of a Church is to have all the ſmall Tithes within the Pariſh, and the Parſon Impropriate doth take the ſame, and be ſued therefore in the Court Chriſtian, and thereupon doth bring a Prohibition upon ſurmiſe of a Preſcription, and then the Vicar doth come and plead the firſt Endowment, which was *Anno Dom.* 1310. whereby ſuch Tithes were allotted to the Vicar, and the Parſon doth demur thereto, the Vicar ſhall have a Conſultation, for that the Parſon cannot preſcribe againſt the firſt Endowment, *Trin. 2 Jac. Rot.* 520. *Pringe* v. *Child*, *Noy* 3. *Paſch. 3 Jac. Springe's Caſe*, *Moor* 761, & 781. for the Preſcription ought to commence after the Endowment, which was after the time of Limitation, *viz. R. 1. Rolls Abr. 2. p.*269. And accordingly, a Vicar libelled againſt a Parſon in the Spiritual Court for Tithes allotted to him by the Compoſition, and (the Parſon pleading Preſcription againſt the Compoſition) the Court Spiritual did allow of ſuch Plea, but a Prohibition was awarded for the Vicar to ſtop his own Suit; and it was alſo decreed in Chaneery for the Vicar, that ſuch Preſcription by the Prrſon againſt the Compoſition was not good; and an Injunction was awarded for the Vicar to ſtay the Parſon's Suit for ſuch Tithes limited to the Vicar by the Compoſition, *Paſch. 4 Jac. Pringe* v. *Child*, *Moor* 780.

But if a Vicar be endowed out of the Parſonage, and thereby to have *Altaragium cum manſo competenti*, he ſhall by the meaning of theſe words have Tithes of Wool, Lambs, Colts, Calfs, Pigs, Goſlins, Chickens, Butter, Cheeſe, Hemp, Flax, Honey, Fruits, Herbs and ſuch other ſmall Tithes, with Offerings, as ſhall be due within the Pariſh of which he is Vicar, for *Alteragium*, doth comprehend not only the Offerings made upon the Altar, but alſo all the Profit that accrues to the Prieſt by reaſon of the Altar, as it was expounded by the Civilians upon conference had with them by *John* Lord Biſhop of *London*, *Mich.* 21 *Eliz. Turner & Andrews Caſe in the Exchequer*, and after it was ſo adjudged in the ſame Court, as *Blount* ſays upon the word *Alteragium*, in his *Law Dictionary*, where alſo he adds from the Gloſs in *Mat. Paris*, *Oblationes ſive nummorum ſive panum tali vel tali Altari, vel ex devotione vel ex conſuetudine, aut Parochianis, aut ab extraneis factæ Altaragii nomine cenſebantur.* And if the uſe hath been (where the Vicar hath by the Compoſition *Altaragium*) to pay to the Vicar Tithe Wood, it ought to be continued to him, otherwiſe not, *Mich. 4 Car. C. B. D. Wood & Greenwood's Caſe*, *Hetley* 135. And ſo it was held by the Doctors, who certified that the word *Altaragium*, accordingly did paſs Tithe Wool, the Uſage being ſhewed in Evidence to be accordingly, *Hill. 21 Jac. B. C. Bret and Ward's Caſe*, *Winch* 70. And when the Vicar entituled himſelf by the words *Altaragium & Minutæ Decimæ*, to Tithe Wood, it was held by all the Judges, that though theſe words do not comprehend Tithe Wood, yet becauſe the Vicar hath uſed by theſe words to have the Tithe of Wood, (which uſe was laid) in reſpect of

the Uſage or Preſcription, the Vicar ſhall have it, though otherwiſe it ſhould not have paſſed thereby, and ſo 'tis ſaid to be adjudged in the Exchequer, that theſe words have given to the Vicar Sheaves of Corn, where the Vicar uſed to have them, *Mich.* 13 *Jac. B. R. Reynolds* v. *Green*, 2 *Bulſtr.* 27.

But if a Vicar be endowed out of the Parſonage with all white Tithes growing and renewing within a Pariſh, upon all the Land within the Pariſh, the Vicar ſhall not from thence have Tithes of the Parſons Glebe, for it is always excepted, nor ſhall the Vicar in ſuch caſe have Tithes of the Land that at the time of the Endowment was part of the Glebe, though it be ſince ſevered from it, becauſe at the time of the Endowment this Land was exempted out of the Endowment, *Trin.* 38 *Eliz. B. R. Blenco and Marſton's Caſe*, and *Coke* ſaid it had been ſo adjudged in one *Young's Caſe*, 2 *Rolls Abr.* 335. and if there be a ſpecial Cuſtome after the Endowment of the Vicarages, this is iſſuable, *Blinco and Marſton's Caſe*, *Moor* 457. Or if a Vicar be endowed *de minutis Decimis totius Parochiæ*, and the Glebe of the Parſon doth come by means of the Statute of Diſſolutions to the King's Patentee, yet the Patentee, though a Lay Man, ſhall not pay Tithes to the Vicar of his Glebe, for the words in the Endowment did not give them; but if there had been in the Endowment expreſs words, that the Vicar ſhould have the minute Tithes of the Parſon's Glebe, it had been otherwiſe, for the Parſon himſelf ſhould have paid them, and by conſequence the King's Patentee, otherwiſe not, *Mich.* 39 & 40 *Eliz. B. R. Blinco* v. *Baksdale*, 3 *Cro.* 578.

And here we may add that it hath been Enacted, **Whereas divers Archbiſhops, Biſhops, Deans and Chapters, and other Eccleſiaſtical perſons in obedience to his Majeſty's Letters, bearing date the firſt day of** June, **in the twelfth year of his ſaid Majeſty's Reign, and out of a pious care to improve poor Vicarages and Curacies, where the endowment thereof was found too ſmall to afford a competent maintenance to thoſe that ſerve the Cure, have ſince his Majeſty's happy Return, upon their renewing of Leaſes of Rectories, or Tythes Impropriate or appropriate, made or may hereafter make divers Reſervations beyond the ancient Rent, to the intent the ſame ſhould or might become payable to the ſaid Vicars or Curates, in augmentation of their Endowments, which have been for the moſt part enjoyed accordingly: But in regard that ſuch Reſervations were not made to the Vicars or Curates, or if they were, no convenient remedy could be had by ſuch Vicars or Curates for the Recovery thereof, and they were not at the time thereof capable of taking any Intereſt to their own uſe, whereby the ſaid Proviſions will depend upon the good pleaſure of the Succeſſors, and may in time be diſappointed;**

For the eſtabliſhment thereof, Be it enacted by the King's moſt excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, That all and every Augmentation of what nature ſoever, granted, reſerved or agreed to be made payable, or intended to be granted, reſerved or made payable ſince the ſaid firſt day of June, **in the twelfth year of his ſaid Majeſty's Reign, or which ſhall at any time hereafter be granted, reſerved, or made payable to any Vicar or Curate, or reſerved by way of increaſe of Rent to the Leſſors, but intended to be to or for the uſe or benefit of any Vicar or Curate, by any Archbiſhop, Biſhop, Dean, Provoſt, Dean and Chapter, Archdeacon, Prebendary, or other Eccleſiaſtical Corporation, perſon or perſons whatſoever, ſo making the ſaid Reſervation out of any Rectory Impropriate, or Portion of Tythes belonging to any Archbiſhop, Biſhop, Dean, Provoſt, Dean and Chapter, or other Eccleſiaſtical Corporation, perſon**

ſon or perſons, ſhall be deemed and adjudged to continue, and be, and ſhall for ever hereafter continue and remain, as well during the continuance of the Eſtate or Term upon which the ſaid Augmentations were granted, reſerved or agreed to be made payable, as afterwards, in whoſe hands ſoever the ſaid Rectories or Portion of Tythes ſhall be, or come; which Rectories or Portion of Tithes ſhall be chargeable therewith, whether the ſame be reſerved again, or not; and the ſaid Vicars and Curates reſpectively, are hereby adjudged to be in the actual poſſeſſion thereof, for the uſe of themſelves and their Succeſſors, and the ſame ſhall for ever hereafter be taken, received, and enjoyed by the ſaid Vicars and Curates, and their Succeſſors, as well during the continuance of the Term or Eſtate upon which the ſaid Augmentations were granted, reſerved or agreed to be made payable, as afterwards; and the ſaid Vicars and Curates ſhall have remedy for the ſame, either by Diſtreſs upon the Rectories Impropriate or Portions of Tythes charged therewith, or by Action of Debt againſt that perſon who ought to have paid the ſame, his Executors or Adminiſtrators; any diſability in the perſon or perſons, Bodies Politick or Corporate ſo granting, or any diſability or incapacity in the Vicars or Curates to whom, or to or for whoſe uſe or benefit the ſame are granted, or intended to be granted, the Statute of Mortmain, or any other Law, Cuſtom, or other matter or thing whatſoever to the contrary notwithſtanding.

Provided always, That no future Augmentation be confirmed by vertue of this Act, which ſhall exceed one moiety of the clear yearly value, above all Reprizes, of the Rectory Impropriate out of the which the ſame ſhall be granted or reſerved.

And to the end the ſaid Vicars and Curates may the better make appear the certainty of the ſaid Augmentations; Be it enacted by the authority aforeſaid, That every Archbiſhop, Biſhop, Dean and Chapter reſpectively, on, or before the nine and twentieth day of September next coming, ſhall cauſe every Leaſe or Grant whereon any ſuch Augmentation, is made to be fairly entred in a Book of Parchment, to be kept by their reſpective Regiſters for that purpoſe. And every Dean, Archdeacon, Prebendary, or other Eccleſiaſtical perſon reſpectively, ſhall cauſe every Leaſe or Grant whereon any ſuch Augmentation hath been made by himſelf, his Predeceſſor or Predeceſſors, to be entred in the ſaid Book, to be kept by the Regiſter of the Biſhop of the Dioceſs; for the entring whereof no Fee ſhall be paid, nor any thing demanded, ſave only a reaſonable Reward to the Clerk for entring the ſame, not exceeding five ſhillings: which ſaid Entry being examined by the reſpective Archbiſhop, Biſhop or Dean, and by them reſpectively atteſted in the ſaid Book, to be a true Copy of the Original Leaſe or Grant, and that the Augmentation in the ſame was intended for ſuch uſe, ſhall be as a Record; a true Copy whereof, proved by Witneſſes to be a true Copy, ſhall be deemed, taken, adjudged and expounded to be good and ſufficient Evidence in the Law, whereupon the ſaid Vicars and Curates reſpectively, ſhall and may by vertue of this Act, from time to time recover the benefit of ſuch Augmentation.

And be it further enacted by the authority aforeſaid, That where any Archbiſhop, Biſhop, Dean and Chapter, or any other Eccleſiaſtical Corporation or perſon whatſoever, upon the renewing or granting any Leaſe or Eſtate, have made any Agreement for an Augmentation for the Vicar or Curate, and ſuch Augmentation hath for any time been accordingly paid, although the ſaid agreement is not expreſſed or mentioned in the ſaid Leaſe or Grant, every ſuch Eccleſiaſtical perſon ſhall cauſe the ſubſtance of ſuch Agreement to be entred in the ſaid Book, to remain for a memorial of it to perpetuity.

And

And be it farther enacted, That such Augmentation so entred, shall likewise continue, and be for ever hereafter good and available in the Law, for the benefit of the Vicar or Curate for whom it was intended, and their Successors, as well against the Archbishop, Bishop, or other Ecclesiastical Corporation or person who agreed for the same, and his and their Successors, as against every other person enjoying the said Rectories or Portions of Tythes intended to be charged therewith, in the same manner, and for which they shall have the same remedy as they should or ought to have by vertue of this Act, if the same had been mentioned and reserved in and by the Lease.

And if any question shall hereafter arise concerning the validity of such Grants, or any other matter or thing in this Act mentioned and contained, such favourable constructions, and such farther remedy, if need be, shall be had and made for the benefit of the Vicars and Curates, as heretofore hath been had and made, or may be had for other Charitable Uses, upon the Statutes for Charitable Uses.

Provided always, and be it farther enacted by the authority aforesaid, That if upon the Surrender, Expiration or other determination of any Lease wherein any such Augmentation as aforesaid, hath been or shall be granted, any new Lease of the Premisses, or any part thereof shall hereafter be made, without express continuance of the said Augmentation, every such new Lease shall be utterly void to all intents and purposes.

Provided always, That this Act, or any thing therein contained shall not extend, or be construed to invalidate, alter or make void one Lease, bearing date the nineteenth of October, one thousand six hundred seventy and six, made by the Dean and Chapter of York, of the Parsonage and Tythes of Stourton in the County of Nottingham, wherein there is an augmentation of six and thirty pounds per annum reserved, and made due and payable to the Vicar of Stourton aforesaid, but that the said sum of six and thirty pounds be always paid to the Vicar and his Successors accordingly; any thing in this Act contained to the contrary in any wise notwithstanding.

Provided, That this Act, or any thing therein contained, shall not extend, or be construed to invalidate, alter or make void one Lease lately made by the Dean and Chapter of Exon, unto Arthur Sprey Esquire, of the Tythe-sheaf of the Parish of Saint Eval in the County of Cornwal, whereon there is an augmentation of twenty pounds per annum already made due and payable to the Vicar of the said Parish during the said Lease, but that the said sum of twenty pounds be always paid to the Vicar and his Successors accordingly; any thing in this Act contained to the contrary in any wise notwithstanding. Stat. 29 Car. 2. cap. 8.

And by a Clause in a Statute of 14 *Car.* 2. it is Enacted, That whereas the said Conveyances and Assurances in and by this Act intended to be made void, were some of them of Estates in Fee simple, and some of them long Terms for years made to Trustees, who re-demised the same at and under such yearly Rents and Sums of Mony as were then appointed to be the augmentation of certain Vicarges, or maintenance for Preaching Ministers, since which time, many of the Rectories and Lands so conveyed and leased have been absolutely sold, and the Re-demises thereof granted and assigned by the Owners thereof, for the benefit of such Purchasers. Be it further enacted and ordained by this present Parliament, and by the authority of the same, that the said Purchasers, their Heirs and Assigns, shall pay, and the said former Owners of the said Lands and Rectories, their Executors, Administrators and Assigns, shall have, hold and enjoy the said Rents and Sums of Mony so reserved (for the augmentation of the said Vicarages, and maintenance

tenance for Preaching Miniſters) upon the ſaid ſeveral Re-demiſes, and ſhall have the ſame, and the like Remedies by Diſtreſs, or by Action of Debt, for the recovery thereof, as the ſaid Truſtees who re-demiſed the ſame, ſhould or might have had, if this Act had not been made. Stat. 14 Car. 2. c. 25.

I will alſo here add the Statutes concerning Dilapidations. Be it therefore enacted by the Queens moſt excellent Majeſty, the Lords Spiritual and Temporal and the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, That if any Archbiſhop, Biſhop, Dean, Archdeacon, Provoſt, Treaſurer, Chaunter, Chancellor, Prebendary, or any other having any Dignity or Office in any Cathedral or Collegiate Church within this Realm; or if any Parſon, Vicar or other Incumbent of any Eccleſiaſtical Living whereunto do belong any Houſe or Houſes, or other Buildings, which by Law or Cuſtom he is bound to keep and maintain in reparation, do from henceforth make any Deed or Deeds of gift or alienation, or other like Conveyances of his moveable Goods or Chattels, to the intent and purpoſe aforeſaid; (viz. to defraud their Succeſſors of their remedies againſt their Executors or Adminiſtrators for Dilapidations) That then the Succeſſor and Succeſſors of him that ſhall make ſuch Deed or Deeds of gift or alienation, ſhall and may commence Suit, and have ſuch remedy in any Court Eccleſiaſtical of this Realm, competent for the matter againſt him or them to whom ſuch Deed or Deeds of gift or alienation, ſhall be ſo made, for the amendment and reparation of ſo much of the ſaid Dilapidations and decays, or juſt recompence for the ſame, as hath happened by his fact or default, in ſuch ſort as he might, ſhould or ought lawfully to have, if he or they to whom ſuch Deed or Deeds of gift or alienation ſhall be ſo made, were Executor or Executors of the Teſtament and laſt Will of him that made ſuch Deed or Deeds of gift or alienation, or were Adminiſtrator or Adminiſtrators of his Goods or Chattels; any Law, Cuſtom or other thing to the contrary in any wiſe notwithſtanding. Stat. 13 Eliz. c. 10.

And by another Statute it is Enacted, That all Sums of Mony hereafter to be recovered for or in name of Dilapidations, by ſentence, compoſition or otherwiſe, ſhall within two years after ſuch receipt, be truly imployed upon the buildings and reparations, in reſpect whereof ſuch mony for Dilapidations ſhall be paid, on pain that every perſon ſo receiving, and not imploying as aforeſaid, ſhall forfeit double as much as ſo ſhall be by him received, and not imployed; the which forfeiture ſhall be to the uſe of the Queens Majeſty, her Heirs and Succeſſors. Stat. 14 Eliz. c. 11.

It is ſaid that no remedy is given at Common Law for Dilapidations, Suits for them being moſt proper to be brought in the Eccleſiaſtical Courts, which Suits are not to be hindred by Prohibitions; but if any Prohibition be granted, a Conſultation is to be awarded, *Regiſter of Writs* 48. *Fitz. N. Br.* 52. But by *Parſons Counſellor* 95 this is to be intended, where the Suit is grounded upon the Canon Law: for that an Action of the Caſe might have been brought at Common Law by the Succeſſor againſt the Executors or Adminiſtrators of the Dilapidator, and damages recovered, as appears by many Preſidents, *Parſons Counſellor* 97, 98. But a Curate, though he by Licence or Agreement receive the Tithes, and have an allowance for the Repairs of the Parſonage-Houſe, *&c.* yet being but at Will, and not coming in by Inſtitution and Induction, ſo no Incumbent, his Executors, *&c.* are not to be ſued or charged in the Spiritual Court for Dilapidations, which I collect from *Pawly and Wiſeman's Caſe*, 3 *Keb.* 614.

CHAP.

CHAP. XL.

Fruits and Profits of Benefices in time of Vacation to whom they belong, and the Remedies how to recover them if detained. What Charges Parsons are liable to in respect of their Glebe, or Tithes; and of the Temporalties of Bishops in time of Vacation, &c.

THough before Institution, Collation, *&c.* a Clerk hath Right to the Profits of any Benefice, yet a legal Title when obtained, hath also this effect, that it doth so work backwards, as to give the Clerk a Right to the Profits from the time that the Church became void of the preceding Incumbent, and this is by vertue of the Statute of 28 *H.* 8. *c.* 11. which is as followeth.

Whereas by reason that it is not declared who shall have the Fruits, Tithes, and other Profits of Benefices, Offices, Promotions and Dignities Spiritual, during the time of Vacation thereof, divers of the Archbishops and Bishops of this Realm, have not only when the time of perceiving and taking of Tithes (that is to say, Wool, Lamb, Corn and Hay, and of Tithes usually, paid at the holy time of Easter) hath approached, deferred the Collation of such Benefices as have been of their own Patronage, but also have upon Presentations of Clerks made unto them by the just Patrons, protracted and deferred to institute, induct and admit the same Clerks, to the intent that they might have and perceive to their own use the same Tithes growing, during the Vacation. So that through such delays (over and above the first-fruits, which be justly due to the Kings Highness) they have been constrained also to lose all, or the most part of one years Profits of their Benefices and Promotions, and to serve the Cure at their and their friends proper costs and charges, or utterly to forsake and give over their Benefices and Promotions, to their great loss and hindrance.

For reformation whereof, it is ordained and enacted by the King our Sovereign Lord, with the assent of the Lords spiritual and temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that the said year, in which the first-fruits shall be paid to the King's Grace, shall begin and be accounted immediately after the avoidance or vacation of any such Benefice or Promotions spiritual afore rehearsed. And that the Tithes, Fruits, Oblations, Obventions, Emoluments, Commodities, Advantages, Rents and all other whatsoever Revenues, Casualties or Profits, certain and uncertain, affering or belonging to any Archdeaconry, Deanry, Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship, or other Spiritual Promotion, Benefice, Dignity or Office, (Chaunteries only except) within this Realm, or other the King's Dominions growing, rising or coming, during the time of Vacation of the same Promotion spiritual, shall belong and afer to such person as shall be thereunto next presented, promoted, instituted, inducted or admitted, and to his Executors, toward the payment of the first-fruits to the King's Highness, his Heirs and Successors; any Usage, Custom, Liberty, Privilege or Prescription to the contrary had, used or being in, any wise notwithstanding.

And it is also enacted by the authority aforesaid, that if any Archbishop, Bishop, Archdeacon, Ordinary, or any other person or persons, to their uses and behoof, at any time heretofore sith the first day of May last past, have perceived,

ceivad, received or taken, or at any time hereafter do perceive, receive or take the Fruits, Tithes, Obventions, Oblations, Emoluments, Commodities, Revenues, Rents, Advantages, Profits, or Casualties, coming, growing or belonging, or which hereafter shall come, grow, affere or belong to any Archdeaconry, Deanry, Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship or other Spiritual Promotion, Benefice, Dignity or Office (Chaunteries only excepted) within this Realm, or other the King's Dominions, during the Vacation of such Archdeaconry, Deanry, Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship or other Spiritual Promotion, Benefice, Dignity or Office (Chaunteries only excepted) and the same upon reasonable request from henceforth to be made, doth not render, restore, satisfie, content and pay to the next Incumbent, being lawfully instituted, inducted or admitted to such Archdeaconry, Deanry, Prebend, Parsonage or Vicarage, or other Promotion, Benefice, Dignity or Office Spiritual, except before excepted, or do let or interrupt the said Incumbent to have the same; that then every Archbishop, Bishop, Archdeacon, Ordinary, or other person so doing, shall forfeit and lose the treble value of so much as he shall then have received of the Fruits of every Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship, or other Spiritual Promotion whereof he so shall perceive, receive or detain, lett or interrupt the Incumbent to perceive, receive and have the Fruits, Tithes, Obventions, Oblations, Emoluments, Commodities, Revenues, Rents, Advantages, Profits or Casualtits. The Moiety of which Forfeiture shall be to the King our Sovereign Lord, and the other Moiety thereof to the Incumbent of the same Prebend, Parsonage or Vicarage, or other Spiritual Promotion, to be recovered in any of the King's Courts by Action, Bill, Plaint, Information or otherwise; in which Action or Suit the Defendant shall not be admitted to wage his Law, nor any Protection or Essoin shall be unto the Defendant allowed.

Provided alway, That it shall be lawful to every Archbishop, Bishop, Archdeacon and Ordinary, their Officers and Ministers, to retain in his or their custody, so much of the Tithes, Fruits, Obventions, Oblations, Emoluments, Commodities, Advantages, Rents, Revenues, Casualties and Profits, as shall amount to pay unto such person or persons as hath or shall serve or keep the Cure of such Archdeaconry, Deanry, Prebend, Parsonage or Vicarage, or other Spiritual Promotion, during the Vacation, his or their reasonable Stipend or Salary. And also for the collection, gathering or levying of such Tithes, Fruits, Emoluments, Rents and other Profits, rising and growing during the Vacation aforesaid; any thing in this Act contained to the contrary in any wise notwithstanding.

Provided also, and be it further enacted by the authority aforesaid, That in case any of the Incumbents aforesaid happen to die, and before his death hath caused any of his Glebe Lands to be manured and sown at his proper Costs and Charges with any Corn or Grain, that then in that case, all and every of the same Incumbents may make and declare their Testaments of all the Profits of the Corn growing upon the said Glebe Lands so manured and sown; any thing contained in this present Act in any wise notwithstanding.

Provided alway, That if the Fruits of the Vacation of the said Spiritual Promotions be not sufficient to pay the Curates Stipend and Wages for serving the Cure the Vacation time, that then the same to be born and paid by the next Incumbent within fourteen days next after that he hath the possession of the said Promottions Spiritual. Stat 28 H. 8. c. 11.

Note, That that part of the Statute, not here ſet down, concerning the ratifying of Leaſes made by Spiritual perſons of their Benefices to Lay-men is Repealed by 1 & 2 *Ph. & M. c.* 17.

Before this Statute of 28 *H.* 8. *c.* 11. the Law is ſaid to be, That after the death of the Dean of a Free Chapel of the Kings, the King ſhall have the Profits of the Deanry during the Vacation, becauſe it is at the King's Election to collate a new Dean, 33 *E.* 3. *Aid del Roy* 103. But if the Dean hath a Parſonage appropriate to him, the King ſhall not have the Tithes and Profits thereof, 2 *Rolls* 340. So 'tis ſaid, that the Patron of a Donative may take the Profits thereof in the Vacation; but that if any take them from him, he cannot maintain an Action to recover them, *Britton* v. *Wade*, 2 *Cro.* 518. But I ſuppoſe this Statute gives them to the next Incumbent, for the words are general.

Though the Profits of the Church during the Vacation are in the Incumbent upon his Induction, and not due to the Patron or Ordinary, yet the Patron and Ordinary have ſuch an Intereſt in the Revenues of a Church, as that at Common Law they might have charged the ſame in time of Vacation, which would have bound all ſucceeding Incumbents, becauſe no other had any Intereſt at that time but they only, *Hill.* 35 *Eliz. Ann Mayow's Caſe*, 1 *Co.* 147. *b.* See *Paſch.* 37 *Eliz. Ford's Caſe*, 5 *Co.* 81. *b.* And if a Man hath an Annuity out of a Parſonage, and he releaſes to the Patron in the time of Vacation, this ſhall extinguiſh the Annuity, 2 *Rolls Abr.* 339. *K.* 340. *Foord's Caſe*, 5 *Co.* 81. But if one that hath Right to the Glebe, releaſe to the Patron in time of Vacation all his Right, this is not good, becauſe the Patron hath not any Eſtate in the Glebe, 2 *Rolls Abr.* 340.

As to the aforeſaid Statute I do find but little in all the Books relating thereunto, yet I will venture to deliver my own thoughts concerning ſeveral Queſtions that may ariſe upon it.

Firſt then I conceive, that by this Statute in caſe (a Church being void) a Clerk doth get Inſtitution and Induction upon the Preſentation of him that hath no Right to preſent, ſuch Clerk ſhall have the Profits due in the Vacation, and alſo all the Profits of the Church unto the time of his removal, and not the Clerk of him that removed ſuch firſt Incumbent by *Quare Impedit* or other Suit of Law. And ſo it is if a Writ of Error be brought, as is ſaid in *Grange and Howlet's Caſe*, *Mich.* 12 *Jac. B. R.* 1 *Rolls Rep.* 61. And ſuch Incumbent is to pay Firſt-fruits, Tenths, and other Duties becoming due before ſuch removal, *Jones* 340. And he is not to be looked upon as removed, (with reſpect to the ſaid Profits and Duties) until ſuch time as the Clerk of him that recovers is inſtituted; for altho' by the Judgment in a *Quare Impedit* he be ſo removed, that the Plaintiff may preſent, and his Clerk may be inſtituted; yet until ſuch Inſtitution, *&c.* actually had, the firſt Clerk remains Incumbent *de facto*, by *Coke*, *Mich.* 12 *Jac. B. R. in Whiſtler and Singleton's Caſe*, 1 *Rolls Rep.* 62. but after the ſecond Clerk is inſtituted and inducted, he may enter upon the Profits, and reap the Corn ſowed upon the Gleab by him againſt whom the Recovery was had, and that without a *Scire Facias*; by all the Juſtices, *Hill.* 41 *Eliz. Bennet* v. *Edwards Moor* 571.

If the Incumbent of one Church of the yearly value of eight pounds, or above, doth without a Diſpenſation accept another Benefice, the firſt is abſolutely void, ſo that if he doth continue as Incumbent by ſerving or providing for the Cure, taking up the Profits, *&c.* I conceive that he is in the ſame Caſe, as if upon the death of the Incumbent of another Church he ſhould of his own authority enter upon the Profits, and ſerve the Cure thereof as if lawful Incumbent, that is, that he is accountable to the next Incumbent for the Profits

Profits received by him, and lyable to an Action upon this Statute, if he refuſe to ſatisfie the next Incumbent for the ſame, See *the King and Priſt's Caſe, Hill. 9 Car. Jones* 337, 339, 340. But if any inferiour Dignity, or other Benefice doth become void by Ceſſion upon the account of the Canon Law only. As if one having one Benefice with Cure under the yearly value of eight pounds, doth accept of another that is incompatible, although that in ſuch Caſe the Patron may preſent before the Church is judicially declared to be void, or notice thereof be given by the Ordinary; yet it hath been held, that until Deprivation be made, by reaſon of the acceptanee of another Benefice incompatible, the Church is only void to the Patron, not to Strangers; and that if the Clerk doth ſue for the Tithes of the former Benefice, it is not any barr to him to ſay, that he hath taken a ſecond Benefice; by Juſtice *Barkly* 13 *Car. B. R.* which Juſtice *Yelverton* in his Argument of the Caſe of *Priſt* ſaid had been ſo adjudged, 2 *Rolls Abr.* 361. from which it ſeems to be, that immediately upon ſuch Ceſſion, the Profits of the Church do not belong to the next Incumbent, but only from the time that the Church is judicially declared to be void. But had not the aforeſaid Authority reſolved the contrary, it might have been a doubt, whether ſuch Church had not been ſo void, that the Profits of it by this Statute had belonged to the next Incumbent, from the time that the Clerk had been inſtituted, or otherwiſe intitled to the ſecond Benefice incompatible, and not from the time only of the Deprivation, or judicial Declaration of the Avoidance in the Court Chriſtian; for the Conſtitution of the Council of *Lateran* ſaith, *Ipſo jure ſit privatus*, not ſpeaking of any Sentence of Deprivation; And by the ſame Canon and Words a Church ſhall be void to all purpoſes, upon conſecrating its Incumbent a Biſhop, without any judicial Proceedings, and particularly to the entitling the next Incumbent to the Profits of the Vacation from the Ceſſion; which none diſpute; why then ſhould not the ſame Canon have the ſame conſtruction and effect in this Caſe; Beſides, 'tis ſaid 10 *E.* 3. 1. that the Conſtitution of *Lateran* is a general Sentence of Deprivation; and that if particular Deprivation for a Crime, or Reſignation of the Incumbent, doth abſolutely void a Church, much more ſhall the Conſtitution in this caſe do it, *Hill. 9 Car. King* v. *Priſt*, *Jones* 337. In the Caſe of particular Deprivation for Crime, the Church is not only void to the true Patron's Preſentment, but to an Uſurper's alſo, although no notice be given thereof, *Trin.* 44 *Eliz. Green* v. *Baker*, 2 *Rolls Abr.* 369. *Paſch.* 17 *Jac. Sir William Elvis's Caſe* v. *the Biſhop of York, &c. Hobart* 318. And ſo it is if the Church be void by Reſignation, and no notice be given to the true Patron, *Paſc.* 33 *Eliz. Serven* v. *the Biſhop of Lincoln*, *Noy* 65. And by *Hobert* in Sir *William Elvis Caſe* v. *the Biſhop of York*, *&c. Hobert* 318. If when the Church by Ceſſion is open to the Preſentment of the true Patron, an Uſurper doth get his Clerk inſtituted and inducted thereunto, before any declaration of the Ceſſion is made judicially, it may be worth the conſidering, whether the Church thereby ſhall be ſaid to be *plena & conſulta*, ſo that the Ordinary ſhall be a Diſturber in refuſing to admit the true Patron's Clerk; and whether if he did admit and inſtitute him, it would not amount to a Superinſtitution, and be void. If it be ſaid, that the Church in ſuch Caſe is not full of the Uſurper's Clerk, but that the Biſhop is bound to admit the Clerk of the true Patron preſented to him, that muſt be, becauſe the Inſtitution of the Uſurper's Clerk was a Superinſtitution; if ſo, then the Clerk that voided the Benefice by Ceſſion might have an Aſſize or other Action againſt him, which is hard to ſay, he being deprived by the aforeſaid Conſtitution, the intent of which was, to put the Cure and Profits into the poſſeſſion of another, and not only to put it into the Patron's Power to preſent

if he pleaſed; but if on the other hand it be granted, that the Uſurpers Clerk is Incumbent *de facto* until the true Patron remove him by Suit, 'tis then to be confeſt, that the Church by ſuch Ceſſion without particular Deprivation is void as to others, as well as to the true Patron, and then, why not to the next Incumbent to give him a Right to the Profits immediately from the Ceſſion? but *Quære.*

Further, I conceive that if a Clerk be Simoniacally preſented to a void Church, although that he be inſtituted and inducted thereupon, that he hath not any Right to the Profits of the Church, neither to thoſe that did ariſe from the time that the Church fell void until his Inſtitution, nor to thoſe ariſing after it; but in ſuch caſe the Profits of the Church are due to the Clerk preſented by the King upon the Title of Simony, from the time that it became void of its lawful Incumbent; the reaſon is, becauſe that the Church to which a Perſon is Simoniacally preſented, remains void notwithſtanding the Inſtitution and Induction had thereupon, the Preſentation, Inſtitution and Induction being made void by the Staute, 31 *Eliz. c.* 6. *Co. Lit.* 120. And are not only void as to the King, ſo that he may preſent upon his Title by Simony without any Deprivation, or bringing his Writ to remove the Simoniſt; but alſo as to the Pariſhioners, ſo that they may detain their Tithes and plead the Simony, as a Bar in any Action brought by the Simoniſt to recover them, *Winchcomb* and *Pulleſton's Caſe*, *Hobart* 166. *ſame Caſe*, *Noy* 25. *Mich.* 8 *Jac. Penn's Caſe*, 1 *Brownlow* & *Gouldsborough* 7. *Trin.* 8 *Jac. Dr. Hutchenſon's Caſe*, *Godbolt*, *and Trin.* 14 *Car.* 2. *B. R. Knight* v. *Dancer*, 1 *Keb.* 311, 312. It was there objected by *Finch Solicitor General*, that a Parſon in by Simony may ſue for Tithes notwithſtanding what is ſaid by *Hobart*, which he ſaid was not Law; but this was denyed by the Court, and agreed that Simony may be pleaded in Bar, in an Action of Debt for Tithes; Yet 3 *Cro.* 642. ſeems to be to the contrary. But if the King doth not preſent during the Life of the Simoniſt, and then the true Patron, or an Uſurper doth preſent a Clerk, who is inſtituted and inducted, I conceive that in this Caſe ſuch Preſentee hath Right to the Profits of the Church from the time that it was firſt void of a lawful Incumbent; and that if the King before the death of the Patron's or Uſurper's Clerk doth remove him by *Quare Impedit*, and preſent another, as he may, (if the Patron, *&c.* be not within the relief of the Statute 1 *W. & M. c.* 16.) *Paſch.* 14 *Jac. Winchcomb* v. *Pulleſton*, *Hob.* 165. *ſame Caſe*, *Noy* 25. and 1 *Brownlow & Goulds b.* 164. the King's Clerk can claim the Profits only from his Inſtitution. So I conceive in all Caſes, when notwithſtanding Inſtitution and Induction the Church doth remain void, for that the Inſtitution and Induction are declared by Law to be *ipſo facto* void, the Profits from the time that the Church was void, before ſuch Inſtitution and after, go to the perſon next legally inſtituted. (And when a Church notwithſtanding Inſtitution doth remain void, See *Cap.* 20.) But when the Admiſſion, Inſtitution and Induction of a Clerk to a Church are not abſolutely void, although that the Church afterwards through the Omiſſion of ſome legal duty doth become void, the Profits ariſing in the Vacation go to the perſon ſo admitted, *&c.* and from the time of the Avoidance through ſuch Omiſſion, to the next Incumbent, although the Perſon admitted doth ſerve the Cure after the Avoidance as Incumbent, (and when a Church by ſuch Omiſſion becomes void is ſhewed before, *Chap.*) But whenſoever any perſon doth receive the Profits of a Church when he hath no Title thereto, ſuch perſon ſhall be ſubject to pay the Tenths due to King, ſo alſo to a Diſtreſs for a Rent-Charge, and to all other Charges and Payments which are payable out of ſuch Benefice, and that, from the reaſon of his taking up the Profits thereof, and ſo ſhall every one

that

that enters upon a Benefice without Inſtitution or other Title. But neither the one nor the other may bring an Action of *Juris utrum*, or a *Writ of Annuity*, nor may he ſue for the Tithes, nor can he plead in Bar in a *Quare Impedit* as Incumbent in poſſeſſion, as was ſaid, *Hill. 9 Car. in the King and Priſts Caſe, Jones* 339, 340.

Note, That although the Words in this Statute be in the disjunctive preſented, inſtituted, inducted, or admitted, yet I conceive that a bare Admiſſion, which is that Act by which the Ordinary doth approve of a Clerk preſented to him, as fit to ſerve the Cure, is not here to be underſtood, as if ſuch Admiſſion alone was ſufficient by this Statute to give the Clerk the Profits of the Vacation, for then, the ſame may be ſaid of being only preſented, but is added with reſpect to thoſe Preferments, which are not taken by the way of Inſtitution and Induction; and ſo is not here to be taken in its general, but reſtrained ſignification with reſpect to ſuch Preferments only; and probably it may be thought, that where a perſon is to be made complete Incumbent of a Church by the way of Preſentation, Inſtitution and Induction, the Words *Preſented, Inſtituted, Inducted* in this Statute, ſhall be taken in a Copulative Sence; ſo that the new Incumbent to give him a capacity to ſue for the Profits of the Church ariſing in the Vacation, muſt be as well lawfully inducted as inſtituted; and it is doubtleſs the ſafeſt way to get Induction before any Proceedings at Law be for ſuch Profits; yet it is reaſonable to judge, that a Clerk by Inſtitution only, hath the ſame Right to the Profits ariſing in the Vacation, as to thoſe Profits ariſing after his Inſtitution; and by *Coke*, by Inſtitution he hath a Right to enter upon or take the Profits, though not to ſue for them, *Hitchin* and *Glover's Caſe, Paſch.* 13 *Jac.* 1 *Rolls Rep.* 227. Alſo by Inſtitution a Church is *plena & conſulta*, and a perſon is then ſaid to be promoted to it; and beſides, the Profits of the Vacation are given by this Statute towards the payment of the Firſt-Fruits, which are due upon Inſtitution, and before Induction by *Stat.* 26 *H.* 8. *c.* 3.

But if Inſtitution before Induction ſhall be ſaid to entitle a Clerk to ſuch Profits, ſo that he may take them, or diſcharge the payment thereof, though not to ſue for the ſame. A farther Queſtion may be made, whether the ſame ſhall be extended to Benefices which are of the King's Gift, *viz.* Whether a Church be ſo filled by Inſtitution upon the Preſentation of the King, or of an Uſurper to a Benefice of the King's Gift, as to entitle the Party inſtituted to the Profits of the Vacation, and to charge him with the Payment of Firſt-Fruits, *&c.* becauſe, the Church is not ſo filled by Inſtitution only againſt the King, but that the King may, when he pleaſeth before Induction preſent to his own Benefice, upon his own, or an Uſurper's Preſentee to the outing of him.

As to which Queſtion I rather think, that ſuch Clerk is entitled to the Profits ariſing in the Vacation, and is chargeable with the Payment of Firſt-Fruits, *&c.* yea although that the King ſhould actually out him by preſenting another Clerk before his Induction, for though the King hath ſuch Prerogative, that he may before Induction preſent another Clerk to the outing of his own Preſentee, or an Uſurpers, without being put to his Writ for the Removal of them; yet I apprehend, that the Church in ſuch Caſes is filled by Inſtitution alone as to other purpoſes; Firſt, I ſuppoſe that it will be granted, that ſuch Clerks have the Cure of Souls by Inſtitution, and may not be interrupted in ſerving the Cure, even as Clerks of other Patrons being only inſtituted, elſe the Cure is not actually committed to them, and to ſuch when inſtituted (as well as to other Clerks) the Biſhop ſaith, *Accipe Curam tuam & meam*; and they may (even as others) be puniſhed by their Ordinary for the neglect of the Cure, *&c.* before Induction, even by Deprivation. And

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if ſo be that they may be deprived, it muſt be of that they were intituled to before, therefore it ſeems to follow, that the Preſentee of the King, or of an Uſurper upon the King's Right, hath the ſame Intereſt in the Profits, and is ſubject to the ſame Charges and Payments, which a Clerk inſtituted upon any other private Patrons Preſentment hath, or is ſubject to.

Farther it will appear, that a Church of the King's Gift is full by Inſtitution as to all purpoſes but againſt himſelf, if we conſider, that the Inſtitution of another Clerk upon the Preſentment of an Uſurper to the ſame Living to which the King's Clerk is inſtituted, is a Superinſtitution and ſo void, and makes no Uſurpation upon the King, althongh that Induction alſo thereupon be had; alſo if a Clerk being poſſeſſed of a Benefice with Cure, doth after take a Church of the King's,only by Inſtitution,(Diſpenſation not intervening) his firſt is void thereby, and if ſuch Inſtitution alone be ſufficient to void a former full Church, it muſt be ſufficient to make a void Church full, ſaving in the Caſe of the King's Prerogative, and ſo ſeems to have all the Effects which Inſtitution in other Caſes may be ſaid to have, *viz.* until the King's Preſentment comes. And ſo the Caſe of a Preſentee to a Living of the King's Gift taken only by Inſtitution, ſeems to be like the Caſe of him that by Uſurpation is preſented, inſtituted and inducted to a Benefice, who until a Recovery is had, and the Clerk of the Recoverer inſtituted, is Incumbent to all purpoſes: Or it may be ſaid to be like the Caſe of him who is collated and inducted by the Uſurpation of the Ordinary, who thereby is Incumbent to all purpoſes, that is, hath Right to the Profits, in, and after the Vacation; and as I conceive is obliged to pay Firſt-Fruits; and yet if the true Patron's Clerk be received by the Ordinary, his Incumbency ceaſeth.

By the ſecond Clauſe of this Statute as here ſet down, the Clerk that hath Right to the Profits of the Church during the Vacation, hath his remedy given him, if upon reaſonable requeſt made they be not rendred to him, or ſatisfaction for them, which remedy is not only againſt Archbiſhops, Biſhops, Archdeacons and other Ordinaries, but alſo againſt all and every other perſon and perſons; and therefore againſt any Lay perſon that ſhall take up ſuch Profits without Commiſſion of the Ordinary; and againſt any Clerk that ſhall take them up without ſuch Authority, or legal Title, as pretendiug himſelf to be Iucumbent. Yet if the Caſe be, that the Ordinary hath ſequeſtred the Profits of a void Church, and hath given Commiſſion to the Churchwardens, or other perſons to take them up, and the Profits be taken up accordingly, and remain in ſuch perſons poſſeſſion until a new Incumbent is made, to whom the Churchwardens or other perſon will not render them or their value, it may be doubted, whether the Action for them may not be brought by the new Incumbent againſt the Ordinary under whom ſuch perſon acted, and not only againſt the Churchwardens, or other authorized party, theſe being but as the Ordinaries Servants, and to give an account to him, and to ſue for them (if need be) in the Ordinary's Name. For if the Ordinary in reſpect of his Miniſters, or Servants, be not chargeable, I do not ſee how he ſhould be chargeable at all, in regard that it cannot (nor could it by the Makers of this Statute) be preſumed, that an Archbiſhop, Biſhop, &c. would take them up in their proper perſons, but that they would order ſome perſon under them ſo to do, who ſhould anſwer them to him, or in his Name to the next Incumbent to whom he became by his Commiſſion anſwerable for them; and if the Party appointed by the Ordinary be by this Statute chargeable from the reaſon of his taking up the Profits, and his accounting for them to the Ordinary from whom he received his Commiſſion and Authority, be not a ſufficient diſcharge to him, it cannot be reaſon that he pay

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them, or the value of them, to the Ordinary, for that he is ſtill the perſon that took them up, and may remain liable to anſwer for them. Upon which doubt, for the Security of the Ordinary, and benefit of new Incumbents, it ſeems to be adviſable for the Ordinary to give his Authority of taking up the Profits, and of providing a Curate (if need be) to ſome diſcreet Clergy-Man near the void Benefice, rather than commit it to Churchwardens, who are ſometimes unreſponſible for the Profits, ſometimes ſell or diſpoſe them much under the value, to them that ſhould pay them, or to others, and often againſt the Law imply ſome unqualified Perſon to ſerve the Cure, and allow him ſo extravagantly, that upon the whole account it frequently falls out, that Clerks have little or no benefit by this Statute made in their favour, but are ſometimes run in arrear, as when more is paid for ſerving the Cure than the Profits do amount unto.

Though the Ordinary or other perſon taking up the Profits be puniſhable by this Statute, if upon reaſonable requeſt ſatisfaction be not made to the next Incumbent; yet if any Pariſhioner hath not ſet forth, or paid his Tithes, or if other perſon hath not paid other Profits of the Church payable by him or them to the Ordinary, or others commiſſioned by him, before the Church be full of an Incumbent (at which time the Biſhop's Authority ceaſeth) I conceive, that ſuch Pariſhioner or other perſons refuſing to ſatisfie the new Incumbent, is not ſubject to the Penalty of this Statute, *viz.* the treble value of the Profits, but only to ſuch Actions for them, which Incumbents may have for Profits ariſing after their Incumbency, although their Right to them is by this Statute; becauſe, this Clauſe ſeems only to reach thoſe that do receive the Profits during the Vacation, and he from whom they are due, and who ought to pay them to the Ordinary, or his Miniſters during the Vacation, by retaining them cannot be ſaid to be a Receiver of them.

If the Incumbent of a Benefice be put to ſue, either for any of the Profits of his Church received during the Vacation, or for ſuch as are not paid by any one, it is ſafe for him to recite this Statute in his Declaration, leſt it ſhould be thought not to be a general Statute whereof the Judges are bound to take notice, becauſe it extendeth not to all the Spiritualty, *viz.* not to Biſhops, and alſo to aver that he is the next lawful Incumbent, and that he made a demand thereof, and the Non-payment of the ſame, eſpecially if he ſue for the treble value.

From the third Clauſe of the Statute as here ſet down, I conceive that though the Ordinary, or his Miniſters, may detain ſo much of the Profits they receive as ſhall amount to pay him or them who ſhall ſerve the Cure his or their reaſonable Stipend, and for collecting the Profits, yet that if the Ordinary or his Miniſter, doth detain or allow upon ſuch account, more than the new Incumbent ſhall think reaſonable, he may try it by Action at Law grounded upon this Statute.

Alſo if ſuch Parſon as did attend the Cure was not then twenty four years of Age, or was only appointed by the Churchwardens or other perſon, and not duly licenſed and admitted thereunto by the Ordinary, or did not duly qualifie himſelf according to the Statute, 14 *Car.* 2. *c.* 4. I conceive neither the Ordinary, not his Miniſter may detain any part of the Profits in reſpect thereof, for that his Licence (he not being duly qualified) is void, *Stat.* 13 *Eliz. cap.* 12. and *Stat.* 14 *Car.* 2. *cap.* 4. and his ſerving the Cure an unlawful Act. And if the Biſhop's Commiſſioner doth imploy ſome neighbouring Miniſters that have Cures of their own, to ſerve ſuch Cure for the time, without Admiſſion, as aforeſaid by the Ordinary;

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I ſuppoſe that their Caſe is the ſame, although that they performed the legal Acts aforeſaid, to ſettle them in their own Churches, and that alſo they may be queſtioned upon *Stat.* 14 *Car.* 2. *cap.* 4. if upon ſuch occaſion the reading either of Morning or Evening Prayers in their own Churches be neglected.

Note alſo, That if any other perſon than the Ordinary, or ſuch as he ſhall appoint as his Officer or Miniſter to this Buſineſs, do take up the Profits aforeſaid, that he by this Statute is not allowed to detain any part thereof, upon the account either of ſerving the Cure, or collecting the Profits.

As to the next Clauſe about Incumbents declaring their Wills of Corn ſowed on the Glebe, it is to be noted, that if an Incumbent hath ſown his Glebe, and his Church doth become void by Deprivation, or Reſignation, and another be inducted, it is ſaid by *Coke* in the Caſe of *Moyl* v. *Ewer*. *Hill.* 11 *Jac.* 2 *Bulſtrode* 184. that the new Incumbent ſhall have Tithes of his Predeceſſor, and a *Quære* is made by *Rolls*, whether there be not a difference, where the Incumbent dies before the *Annunciation*, and where he dies after, *Hill.* 11 *Jac. B.R. per Cur.* 1 *Rolls Abr.* 655, 656. The reaſon of which *Quære*, I ſuppoſe to be from what is ſaid by *Littleton*, 34 *H.* 6. 38. *b. viz.* that if a Parſon die before the Feaſt of the Conception of the bleſſed Virgin, by the Law of the Chuch the Succeſſor ſhall have the Emblements as well of the Glebe as of the Tithes, which differs from our Law, which makes no diſtinction as to what time of the year the dying happens to be in.

As to the laſt Clauſe concerning paying for the Cure, if the Fruits of the Vacation be not ſufficient for it, it muſt be remembred what is before ſaid, *viz.* that he who ſerves the Cure in the Vacation muſt be duly qualified admitted, *&c.* otherwiſe I ſuppoſe the new Incumbent need not pay him, but may plead his Incapacity in Bar. So if one pretending to be Incumbent of a void Church, doth cauſe a Clerk to be duly admitted to ſerve the Cure thereof as his Curate, and after the Intruſion being detected, the Church is filled, and the Curate imployed by the pretended Incumbent is not paid his Salary, or Wages, I conceive that this Clauſe will not relieve ſuch Curate againſt the new Incumbent, although that the Caſe ſhould be, that ſo much of the Fruits did not ariſe in the Vacation as were ſufficient to pay his Salary. For this Clauſe hath relation to the former; and therefore, as the former Clauſe doth not enable any Intruder or meer Treſpaſſer to detain any of the Profits, either for him that ſerves the Cure, or for his taking up the Profits, but only the Biſhop and his Miniſter as hath been ſaid, ſo this Clauſe cannot well be thought to be added to relieve Intruders by providing for the payment of ſuch Curates as are ſet up by them with deſign to injure the next Incumbent, and to fruſtrate this Law for whoſe Benefit it was made, but is ſtrictly to be underſtood to provide for ſuch Curate only as ſhall be appointed by the Ordinary, in caſe the void Church ſhall be ſo ſuddenly filled, that the Fruits that did ariſe in the Vacation were not ſufficient for the payment of him.

But ſuppoſe that the Profits that did ariſe in the Vacation were ſufficient to pay the Curates Stipend; yet becauſe no one did take up ſuch Profits they remain in the hands of thoſe from whom they were due, and the Curate is not paid before a new Incumbent enters; yet I conceive, although the Words of the Statute may not ſtrictly taking them reach this Caſe, that yet by an equitable conſtruction thereof the Curate may be relieved againſt the new Incumbent.

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Notwithſtanding this Statute, upon the filling of a void Biſhoprick, not the new Biſhop, but the King by his Prerogative hath the Temporalties thereof from the time that the ſame became void, to the time that a new Biſhop ſhall receive them from the King, and the Perſon or Perſons that execute the Power of Order and Jurisdiction, have the Perquiſites that happen by the Execution of ſuch Power, until the new elected Biſhop may by Law execute the ſame. And it hath been Enacted, **That the King ſhall have Eſcheats of Lands of the Free holders of Archbiſhops and Biſhops, when ſuch Tenants be attainted for Felony in time of Vacation, whiles their Temporalities were in the King's hands to give at his pleaſure, ſaving to ſuch Prelates the Service that thereto is due and accuſtomed.** Stat. 17 Ed. 2. cap. 14. Accordingly (the Temporalties being in Queen *Elizabeth's* Hands) a Copyhold eſcheated which was granted by the Queen, and it was held to be good, *Paſch.* 42 *Eliz. B. R. Coveri's Caſe*, 3 *Cro.* 754. If a Biſhop making a Leaſe of Lands of his Biſhoprick, doth reſerve a yearly Rent to himſelf and Succeſſors, with a Proviſo therein, that in the time of the Vacation of the Biſhoprick the Rent ſhall be paid to the Dean and Chapter, this Proviſo is void and repugnant, and ſhall not bar the King of the Rent, *Paſch.* 4 *Eliz.* 1 *Anderſon f.* 9. *Eires Caſe*, *Moor p.* 51. *Paſch.* 5 *Eliz. Ayer* v. *Ome*, *Dyer* 221, 222.

Though the King hath the Temporalties of a Biſhoprick during the Avoidance, yet during ſuch time Waſt may not be committed; to prevent which it hath been Enacted, **The Keeper, ſo long as he hath the Cuſtody of the Land of ſuch an Heir, ſhall keep up the Houſes, Parks, Warrens, Ponds, Mills and other things pertaining to the ſame Land, with the Iſſues of the ſaid Land; and he ſhall deliver to the Heir when he cometh to his full age, all his Land ſtored with Ploughs and all other things, at the leaſt as he received it. All theſe things ſhall be obſerved in the Cuſtodies of Archbiſhopricks, Biſhopricks, Abbeys, Priories, Churches and Dignities vacant, which appertain to us; except this, that ſuch Cuſtody ſhall not be ſold.** Stat. 9 H. 3. cap. 5. And after it was Enacted, **Becauſe that in the Petition of the ſaid Prelates and Clergy it is contained, that Eſcheators and other Keepers, in the time of Vacation of Archbiſhopricks, Biſhopricks and other Prelacies, have done great waſte and deſtruction in the ſame in time paſt: We will and grant for us and for our Heirs, that at all times from henceforth, when ſuch Voidances ſhall happen, that our Eſcheators and the Eſcheators of our Heirs, which for the time ſhall be, ſhall enter and cauſe to be well kept the ſaid Voidances, without doing waſte or deſtruction in the Manors, Warrens, Parks, Ponds or Woods. And that they ſell no Underwood, nor hunt in the Parks or Warrens, nor fiſh in Ponds, nor Free Fiſhings, nor ſhall rack nor take Fines of the Tenants free nor bond; but ſhall keep and ſave as much as pertaineth to the ſaid Voidances, without doing harm, or any manner of oppreſſion. And if the Dean and Chapter of Churches Cathedral, Priors, Subpriors, Prioreſſes, Subprioreſſes and Covents of Prelacies, Abbies or Priories, whoſe Voidance pertaineth to us and our Heirs, will render to us and our Heirs the value of the ſaid Voidance, as other will reaſonably yield, then the Chancellor and Treaſurer ſhall have power to let the ſaid Dean and Chapter, Prior, or Subprior, Prioreſs or Subprioreſs, and Covent, the ſaid Voidances by good and ſufficient Surety, ſo that they ſhall have the ſame before all other, yielding to us the value of them, according as ſhall be found by Remembrances of the Exchequer, or by Enqueſt to be taken upon the ſame if need be without making Fine. And in caſe they will not accord to yield to the value, nor find ſuch Surety, then the Chancellor and Treaſurer ſhall cauſe to be ordained the good preſervation of ſuch Voidances, by Eſcheators or other ſufficient Keepers to anſwer the**

King of that to him pertaineth reasonably, without doing waste or destruction, or other thing which may turn in disherison of the Churches whereof such Voidances shall happen.

Item. Wholly to shew the affection and good will which we have, that that pertaineth to God and holy Church be safely kept without waste or destruction, or impeachment to be made thereof by us or our Ministers, we will, and by these present Letters do grant full power to our said Chancellor and Treasurer, which taking to them other of our Council such as to them shall seem best to be taken, by good information of Remembrances of the Exchequer, and other informations as to them shall seem best, shall let the Vacations of Archbishopricks, Bishopricks, Abbacies, Priories and other Houses, which Voidances pertain unto us, to the Dean and Chapter, Prior or Subprior, Priorels or Rubpriorels, and Covent, to yield a certain of every Voidance by the year, quarter or month during the Vacations, according as to them shall seem best without making any Fine. So that no Escheator nor other Minister in the time of Vacations shall have cause to enter or meddle to do any thing which shall be in prejudice of the Churches whereof such Voidances shall happen; saving to us and to our Heirs the Knights Fees, Advowsons of Churches, Escheats, Wards, Marriages, Reliefs and Services of the said Fees. In witnels whereof, we have made these our Letters Patents, dated at Westminster the sixteenth day of April, the fourteenth year of our Reign of England, and the first of France, *Stat. for the Clergy* 14 *Ed.* 3. *cap.* 4. *&* 5.

And it is said, that the King's Grant of the Temporalties of a Bishoprick in the Life of the Bishop is good, *Jenkins Cent.* 5. *Case* 44. *p.* 210. But tho' if a Bishop be attainted of Treason the King shall have his Temporalties *in Jure Coronæ*. But a Bishop having to him and his Successors *Bona Felonum de se*, commits Treason, and then the King makes a Grant to the Almoner of Felon's Goods, then the Bishop is attainted; *H.* the Bishop's Lessee for years is *Felo de se*; in this Case, not the Almoner, but the King shall have this Lease, for the King's Grant after the Treason committed, and before the Attainder, was before the King had any Right; which accrued to him by the Attainder, only so was but as a remote Possibility in the King at the time of his Grant not grantable; but *Quære*, inasmuch as the Attainder hath Relation to the time of the Treason committed, *Dyer* 107. *Jenkins Cent.* 44. *Case* 11. *Hughes Abr.* 959. Note that it is agreed in the Case above, that if a Bishop be attaint of Treason, the King shall have the Forfeiture of the Lands of the Bishoprick during the Life of the Bishop only, See the Statutes 26 *H.* 8. *c.* 13. and 5 *E.* 6. *c.* 11.

When a new Bishop is made, he may not *de Jure* before his Consecration claim the Temporalties of his Bishoprick, although that *ex gratia* the King by his Letters Patents may grant them unto him, after his Confirmation and before his Consecration, and the Grant then made is good: But after that he is consecrated, invested and installed he may sue for his Temporalties out of the King's Hands, by a Writ *de Restitutione Temporalium*, directed to the Escheator, *F. N. B.* 169. Yet upon such Writ the Temporalities are not *de Jure* to be delivered, until the Metropolitan hath certified the time of his Consecration, although that the Freehold of the Temporalties be in him by the Consecration, 38 *Ed.* 3. *Godbolt. Parson's Law cap.* 1. *Quære* if such Certificate be necessary upon a Translation.

Having before shewed what Charges Incumbents are liable to, and ought to allow when they enter upon their Benefices, it will be necessary to shew what other Temporal Charges every Person in respect of his Tithes and Glebe is liable to; By the Common Law Spiritual Persons are exempted from

from Toll, Murage, Pontage, and Cuſtoms for their Eccleſiaſtical Goods or other things by them bought for their neceſſary Subſiſtence, which appears by the *Regiſter of Writs* 260. *and Fitz. Nat. Br.* 228. But whatever Privilege or Exemption Clergy-Men had at Common Law, yet they both in reſpect of their Tithes, and Glebe, are lyable to all Charges impoſed by Act of Parliament: They are to contribute to watch and ward, to repairing of the High-ways, and may be rated or taxed by the Commiſſioners of Sewers; they as well as Laymen are chargeable to the poor maimed Soldiers or poor Priſoners, Conſtable Rates, and all other publick Charges impoſed by Act of Parliament, and that hath been reſolved upon Debate as *Hales* Chief Juſtice ſaid before all the Judges, *Trin.* 27 *Car.* 2. *in the Caſe of Web* v. *Batchelor*, 3 *Keb.* 476. & 1 *Ventris* 273. *Trin.* 25 *Car.* 2. *Dominus Rex* v..... 3 *Keble* 255. *Deggs Parſon's Counſellor* 277. *Callis Lecture on the Statute of Sewers* 230, 232.

CHAP. XLI.

What Eſtates Eccleſiaſtical Perſons might have made at Common Law, and how their Power is enlarged or leſſened by Acts of Parliament, and the ſeveral Acts of Parliament relating thereunto.

OF a Clergy-Mans being legally poſſeſſed of an Eccleſiaſtical Benefice, the effect is not only, that the Lands and other Profits of the Church are veſted in him, ſo that he may enter upon and convert the ſame to his own proper uſe, but alſo that upon ſuch Induction or Poſſeſſion only, and not before, he may let and diſpoſe of them to others; and that not only during his own Incumbency, but in ſome Caſes to bind the Succeſſors alſo. That this is an effect of a legal Poſſeſſion or Seiſin will be evident from many Caſes hereafter mentioned: As firſt, (King *Edward the Sixth* having by his Letters Patents appropriated a full Church to a Biſhop and his Succeſſors, to hold the ſame after it ſhould become void, the Biſhop made a Leaſe by Indenture for forty years, to commence from the time that the ſaid Parſonage ſhould come to the Hands of the ſaid Biſhop or his Succeſſors by the death of the Incumbent or otherwiſe, (which Leaſe was confirmed by the Dean and Chapter) the Biſhop and Incumbent being dead, the ſucceeding Biſhop entred, and made a new Leaſe. The Opinion of all the Juſtices in this Caſe was, that the firſt Leaſe was void, for that the Leſſor had no Right to, or Intereſt in the Parſonage appropriate during the Life of the Incumbent, who ſurvived him, and who alone was ſeized of it for his time. The like Caſe was after in the *Chancery* between *Jobſon* and *Michael*, and was referred to *Dyer* and *Welſh* Juſtices, who determined it according to the ſaid Opinion, *Mich.* 7 & 8 *Eliz. C. B. Dyer fol.* 244. See *Rector of Cheddirgton's Caſe*, 1 *Co.* 155. And ſo it was held by all the Juſtices, that the Grant of a Prebendary before his Inſtallation (which gives the Poſſeſſion) was void, and did not charge the Prebend, *Trin.* 20 *Eliz. C. B. Hare* & *Bukley*, *Plowden* 529. And the like Law is ſaid to be, in the Caſe of a Dean and Chapter, becauſe during the Life of the Incumbent, they have nothing in the Rectory, the Appropriation not being executed, nor executable, but by their Entry after the Church becomes void, *Mich.* 18 & 19 *Eliz. C. B. Grendon* v. *the Biſhop of Lincoln*, *Plowden* 500. *b.*

But what Eſtates Church-men at this day may make to others of their Poſſeſſions comes now to be declared; In order to which, for the better apprehending thereof, I ſhall firſt remember what Eſtates they might anciently have made, before their Power in this reſpect was either enlarged or leſſened by Acts of Parliament. In brief therefore, all Eccleſiaſtical Perſons had in former times, as full Power and Authority to leaſe, grant, or alien, any, or all of their Eccleſiaſtical Eſtates of which they were ſeized in Fee; as any Perſon ſeized of a Temporal Eſtate in his natural capacity then had, or as yet hath; that is, if the Grant made by a ſole Corporation was with the conſent of others whoſe Confirmation was in ſuch caſe neceſſary. For though Deans and Chapters, Maſters and Fellows of Colleges, Maſters and Brethren of Hoſpitals and ſuch like Corporations aggregate of many, might of themſelves alone without the conſent or confirmation of any, have made long Leaſes for Lives, or Years, or Gifts in Tail, or Eſtates in Fee to others of their Poſſeſſions, according to their own Wills, yet Biſhops, Deans, *&c.* ſeized in the Right of their Biſhopricks, Deanries, *&c.* ſo Archdeacons, Prebends, Parſons, Vicars, *&c.* if they made the ſame Grants muſt have had the Conſent, and Confirmation of others that had power of confirming in that behalf, and then their Grants were as good, as the Grants made by aggregate Corporations. But the Law as to the Capacity of Clergy-Men with reſpect to their Eſtates is at this day much altered, *viz.* by ſeveral Statutes, and the firſt of them is 32 *H.* 8. *c.* 28. and in theſe Words following.

Where great number of the King's Subjects have heretofore taken Leaſes of Lands, Tenements, and other Hereditaments, for term of Years, and divers of them for term of Lives, and have given and paid great fines and great ſums for the ſame, and alſo have been at great coſts and charges, as well in and about great Reparations and Buildings upon their ſaid Ferms, as otherwiſe concerning their ſaid Ferms: yet notwithſtanding, the ſaid Fermors, after the deaths or reſignations of their Leſſors, have been, and be daily with great cruelty expulſed, and put out of their ſaid Ferms and takings, by the Heirs or Succeſſors of their ſaid Leſſors, or by ſuch perſons as have intereſt therein after the deaths or reſignations of their ſaid Leſſors, by reaſon of privy Gifts of Entail, or for that the Leſſors had nothing in the Lands, Tenements or other Hereditaments ſo letten, at the time of the Leaſes thereof made, but only in the right of their Wives, or ſuch other like cauſe, to the great impoveriſhment, and in manner utter undoing of the ſaid Fermors: for reformation whereof, be it ordained, eſtabliſhed and enacted by the King our Sovereign Lord, the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by authority of the ſame, That all Leaſes hereafter to be made of any Manors, Lands, Tenements, or other Hereditaments by writing indented under Seal for term of Years, or for term of Life, by any perſon or perſons, being of full age of xxj. years, having any Eſtate of Inheritance, either in fee-ſimple, or in fee-tail, in their own right, or in the right of their Churches or Wives, or joyntly with their Wives, of an Eſtate of Inheritance made before the Coverture or after, ſhall be good and effectual in the Law, againſt the Leſſors, their Wives, Heirs and Succeſſors, and every of them, according to ſuch Eſtate as is compriſed and ſpecified in every ſuch Indenture or Leaſe, in like manner and form as the ſame ſhould have been if the Leſſors thereof, and every of them, at the time of the making of ſuch Leaſes, had been lawfully ſeiſed of the ſame Lands, Tenements and Hereditaments compriſed in ſuch Indenture, of a good, perfect, and pure Eſtate of Fee ſimple thereof to their own only uſes.

Provided

Provided alway, That this Act, or any thing therein contained, shall not extend to any Leases to be made of any manors, lands, tenements or hereditaments being in the hands of any fermor or fermors by vertue of any old lease, unless the same old lease be expired, surrendred or ended within one year next after the making of the said new lease, nor shall extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments, nor to any lease of any manors, lands, tenements, or hereditaments which have not most commonly been letten to ferm, or occupied by the fermors thereof by the space of twenty years next before such lease thereof made: nor to any lease to be made, without impeachment of waste, nor to any lease to be made above the number of xxj. years, or three lives at the most, from the day of making thereof. And that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomably yeelden or paid for the manors, lands, tenements, and hereditaments so to be letten within xx. years next before such Lease thereof made, And that every such person and persons to whom the reversion of such manors, Lands, Tenements, or hereditaments so be letten, shall appertain, as is aforesaid, after the deaths of such lessors or their heirs, shall and may have such like, remedy advantage, to all intents and purposes against the Lessees thereof, their executors and assigns, as the same Lessor should or might have had against the same Lessees

Provided also, That this Act extend not to give any liberty or power to any person or persons to take any more Ferms, Leases, or takings of any manors, Lands, Tenements, or other hereditaments, then he or they should or might lawfully have done before the making of this Act, nor extend to give any liberty or power to any Parson, or Vicar of any Church or Vicarage, for to make any Lease or grant of any of their messuages, lands, tenements, tithes, profits, or Hereditaments belonging to their Churches or Vicarages, otherwise or in any other manner, than they should or might have done before the making of this Act; any thing contained in this Act to the contrary notwithstanding. Stat. 32 H. 8. cap. 28.

As to this Statute it may be noted, that the same is an enabling Statute; for whereas before the making thereof no sole Corporation could have made any Gift, Alienation, or so much as a Lease for Years or Lives to bind their Successors without the assent or confirmation of others *quorum* Interest, *Trin.* 11 *Jac. C. B. the Bishop of Salisbury's Case*, 10 *Co.* 60. By this Statute any Person that is seized of an Estate in Fee simple in the Right of his Church (Parsons and Vicars excepted) are enabled to make Leases for three Lives or one and twenty Years of their own single Authority, without any Confirmation, respect being had to the several qualifications therein mentioned, *Trin.* 21 *Eliz. Fox* v. *Collier*, *Moor* 107. And those that in the intent of this Statute are said to be seized of an Estate in Fee-simple in the Right of their Churches, are only Bishops, who are seized in the Right of their Bishopricks, Deans seized of their sole Possessions in the Right of their Deanries, and so Archdeacons, Prebendaries and all other sole Corporations, except Parsons and Vicars, for they by a special Proviso are excepted out of the Statute; for though a Prebend, *&c.* is not seized *in Jure Ecclesiæ*, but *Prebendæ*, *&c.* yet because Parsons, and Vicars are especially excepted and none others; Prebends, *&c.* are within the Statute even as Bishops; and *Popham* said in *Dr. Dales Case*,

Caſe, that for an Houſe near *Pauls* it was ſo adjudged, and ſo had been twice adjudged in his experience; and *Fenner* ſaid it was ſo adjudged in the Caſe of a Treaſurer of a Church, *Trin.* 31 *Eliz. C. B. Acton & Pricher's Caſe*, 4 *Leonard* 51. So likewiſe was it adjudged in the Caſe of a Chancellor, and of a Precentor, by reaſon theſe were but Offices and Names of Dignity annexed to the Prebendaries; but it was then ſaid by *Twiſden* Juſtice, that he did not remember, that it had been ſo adjudged in the Caſe of a Treaſurer, *Mich.* 15 *Car.* 2. *B. R. Bis* v. *Holt*, 1 *Sid.* 158. 1 *Keb.* 576. But as to Corporations aggregate, as Deans and Chapters, though they be ſeized in Right of their Churches, this is no enabling Statute, for ſuch by the conſent of the major part of them might have made any Leaſes or Grants of their Eſtates without Limitations before this Statute was made, and till by latter Statutes they were reſtrained, might have done ſo afterwards, this Statute being meerly enabling, and not at all reſtraining them. And though by this Statute the ſole Corporations before mentioned, could not without Conſent and Confirmations of others, have made Leaſes for above three Lives or one and twenty years, yet with Confirmation they might have made longer Leaſes, or abſolute Alienations of any of their Poſſeſſions, until other Statutes did reſtrain them.

And for the reſtraining of Biſhops was firſt made the Statute of 1 *Eliz. cap.* 19. which is as followeth: **That all Gifts, Grants, Feoffments, Fines, and other Conveyance, or Eſtates, from the firſt day of this preſent Parliament, had, made, done or ſuffered, or to be had, made, done, or ſuffered** by any **Archbiſhop or Biſhop, of any Honours, Caſtles, Manors, Lands, Tenements, or other Hereditaments, being parcel of the Poſſeſſion of his Archbiſhoprick or Biſhoprick, or united, appertaining or belonging to any of the ſame, to any perſon (other then to the Queen, her Heirs or Succeſſors) whereby any Eſtate ſhould or might paſs from the Archbiſhop or Biſhop, other then for term of One and twenty years, or Three lives, from ſuch time as any Leaſe, Grant, or Aſſurance ſhall begin, and whereupon the old accuſtomed yearly Rent, or more, ſhall be reſerved, payable yearly during the ſaid term of One and twenty years, or Three lives, ſhall be utterly void; Any Law, Cuſtom,** &c. **notwithſtanding.**

But this Statute leaving Biſhops to their former Power of granting to the Queen, her Heirs and Succeſſors, took little effect, for that many Eſtates were granted to the Queen upon deſign that the Queen ſhould grant them over to others, and therefore the Statute of 1 *Jac. c.* 3. for the reſtraining of Biſhops was made, which is as followeth

Whereas all the Archbiſhoprics and Biſhoprics within this Realm of England, **were in ancient times founded by his Majeſty's moſt noble Progenitors, Kings of this Realm, and in reſpect thereof, his Majeſty is lawful and rightful Patron of all and every of the ſame: and where alſo by the Laws and Statutes of this Realm, no Archbiſhop or Biſhop can make any Conveyance, Aſſurance or Eſtate whatſoever, of any honors, caſtles, manors, lands, tenements or hereditaments, parcel of the poſſeſſions of his Archbiſhoprick or Biſhoprick, or united, appertaining or belonging to any of the ſame, to any Subject whatſoever, whereby any Eſtate ſhould or might paſs from any Archbiſhop or Biſhop, other then for term of** xxi. **years, or three lives, with ſuch reſervations of Rent, and in ſuch manner and form, as by the Laws and Statutes are provided: His moſt excellent Majeſty underſtanding that divers perſons have with great ſuit and importunity ſought to fruſtrate the true end and intent of the ſaid good Laws and Statutes in that behalf, of his Chriſtian and Princely Piety and Care, minding ſo to Patronize and protect the ſaid poſſeſſions from alienation or diminution,**

nution, as that the ſame may according to the true intent of the Founders, remain and continue in ſucceſſion to the Archbiſhops and Biſhops of this Realm, and their ſucceſſors, for the better maintenance of God's true Religion, keeping of hoſpitality, and avoiding of dilapidations, and thereby for ever hereafter to avoid all ſuits and importunities for or concerning any of the ſaid poſſeſſions, Hath out of his own meer and godly motion, and of his bleſſed diſpoſition for the publick good, without all regard of any private reſpect, vouchſafed, and is pleaſed, That it may be enacted, and enſtabliſhed by his Majeſty, by and with the aſſent of the Lords Spiritual and Temporal and the Commons in this preſent Parliament aſſembled;

And be it enacted and eſtabliſhed by the authority of the ſame, That every Archbiſhop and Biſhop within this Realm, and their and every of their ſucceſſors, ſhall be from and after the end of this preſent Seſſion of Parliament, for ever wholly and utterly diſabled in Law, to make, do, levy or ſuffer any Act or Acts, thing or things, whereby or by means whereof, any of the ſaid honors, caſtles, manors, lands, tenements or hereditaments, or any part of them, or any of them, ſhall or may be aliened, aſſured, given, granted, demiſed, charged, or in any ſort conveyed to our ſaid Sovereign Lord the King, his Heirs or Succeſſors: And that all alienations, aſſurances, gifts, grants, Leaſes, charges and conveyances whatſoever, from and after the end of this preſent Seſſion of Parliament, to be done, ſuffered or made to our ſaid Sovereign Lord the King, his Heirs or Succeſſors, by any Archbiſhop or Biſhop, or their or any of their Succeſſors, of or out of any of the ſaid poſſeſſions, or of or out of any part or parcel of them or any of them, and all and every confirmation and confirmations of the ſame, ſhall be from and after the end of this preſent Seſſion of Parliament, utterly void and of none effect, to all intents, conſtructions and purpoſes; Any former Law, Statute, Act, Ordinance or other matter or thing to the contrary notwithſtanding. Stat. 1 Jac. cap. 3.

Theſe Statutes are meerly reſtraining, ſo that although Biſhops might with the Confirmation of the Dean and Chapter have made any Leaſe, or perpetual Grants, yet now with Confirmation they cannot alien or make other Leaſes than for three Lives, or one and twenty Years. If the Statute of 32 *H.* 8. (of which Statute this of 1 *Eliz.* makes no alteration) which did under ſeveral Limitations enable Biſhops to let Leaſes for three Lives, or one and twenty Years without Confirmation, had not been made before this of 1 *Eliz.* they could not by this have made any Leaſe to bind their Succeſſors without the Confirmation of the Dean and Chapter, (this Statute being meerly diſenabling) and therefore, if a Biſhop doth make a Leaſe for one and twenty Years, or three Lives, according to the Statute of 1 *Eliz.* yet if all the Limitations preſcribed by the Statute of 32 *H.* 8. be not duly purſued, as if it be not all in poſſeſſion, or that the old Leaſe be not expired, or ſurrendred within one year when a new one is made, (which is not prohibited by the Statute of 1 *Eliz.*) ſuch Leaſe ſhall not bind the Succeſſor, unleſs it be confirmed by the Dean and Chapter, *Trin.* 11 *Jac. C. B. the Biſhop of Salisbury's Caſe*, 10 *Co.* 60. *Trin.* 21 *Eliz. Fox* v. *Collier*, *Moor* 108. Note, that this Statute 1 *Eliz.* is but a private or particular Statute and muſt be ſpecially pleaded, elſe the Court will not take notice thereof, *Hill.* 3 *Jac. Valentine* v. *Denton* 2 *Cro.* 112. *Trin.* 30 *Eliz. B. R. Elmer's Caſe*, 5 *Co.* 2. *ſame Caſe*, *Moor* 253. 4 *Co. Holland's Caſe*, 76, 2 *Rolls Abr.* 466. But this Statute being made only for the diſenabling Biſhops, another diſabling Statute was made to extend to all other Eccleſiaſtical Perſons, as alſo to Colleges, &c. which is as followeth.

And

And for that long and unreasonable Leases made by Colleges, Deans, and Chapters, Parsons and Vicars, and other having Spiritual Promotions, be the chiefest causes of the Dilapidations, and the decay of all Spiritual Livings and Hospitality, and the utter impoverishing of all Successors Incumbents of the same, Be it enacted by the authority aforesaid, That from henceforth all Leases, Gifts, Grants, Feoffments, Conveyances or Estates, to be made, had done, or suffered by any Master and Fellows of any College, Dean and Chapter of any Cathedral or Collegiate Church, Master or Guardiam of any Hospital, Parson, Vicar or any other having any Spiritual or Ecclesiastical Living, or any Houses, Lands, Tythes, Tenements, or other Hereditaments, being any parcel of the Possessions of any such College, Cathedral Church, Chappel, Hospital, Parsonage, Vicarage, or other Spiritual Promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, Bodies politick or corporate, (other then for the term of one and twenty years, or three lives, from the time as any such Lease or Grant shall be made or granted, whereupon the accustomed yearly Rent or more shall be reserved, and payable yearly during the said term) shall be utterly void and of none effect, to all intents, constructions and purposes; Any Law, Custom, or Usage to the contrary any ways notwithstanding.

Provided nevertheless, and be it enacted by the authority aforesaid, That this Act, nor any thing therein contained, shall be taken or construed to make good any Lease, or other Grant to be made by any such College or Collegiate Church within either of both the Universities of Oxford and Cambridge, or elsewhere within the Realm of England, for more years then are limited by the private Statutes of the same College.

Provided always, That this Act shall not extend to any Lease hereafter to be made upon surrender of any Lease heretofore made, or by reason of any covenant or condition contained in any Lease heretofore made, and now continuing, so that the Lease to be made do not contain more years then the residue of the years of the former Lease now continuing shall be at the time of such Lease hereafter to be made, nor any less Rent than is reserved in the said former Lease. Stat, 13 Eliz. c. 10.

First note, that though this Statute hath general Words, **And all others having any Spiritual or Ecclesiastical Livings,** &c. yet doth it not extend to Bishops, because it begins with others of inferior Order to them, and so those general Words after ought to be supplyed with intention of other inferior, or at least but equal to those that are specified before, by *Coke, Hill.* 43 *Eliz. Gouldsborough* 171. and so it is said 13 *Jac. Warren* v. *Smith, or Magdalen College Case*, 1 *Rolls Rep.* 151. yet it hath been adjudged, that this Statute is a general Law, 4 *Co. Dumper's Case*, 20. 4 *Co. Holland's Case* 76. 2 *Rolls Abr.* 465. *dubitatur*, *Pasch.* 32 *Eliz.* 2. *Carter* v. *Dame Cromwel, &c. Savils Case* 198. 1 *Leon.* 306. *Trin.* 27 *Car.* 2. *C. B. The Chapter of the Collegiate Church of Southwel* v. *Bishop of Lincoln, &c.* 1 *Mod. Rep.* 204.

Secondly note, this Statute hath always been construed largely and beneficially to prevent all Inventions and Evasions against the true intention of it; therefore, whereas the Statute saith, **Masters and Fellows of any College,** be the College incorporate by the same Name, or by the Name of Warden and Fellows, or Warden and Scholars, or Warden Fellows and Scholars, or Provost and Scholars, or by any other Name of Corporations; and be the College Temporal for the advancement of the Liberal Arts and Sciences, or meer Ecclesiastical, or mixt, it is said to be often held that every such

ſuch College is within the Proviſion of this Act; and ſo where the Statute ſaith, **Maſter, or Wardens of any Hoſpital,** be the Hoſpital incorporate by any other Name, or be it a ſole Corporation, or a Corporation agregate of many, the Statute doth extend to it, and ſo of the reſt, *the Caſe of the Maſter and Fellows of Magdalen College in Cambridge, Paſch.* 13 *Jac.* 11 *Co. fol.* 76.

So though the King is not named in this Act, yet it was reſolved in Parliament, 43 *Eliz.* by *Popham* and *Anderſon*, that the Queen was bound thereby, and this Reſolution was allowed of by the Lords and Commons in Parliament, which was the reaſon, why thoſe Perſons that were reſtrained by this Act were not put into the Statute of 1 *Jac.* with Biſhops; for at the Parliament held 1 *Jac.* it was upon making the Act for to bar Biſhops from alienating to the King, reſolved again by the Juſtices aſſiſtants, that by the 13 *Eliz. cap.* 10. they were already in that Caſe reſtrained, *the Caſe of the Maſter and Fellows of Magdalen College in Cambridge, Paſch.* 13 *Jac.* 11 *Co.* 75. *ſame Caſe,* 1 *Rolls Rep.*151. But it ſeems the Law for ſome time was taken to be, that the King was not bound by this Statute of 13 *Eliz.* and for that reaſon, when a Dean and Chapter had leaſed Land to the King for a valuable conſideration, at ſuch time when the Law was taken to be, that the King was not bound by this Statute, and the King did aſſign it over, the Aſſignee (after the Law was taken to be that the King was bound thereby) had his Leaſe made good to him by the *Court of Chancery* againſt the Statute, for that he could not know the Law in a Matter ſo dubious, but decreed that he ſhould pay two hundred Pounds to the Dean and Chapter, *Mich.* 16 *Jac. Long* v. *the Dean and Chapter of Briſtow*, and the like Decree was made between *Maudlen College and Wood*, 1 *Rolls Abr.* 378.

Thirdly note, that this Statute makes no alteration of the Statute of 32 *H.* 8. but leaveth it as a Pattern in many things, for Leaſes to be made by Eccleſiaſtical Corporations aggregate, which are not within the Statute.

Fourthly note, That no Leaſe made according to this reſtraining Statute of 13 *Eliz.* by any ſingle Corporation, as Dean, Archdeacon, *&c.* if it be not with regard to the Limitations in 32 *H.* 8. is not good, without the Confirmation of thoſe, who by Law are to confirm the ſame.

Fifthly note, That as to Houſes in Cities and great Towns the Statute of 13 *Eliz. cap.* 10. is altered by a Clauſe in the Statute of 14 *Eliz. cap.* 11. which is in theſe Words.

Whereas in an Act made 13 Eliz. Entituled, An Act againſt fraudulent gifts, to the intent to defeat Dilapidations of Eccleſiaſtical Livings, and for Leaſes to be granted by Collegiate Churches, there is one branch to avoid certain Leaſes to be made by Maſters and Fellows of Colleges, Deans and Chapters of Cathedral or Collegiate Churches, Maſters or Guardians of any Hoſpital, or by any Parſon, Vicar, or any other having any Spiritual or Eccleſiaſtical Living, Be it enacted, That the ſaid branch, nor any thing therein contained, ſhall not extend to any Grant, Aſſurance, or Leaſe of any Houſes belonging to any perſons, or bodies politick or corporate aforeſaid, nor to any grounds to ſuch houſes appertaining, which houſes be ſituate in any City, Borough, Town-corporate, or Market-town, or the Suburbs of any of them, but that all ſuch houſes and grounds may be granted, demiſed and aſſured, as by the Laws of this Realm and the ſeveral Statutes of the ſaid Colleges, Cathedral Churches and Hoſpitals, they lawfully might have been before the making of the ſaid Statute, or lawfully might be, if the ſaid Statute were not, ſo alway that ſuch houſe be not the capital or dwelling houſe uſed for the habitation of the perſons above-

ſaid, nor have ground to the ſame belonging, above the quantity of ten Acres; any thing in the ſaid Act to the contrary notwithſtanding.

Provided alway, and be it enacted, That no Leaſe ſhall be permitted to be made by force of this Act, in reverſion, nor without reſerving the accuſtomed yearly Rent at the leaſt, nor without charging the Leſſee with the reparation, nor for longer term then fourty years at the moſt; nor any houſes ſhall be permitted to be aliened, unleſs that in recompence there of, there ſhall be afore, with or preſently after ſuch alienation, good, lawful and ſufficient aſſurance made in Fee ſimple abſolutely to ſuch Colleges, Houſes, bodies politick or corporate, and their ſucceſſors of Lands of as good value, and of as great yearly value at the leaſt, as ſo ſhall be alienes; any Statute to the contrary notwithſtanding.

Note, That this Statute of 14 *Eliz.* doth make no alteration of the Statute of 1 *Eliz. c.* 19. nor hath any relation to it, but only to the Statute of 13 *Eliz. c.* 10. and therefore gives no Power to Biſhops to let Houſes, otherwiſe than according to the ſaid Statute of 1 *Eliz.* nor to exchange for any Recompence.

Note alſo, That this Statute need not to be found by Verdict, being it is a general Law, *Paſch.* 39 *Eliz. C. B. Hunt* v. *Singleton*, 3 *Cro.* 564.

By this Statute it ſeems no Leaſes may be made of Houſes in Reverſion, which was not reſtrained by the Statute of 13 *Eliz.* as appears by the Statute of 18 *Eliz. c.* 11. by which Statute that Miſchief is provided for, as not provided for before, as followeth.

Sithence the making of which Statute, (viz. 13 Eliz. c. 10.) divers Eccleſiaſtical and Spiritual perſons, and others, having Spiritual or Eccleſiaſtical Livings, have from time to time made Leaſes for the term of xxj. years, or three lives, long before the expiration of the former years, contrary to the true meaning and intent of the ſaid Statute: Be it therefore enacted by this preſent Parliament, That all Leaſes hereafter to be made by any of the ſaid Eccleſiaſtical, Spiritual or Collegiate perſons or others, of any the ſaid Eccleſiaſtical, Spiritual or Collegiate Lands, Tenements or Hereditaments whereof any former Leaſe for years is in being, not to be expired, ſurrendred or ended within three years next after the making of any ſuch new Leaſe, ſhall be void, fruſtrate and of none effect; Any Law, Uſage or Cuſtom to the contrary notwithſtanding.

And be it likewiſe enacted by the authority aforeſaid, That all and every Bond and Covenant whatſoever hereafter to be made, for renewing or making of any Leaſe or Leaſes, contrary to the true intent of this Act, or of the ſaid Act made in the ſaid xiij. year, ſhall be utterly void; Any Law, Statute, Ordinance or other thing whatſoever to the contrary in any wiſe notwithſtanding.

Provided always, That this Act, nor any thing therein contained, ſhall extend or be prejudicial to make fruſtrate or void any Leaſe or Leaſes heretofore made by any of the ſaid Spiritual or Eccleſiaſtical perſon or perſons, or any of them, but that the ſame, and every of them are of the like force and effect, as they or any of them were before the making of this preſent Statute; This Act, or any thing therein contained to the contrary notwithſtanding.

And whereas in one other Statute made in the ſaid xiij. year of her Majeſty, entituled, An Act touching Leaſes of Benefices, and other Eccleſiaſtical Livings with Cure, one clauſe is contained, That the Incumbent offending the purport of the ſaid Statute, ſhall for the ſame loſe one years profit of his ſaid Benefice, to be diſtributed by the Ordinary among the

Poor

Poor of the Parish, as by the said branch in the said last recited Statute appeareth: Be it therefore enacted by the authority aforesaid, That after complaint made to the Ordinary, and sentence given upon any offence committed by the Incumbent, whereby he shall or ought to lose one years profit of his Benefice, as afore shewed, that the Ordinary within two months after such sentence given, and request to him made by the Churchwardens of the said Parish, or one of them, shall grant the Sequestration of such profits, to such Inhabitant or Inhabitants within the Parish where such Benefice shall be, as to him shall seem meet and convenient; and upon default therein by the Ordinary, that it may and shall be lawful to every Parishioner where the Benefice is, to retain and keep his or their Tithes, and likewise for the Churchwardens of the said Parish, to enter and take the profits of the Glebe-lands, and other Rents and Duties of every such Benefice, to be employed to the use of the poor, as aforesaid, until such time as Sequestration shall be committed by the Ordinary, and then as well the Churchwardens as Parishioners, to yield account of, and make payment to him or them to whom such Sequestration shall be committed; and that he or they to whom such Sequestration shall be committed from time to time, shall justly and truly employ and bestow the said Profits, or the true and just value thereof, without fraud or guile, to such uses as by the said Statute is limited and appointed, upon pain of forfeiture of the double value of such withholden Profits, to be recovered in the Ecclesiastical Court by the poor of the said Parish.

As the Statute of 14 *Eliz. c.* 11. is in respect of Houses in Cities, *&c.* a new Law of it self differing from 13 *Eliz. c.* 10. so this Statute of 18 *Eliz.* hath no relation to that of 14 *Eliz.* therefore the Clause in 18 *Eliz.* which makes Bonds and Covenants void, which are made for the renewing, or making of Leases contrary to the Statutes, doth not extend to Houses mentioned by this Statute; accordingly when the Case was that the Dean and Chapter by their special Names, had covenanted jointly and severally to make a Lease of an House in *London*; and upon an Action brought against the Dean and one of the Prebendaries, the Lease and Covenant was upon demurrer argued to be void by the Statute of 18 *Eliz.* but it was adjudged, that the Covenant was good in Law, because it was not within the Statute of 18 *Eliz.* being made concerning an House in *London*; for it was said, though the Statute of 13 *Eliz. c.* 10. be general against all Leases, and Grants, other than for one and twenty, or three Lives of all the Possessions of Deans and Chapters, *&c.* Yet there is a Statute of 14 *Eliz. c.* 11. which is shuffled into an Act of Continuance of Statutes, that Enacts, **That that Statute** 13 Eliz. (meaning it) **shall not extend to any Houses in Cities, or Towns,** &c. **but that the same may be granted, demised or assured as they might lawfully have been before, and as if that Statute had not been made**; so that Statute sets all loose, touching such Houses in Cities, as against the Statute of 13 *Eliz.* and therefore that Statute of 14 *Eliz. c.* 11. makes a new Law of it self for them. Then comes the Statute of 18 *Eliz.* which recites, that since the making of the Statute of 13 *Eliz.* divers Leases were made long before the Expiration of the former, against the meaning of the Statute of 13 *Eliz.* and Enacteth, **That all Leases made of Lands whereof any former Lease was then in being and not to be ended within three years should be void, and that all Bonds and Covenants for making Leases against the intent of** 18 or 13 Eliz. **should be void**; so that this Statute toucheth not the Statute of 14 *Eliz.* which permitted not Leases in Reversion, and so voids not Bonds, and Covenants which touch Houses in Cities, *&c. Trin.* 14 *Jac.*

Crane v. *Taylor*, *Hobart* 269. but *Trin.* 25 *Car.* 2. *B. R. in Bayly & Munns Caſe*, 1 *Ventr.* 246. My Lord Chief Juſtice *Hales* inclined to be of a contrary Opinion, *viz.* that the Statute of 18 *Eliz.* did extend to that of 14 *Eliz.* See more fully of this Matter *Chapter* 42. So upon the Statute of 14 *Eliz. cap.* 11. the Caſe being, that a Parſon covenanted with *A.* that he ſhould have his Tithes for thirteen years, and afterwards reſigned, and another Parſon was inducted, by which means *A.* being ouſted of his Tithes, brought an Action of Covenant againſt his Leſſor, to which the Defendant pleaded the Statute of 14 *Eliz.* in Bar. And it was adjudged by *Coke*, *Dodderidge and Haughton*, that this Covenant was not made void by the Statute, for that Statute, as appears by the Preamble of it, intended to make Bonds and Covenants void contrary to the Proviſion of 13 *Eliz.* but doth not extend to Bonds and Covenants made for the Enjoyment of Leaſes, which do become void by Reſignation, *&c.* which are Voidances by the Common Law, *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas*, 3 *Bulſtrode* 202. So a Leaſe made for ſixty years before the Statute of 13 *Eliz.* and confirmed by the Patron and Ordinary; and the Succeſſor became bound in a Bond, after the Statute of 14 *Eliz.* that the Leſſee ſhould enjoy the Leaſe during the Term, and after is non-reſident above eighty days in one year, adjudged, that this Bond was not void by the Statute of 14 *Eliz.* becauſe the Leaſe was a good Leaſe, and the Bond given for the Enjoyment of that Leaſe, which the Succeſſor could not avoid, is a good Bond, *Paſch.* 42 *Eliz. Coſtard* v. *Wingate*, 3 *Cro.* 775. *ſame Caſe*, *Moor* 606.

Practices it ſeems have been uſed to avoid this Statute of 18 *Eliz.* and the Clauſe making void Bonds and Covenants againſt it, and alſo 13 *Eliz. c.* 10. and to make them of none effect, but in vain; for the Caſe was, that the Dean and Chapter of *Windſor* in the 35*th* year of the Queen made an Agreement amongſt themſelves, by Lots, to have an Aſſurance of a Leaſe to each of them, of certain part of the Poſſeſſions of their Church, which after the Lots caſt, whereby every one knew his Leaſe, they executed the Aſſurance in this manner: The Corporation enters into an Obligation of 500 *l.* to every Canon that was to have a Leaſe, and the Payment limited to be within a ſhort time before the Expiration of the old Leaſe in being; and the Canon the ſame day entred into an Obligation to pay to the College the Sum of 510 *l.* at the ſame time, if they did make a Leaſe according to a Schedule annexed, which Schedule was *verbatim* the Demiſe agreed to be made. And it was further proved, that the Intent and Agreement betwixt them was, that the one 500 *l.* ſhould be ſtopped for the other 500 *l.* and that the Corporation ſhould only have the 10 *l.* for the Leaſe; upon which Matter (*Egerton* Chancellor) made a Decree, that the Obligation of 500 *l.* made by the Dean and Canons to each Canon was void by the Statute of 18 *Eliz.* And there was viewed the Preſident of a Caſe between *Fry and the Dean and Canons of Wells*, decred 44 *Eliz. in Chancery*, which was thus: *Fry* gave to the Dean and Canons of *Wells* 1000 *l.* and took an Obligation of 2000 *l.* with Condition to repay the 1000 *l.* and for Non-payment he brought an Action of Debt againſt the Dean and Prebends, and obtained a Judgment, and made a Defeazance of the Judgment, that if they make to him a Leaſe of Land that was then in Leaſe to Sir *Amias Pawlet* for fifteen years to come, that then the Judgment ſhould be void. And the truth of the Caſe was, that the thouſand Pounds were paid, and that ſix hundred Pounds thereof was imployed in payment of Tenths due by the Church; yet by the Opinion of *Popham*, *Anderſon* and *Pirryam* it was decreed in *Chancery*, that the Judgment was void by the Statute of 18 *Eliz.* which ſaith, that Bonds and Covenants, *&c.*

&c. ſhall be void, which are made for making of a Leaſe againſt this Statute, or the Statute of 13 *Eliz. c.* 10. But by way of Arbitrament they awarded to *Fry* the 600 *l.* which was paid, and imployed in the Affairs of the Church, *Hill.* 4 *Jac. the Dean and Canons of Windſor* v. *Gilbert Penvin*, *Moor* 789.

And note, that this Statute of 18 *Eliz. c.* 11. is a general Statute, 4 *Co. Holland's Caſe* 76. 2 *Rolls Abr.* 465.

To theſe Statutes may be added theſe Clauſes in the Statute of 22 *Car.* 2. *c.* 11. by which it is Enacted, That for ever hereafter the ſaid Mayor and Commonalty, and Citizens of London, may and ſhall have a Market to be kept three or four days in the week, as to them ſhall ſeem convenient, upon the Ground now ſet out by the aſſent of the Dean and Chapter of the Cathedral Church of St. Pauls London, for a Market-place within New-gate. And that the ſaid Dean and Chapter ſhall make and give one or more Leaſe or Leaſes of the ſaid Ground, to the ſaid Mayor, Commonalty and Citizens, and alſo of the Wall of the ſaid Church Yard, abutting ſeverally upon Pater-noſter-Row and the Old Change, for the Term of forty years, reſerving the yearly Rent of four pounds for the Ground of the ſaid Market-place, and two pence for every ſuperficial Foot of the Ground or Soil of the ſaid Wall, as it is now ſet out by the Surveyors of the City, and of the ſaid Dean and Chapter; and ſo from forty years to forty years for ever, at the like yearly Rent, and one years Rent after the Rates aforeſaid, to be paid by way of Fine, for each of the ſaid Grounds reſpectively, upon the making every new Leaſe thereof; Which ſaid Leaſe and Leaſes ſhall be good and effectual in the Law, as againſt the ſaid Dean and Chapter, and their Succeſſors, and all perſons claiming by, from or under them: and that no Houſe, Shed or other Building ſhall ſtand, or hereafter be erected and ſited upon the ſaid Market-place, other than the Market-houſe already built, without the conſent of the ſaid Dean and Chapter; any thing in this or any other Act to the contrary notwithſtanding.

And whereas the ſaid Parſons and Vicars, or ſome of them (meaning Parſons and Vicars within the City of *London*) are intereſſed in ſeveral Glebe-Lands or Grounds, the which they cannot rebuild themſelves, nor let ſuch Leaſe or Leaſes as may be an Encouragement for others to rebuild the ſame; Be it enacted by the authority aforeſaid, That the ſaid Parſons and Vicars, and every of them reſpectively, be impowred, and are hereby impowred to let ſuch Leaſe or Leaſes of their ſaid Glebe-Lands or Grounds, with the conſent and approbation of the Patron or Patrons and Ordinary, for any term not exceeding forty years, and at ſuch yearly Rents without Fine as can be obtained for the ſame: And that no Lapſes incurred upon any Non-preſentation, in due time of any of the Patrons of the ſaid Livings ſince the ſaid Fire, ſhall any ways prejudice or make void the Preſentations that the ſaid Patrons have ſince made, whereupon any Incumbent is ſince inſtituted and inducted; any Law or Statute to the contrary in any wiſe notwithſtanding.

CHAP.

CHAP. XLII.

What Leaſes and Eſtates Biſhops, &c. may make, and the Rules to be obſerved in making ſuch Leaſes and Eſtates, and what Offices, &c. they may grant.

HAving in the foregoing Chapter ſet down the ſeveral Statutes, which either inlarge, or leſſen the Capacity of Clergy-men with reſpect to their Eſtates, I ſhall next conſider them together. And from all theſe Statutes ſo conſidered it will appear, that whatever the Law was, at this day generally ſpeaking, no Eccleſiaſtical, or Collegiate Perſon, or Corporation can alien any of their Mannors, Lands or Tenements, by any ways, or means whatſoever; for though before the Statute of 1 *Eliz. c.* 19. and 13 *Eliz. c.* 10. were made, they might have aliened, yet by the ſaid Statutes they are now reſtrained.

But note, that if any Perſon obtain a Grant to build Houſes on Church or College Land, and this is confirmed, (in caſe the Grants of the Grantor need to be confirmed,) this Grant makes no Alienation, but is only as a Licenſe or Covenant and no other, for the Soil remains in the Grantor, and ſo by conſequence the Houſes are alſo in him, by *Hutton, Mich.* 3 *Car. C. B. the Mayor and Commonalty of Wincheſter's Caſe, Hetly* 57.

However by the Statute of 14 *Eliz. c.* 11. all but Biſhops, *viz.* ſuch as are reſtrained by 13 *Eliz.* have ſome Liberty given them, as to alienating of Houſes mentioned in the ſaid 14 *Eliz.* for there 'tis ſaid, **That by that Statute not any Houſes ſhall be permitted to be aliened, unleſs that in recompence thereof there ſhall be afore, with, or preſently after ſuch Alienation, good, lawful and ſufficient aſſurance made in Fee-ſimple abſolutely to ſuch Colleges,** &c. **and their Succeſſors, of Lands to as great value as the Houſes aliened.** So that with ſuch Recompence they may alien in Fee, which was not permitted by the Statute of 13 *Eliz. Trin.* 14 *Jac. in Crane and Taylor's Caſe, Hobart* 269. But this Liberty given, ſeems to be reſtrained to ſuch Houſes only, as by the ſaid Statute may be let for forty years, *viz.* to Houſes in Cities, *&c.* however they are not enabled to exchange any Lands by this Statute, but remain diſabled as to that by Statute of 13 *Eliz.* as 'tis ſaid *Trin.* 40 *Eliz. C. B. Turther's Caſe, Noy* 5. And *Quære*, whether Houſes may be exchanged for Lands of greater value without Licence againſt the Statutes of Mortmain. However if a Pariſh be upon the deſign of incloſing, and a Parſon hath Tithes in kind, and Common for Beaſts in the Fields, a Decree may be had in *Chancery*, that he ſhall take a quantity of Ground in lieu thereof, *Underhil* v. *Joyner*, *Tothil* 251. *tit. Tithes.* And when one had a Leaſe of Tithes in kind, it was ordered in *Chancery*, that a Commiſſion ſhould go forth, for ſetting out Meadow and other Grounds in lieu thereof, 12 *Jac. Hungate* v. *Croke*, *Tothil* 251. *tit. Tithes.*

As Eccleſiaſtical Perſons cannot at this day alien their Poſſeſſions; ſo tho before theſe Statutes 1 *&* 13 *Eliz.* ſome of them were even as others bound by Fine and Non-claim, *Paſch.* 13 *Jac. B. R. Warren* v. *Smith*, or *Magdalen College Caſe*, 1 *Rolls Rep.* 171. Yet at this day, albeit a Fine be levied of their Poſſeſſions, and no Claim be made in five years, the Succeſſors ſhall not be bound thereby: For by the Words of both Statutes, *viz.* 1 *&* 13 *Eliz.* they are

are reſtrained from ſuffering their Poſſeſſions to paſs from them, and by Non-claim an Eſtate is ſo permitted, or ſuffered.

And as to Perſons within the Statute of 13 *Eliz.* there was this Caſe. The Maſter and Fellows of the College of St. *Mary Magdalen* in the Univerſity of *Cambridge*, being ſeized of a Meſſuage with the Appurtenances in their Demeſne as of Fee in the Right of the ſaid College; In the 17*th* year of *Eliz.* by their Deed between the ſaid Queen of the one part, and the ſaid Maſters and Fellows of the other part, and inrolled in *Chancery*, did give, and grant unto the ſaid Queen, all that their Meſſuage, *&c.* with the Appurtenances, to have, and to hold for ever, yielding and paying a certain Rent yearly, at a day, with Clauſe of Diſtreſs, and under this Condition, or Proviſo, that if the Queen, her Heirs and Succeſſors, ſhall not ſufficienly convey, and aſſure by Letters Patents under the great Seal of *England* the ſaid Meſſuage with the Appurtenances to one *Spinola* and his Heirs, before the firſt day of *April* next enſuing, that then their Indenture, and every Gift, Grant, and Article therein contained ſhall ceaſe, and be utterly void and of none effect, *&c.* whereupon the Queen granted the ſaid Meſſuage accordingly to the ſaid *Spinola*, which he did bargain and ſell to the Earl of *Oxon* and his Heirs, by force whereof the ſaid Earl entred, and was thereof ſeized, and being ſo ſeized, *A.B.* and his Wife levied a Fine of the ſaid Houſe with the Appurtenances to the ſaid Earl and his Heirs, with Proclamations according to the Statute; and after the ſaid Earl leaſed the ſame for fifty years, after which Leaſe, the Maſter of the College that made the Leaſe dyed, and a new Maſter being made, the Earls Tenant paid to him 15 *l.* of Rent, which was received by the ſaid new Maſter, who by a Writing under his Hand without Seal, acknowledged the Receipt thereof, and within five years after he was elected Maſter, and after he had received the ſaid Rent, did enter into the ſaid Meſſuage, and leaſed the ſame to another, *&c.* In this Caſe it was adjudged, that the ſaid Fine and Non-claim of five years, ſhould not bind the Right of the Maſter and Fellows of the ſaid College for ever; and that for two Cauſes, Firſt, the Words of the Act of 13 *Eliz.* are, **That all Leaſes, Gifts, and Conveyances of Eſtates had, made, done, or ſuffered by any Maſters or Fellows of any College,** &c. **ſhall be utterly void and of none effect, to all intents, conſtructions purpoſes, any Law, Cuſtom or Uſage to the contrary notwithſtanding**; and in this Caſe there is a Conveyance and Eſtate permitted, or ſuffered by the Maſter and Fellows of the ſaid College; and that theſe Words ſhall not be extended only when the Maſter and Fellows ſuffer a Recovery, *&c.* againſt themſelves as Party thereunto, but generally, according to the Letter, when they ſuffer others to levy a Fine with Proclamation, and five years to paſs without Claim; and although that the Concluſion of the Purview of the Act is, **Shall be utterly void and of none effect to all intents, conſtructions, and purpoſes**; yet by Conſtruction it ſhall be ſo taken, that the ſaid Fine levied with Proclamation, *&c.* ſhall be void and of none effect to bind the Right of the Maſter and Fellows of the ſaid College; for it ſhould have been to no purpoſe to have prohibited them to barr the Right of their Colleges by Conveyances made by the Maſter and Fellows themſelves, and to have left them power by their Permiſſion, or Sufferance, or Non-claim to barr it, and to that purpoſe theſe Words (*permitted or ſuffered*) were added.

The ſecond Reaſon was, that foraſmuch as the ſaid Eſtate conveyed to the Queen, was of force during the Life of the Maſter that made the Leaſe, and that he was alive at the time of the Fine levied, and all the Proclamations paſſed in his time, ſo that none could have made an Entry, or Claim during his Life; and that the ſucceeding Maſter within five years after his death

death did enter into the ſaid Houſe claiming the ſame as the Right of him and his Fellows of the ſaid College. For theſe Cauſes and Reaſons it was alſo reſolved that this Entry hath avoided the Fine, *Paſch.* 13 *Jac. the Caſe of the Maſter and Fellows of Magdalen College in Cambridge*, 11 *Co.* 66. The ſame Caſe is in 1 *Rolls Rep. p.* 151. See *Stowel's Caſe*, *Plowd. Com.* 374, 376. *and Croft and Howel's Caſe*, *Plowd. Com.* 538. And in this Caſe of *Magdalen College* it was alſo ſaid by *Coke*, *Dodderidge* and *Haughton*, that before the Statute of 13 *Eliz. c.* 10. Colleges, and ſuch Corporations (which have the true Right, as *Dodderidge* ſaid, and now at this day Corporations which be not within the ſaid Statute of 13 *Eliz.*) ſhall be bound by a Fine and Non-claim, where they have Right to enter by the Statute of 4 *H.* 7. *of Fines*, although the Statute doth not mention Corporations, as *Haughton* ſaid; and by *Dodderidge* the Diverſity in *Croft and Howel's Caſe* is good Law, that ſuch Corporation which hath the true Right ſhall be bound by Non-claim; but otherwiſe it is of ſuch Corporations which have not the true Right, nor may have a *Writ of Right* but their Conveyance ought to be confirmed by another, *Paſch.* 13 *Jac. B.R. Warren* v. *Smith, or Magdalen College Caſe*, 1 *Rolls Rep.* 171. And ſo it ſeems, that Biſhops ſhall not be bound by Fine and Non-claim, although they be not within the Statute of 13 *Eliz. Gouldsborough p.* 171. becauſe regularly, their Conveyances ought to be confirmed by the Dean and Chapter, and the Words of the Statute of 1 *Eliz.* are, **All Gifts, Grants, Fines, Feoffments,** &c. **had, made, done or ſuffered, or to be had, made, done, or ſuffered of any of their poſſeſſions other than for the term of three lives or one and twenty years,** &c. **ſhall be void.** And note, that what is ſaid as to Maſters and Fellows of Colleges with reſpect to 13 *Eliz. in Magdalen College Caſe*, holds good, as to all other perſons reſtrained by the ſaid Statute, and it is particularly ſaid in the ſame Caſe as Reported by *Rolls*, that Non-claim upon a Fine by a Parſon or Vicar doth not bind the Succeſſor.

As Eccleſiaſtical Perſons are not bound, by ſuffering Fines to paſs of their Poſſeſſions, ſo if to avoid this Act a *Writ of Annuity* be brought againſt a Parſon, or Vicar who prays in Aid of the Patron, and Ordinary, and upon default Judgment is given for the Plaintiff, this is not within the Words of the Statute, for that it is not any of their Poſſeſſions, yet it is within the Equity of it, as *Haughton* ſaid, and *Dodderidge* granted, *Magdalen College Caſe*, 1 *Rolls Rep.* 171. and ſo 'twas held *Paſch.* 14 *Eliz. in Elmer's Caſe*, as is ſaid by *Coke in the Caſe of Eccleſiaſtical Perſons*, 5 *Co. Rep.* 14. and alſo *in the Biſhop of Salisburies Caſe*, 10 *Co.* 60. it is there held, that if a *Writ of Annuity* be brought againſt a Biſhop upon Title of Preſcription or otherwiſe, and Judgment be given againſt him upon Verdict, or Confeſſion, the ſame is reſtrained by the Statute of 1 *Eliz.* becauſe, that the Biſhop is charged with the Annuity in reſpect of his Biſhoprick, and therefore the Succeſſor would be charged with the Arrerages incurred in the Life of the Predeceſſor, as it is agreed, 48 *E.* 3. 26. and ſo tendeth to the diminution of the Revenues, and impoveriſhing of the Succeſſors, *George Biſhop of Chicester and Freeland's Caſe*, 1 *Car. Bridgman* 30. and it hath been alſo held that a Rent granted by ſuch Corporation is againſt the Equity of the ſaid Statutes, 5 *Co. f.* 15. *Magdalen College Caſe*, 1 *Rolls Rep.* 171. So if a Biſhop doth confirm an Eſtate to a Diſſeiſor it is within the Statute of 1 *Eliz. Mich.* 37 & 38 *Eliz. Sir Edward Denny* v. *Eakenſtal*, 3 *Cro.* 430. And upon the ſame Reaſon I take the Law to be, that Eccleſiaſtical Perſons are not bound by any of the Statutes of Limitations, which limit and appoint ſeveral Actions to be brought, and Entries to be made within ſuch a certain time; otherwiſe that would be a ſide wind to evade the Statutes made to prohibit their Alienations.

Though

Though Eccleſiaſtical Perſons may not alien, or grant any Rent out of their Poſſeſſions to bind their Succeſſors, and their Succeſſors be not bound by Fine and Nonclaim, or by Recoveries, or the Statutes of Limitations, yet they may make Leaſes to bind their Succeſſors, but with reſpect to theſe following Rules.

Firſt, Such Leaſe muſt be by Deed indented, and not by Word of Mouth; for though the Statutes of 1 & 13 *Eliz.* do not appoint the Leaſe to be made by Writing, yet muſt it therein and in the other following Properties and Qualities required by *Stat.* 32 *H.* 8. follow the pattern thereof, (concurrent Leaſes only excepted,) 1 *Inſt.* 44. A Deed is an Inſtrument written in Parchment, or Paper, conſiſting of three things, *viz.* Writing, Sealing, and Delivery, and comprehending a Contract, or Bargain between Party and Party; of which there are two ſorts, Deeds indented, and Deeds Poll; which Names ariſe from the form or faſhion of them; the one being cut in and out in the top or ſide which we call indented, the other being plain, the indenting being as it were polled or cut off. A Deed Indented is a Deed conſiſting of two Parts or more (for there are Tripartite, and Quadripartite Deeds) in which it is expreſſed, that the Parties thereto have to every part thereof ſet their Hands and Seals; and if it be not really indented, though the Words of the Deed be, *This Indenture, &c.* yet it is not a Deed indented; but if the Deed be indented, it matters not whether it ſpeaks it ſelf to be an Indenture or not, 'tis however a Deed indented.

Notwithſtanding this firſt Rule, a Parſon, or Vicar, may for a Sum of Mony contract without Deed, that the Perſon that ought to pay Tithes to him may retain his Tithes; and if a Parſon doth aſſume to the Pariſhioner upon a valuable conſideration that he ſhall be diſcharged of the Tithes of his Lands, and after doth ſue him in the Eccleſiaſtical Court for the Tithes, this Suit, although he doth not thereby compel him to pay the Tithes, is a breach of the *Aſſumpſit*, *Mich.* 10 *Jac. B. R. Brown* v. *Kinnon*, 1 *Rolls Abr. p.* 430. But ſuch Diſcharge can have no continuance for more than one year, for want of a Deed; and if it be made for more years it is void, by *Fenner*, *Paſch.* 3 *Eliz. Woodward* v. *Nelſon*, *Owen* 103. *Hawks* v. *Brayfield*, 2 *Cro.* 137. *and* 2 *Rolls Abr.* 63. *Trin.* 30 *Eliz. B. R. Woodward* v. *Buggs*, 2 *Leonard* 29. *Dr. Langworths Caſe*, 2 *Rolls Abr.* 63. *Paſch.* 13 *Car.* 2. *B. R. Barnard* v. *Ewen*, 1 *Keb.* 5, & 21. *Raymond* 14. And if this Contract be made before the Occupier of Land hath ſowed his Corn, ſuch Contract for a year is not good, by *Coke*, *Foſter* v. *Warberton*; where alſo the former Opinions and Reſolutions are allowed, *viz.* that a Leaſe for one year may be of Tithes without Deed, but not for more, *Trin.* 21 *Jac. B. R. Hughes p.* 354. It is alſo ſaid to have been ruled in the *Common-Pleas*, between *Weſtled & Pepper*, that a *Concordatum & Agreatum*, between the Parſon and his Pariſhioner, that for twenty Shillings Rent he ſhall have his Tithes for twenty years, if the Parſon ſo long live, was void, *Bugg and Nelſon* v. *Howre*, *Trin.* 32 *Eliz. B. R.* 3 *Cro.* 188, 249. And by all the Juſtices it was agreed, that ſuch a Contract, or Agreement without Deed, for the Tithes of any other than of the Party himſelf who was Party to the Agreement, was void; and that ſuch a Parol Agreement ought to be made by way of retaining or keeping them back only, *Mich.* 2 *Car. B. R. Bellamy* v. *Bulford*, *Godbolt* 374. *Mich.* 8 *Jac. B. R. Brownlow & Gouldsborough* 2 *part*, *p.* 11, 17. For if they be granted to a Stranger but for one year without Deed, 'tis void, *Mich. B. R. Hawkes* v. *Brayfield*, *per Curiam*, 2 *Rolls Abr.* 63. *Trin.* 20 *Car.* 2. *B. R. Angel* v. *Rolf.* 2 *Keb.* 376. Yet if the Stranger ſue for them in the Spiritual Court, and the Defendant plead that all the Right to the Tithes which that Stranger hath is by a Grant of them

without Deed, and the Spiritual Court will not allow this Plea, no Prohibition lies; becauſe the Defendant ought to ſet forth his Tithes not regarding who hath Title to them, and if he doth ſo, he hath diſcharged himſelf, but not otherwiſe, *Trin. 26 Eliz. B. R. Withy* v. *Saunders*, 1 *Leon.* 23. and by *Jones* Juſtice, it is ſaid, that though they may not be demiſed to a Stranger without Deed, yet that they paſs to him by way of Contract, *Hill. 2 Car. Bulſho p* v. *Bellamy*, *Bendloe* 202. And it is ſuch an Agrement upon which an Action of the Caſe may be grounded though it do not actually transfer the Intereſt of the Tithes, 1 *Keb.* 21.

A difference I find to be made between Churchmen, as Parſons, Vicars, *&c.* and an Impropriator; the firſt may, as hath been ſhewed, leaſe their Tithes for one year without Deed, yet an Impropriator cannot, but 'tis meerly void, *per Curiam*, *Mich. 2 Car. B. R. Rot.* 179. *Bellamy* v. *Bulthorp*, *Noy* 89. *Jame Caſe*, *Godbolt* 374. And 'tis there ſaid to be ſo ruled, 20 *Jac. in the Caſe of Bennet* v. *Spell*, much leſs is the Contract good without Deed, if it be made by ſuch perſon for more years, *Trin. 26 Eliz. Withy* v. *Saunders*, 1 *Leon.* 13. According to the Caſes mentioned a Parſon by Parol did leaſe his Tithe Hay to the Vicar, and the Vicar paid the Rent for the firſt year; but finding that the Rent was more than the Tithe was worth, refuſed to hold the Bargain any longer, and being ſued in the Court of Requeſts (which was a Court of Equity) for the Rent, did not plead there any notice of his refuſal; and Sentence being given for the Parſon, the Vicar prayed a Prohibition, and it was agreed by the Court, that if the Leſſee had received the Profits, he was ſuable in the Court of Requeſts for the Rent; and that if he had given notice of the Refuſal of the Bargain, he had been diſcharged of the Rent from the time of the Notice given, becauſe he had no remedy for the Tithes, for that it was a void Contract in Law, and *Dodderidge* and *Jones* ſaid the Caſe is the ſame if he had not given Notice, *the Vicar of Anford's Caſe*, *Latch* 115. *Paſch. 2 Car. Harris and Dilworthies Caſe*, *Palmer* 423.

Though by all theſe Caſes before-mentioned it ſeems to be allowed that a Leaſe or Agreement to retain Tythes more than for one year without Deed is not good; yet on the contrary it hath alſo been adjudged, that a Contract for divers years without Deed that the Owner ſhall retain his Tithes is a good Contract, 22 *H. 6. f.* 43. *Mich.* 3 *Car. Booth* v. *Frankling*, *Hetley* 31. *Mich.* 14 *Jac. Hawkes* v. *Brothwith*, *Yelverton* 94. *Mich.* 4 *Jac. B. R. Tanner* v. *Small*, *Yelverton* 95. where it is ſaid to have been ſeveral times ſo adjudged, *Trin.* 21 *Jac. Honycomb* v. *Sweet*, 2 *Cro.* 668. and by *Wray*, *Trin.* 30 *Eliz. B. R. Woodward & Bugg's Caſe*, 2 *Leon.* 29. *Mich.* 4 *Car. C. B. Stone* v. *Walſingham*, *Hetley* 107, 122. *Paſch.* 5 *Jac. B. R. Small's Caſe*, *Noy* 121. *Mich.* 8 *Jac. B. R. Brownlow & Gouldsborough* 2 *part* 11. And it is ſaid to be the Opinion of the whole Court, that by way of Agreement Tithes may paſs for years without Deed, but not by way of Leaſe Parol, *Trin.* 21 *Jac. B. R. Hughes* 354. *by Dodderidge*, *Jones and Whitlock*; and it was ſaid, that a Parſon may Leaſe, *&c.* his Rectory conſiſting of Glebe and Tithes by Parol for years; for then the Tithes paſs as annexed to the Rectory, 2 *Rolls Abr.* 63. *Mich.* 2 *Car. B. R. Bellamy* v. *Balthrop*, *Lach* 175. And becauſe Tithes and Offerings are incident to a Parſonage, by a Leaſe of the Parſonage, though but by Parol, they ſhall paſs, though they be not expreſly named, 15 *H.* 7. 8. *Br. Incidents*, *&c.* 7. And if a Portion of Tithes have been for a long time uſed with a Chapel it ſhall paſs by the Grant of the Chapel and all Tithes thereunto belonging, though otherwiſe the Name *Portion of Tithes* is neceſſary in Grants, *Bradford's Caſe*, *Clayton ſect.* 25. However he that by ſuch Contract may retain his Tithes, cannot leaſe or aſſign them over to another, 2 *Rolls Abr.*

Abr. 63. *Mich.* 4 *Jac. B. R. Hawkes* v. *Brothwith*, *Yelverton* 94. or at moſt not without Deed, *Trin.* 26 *Eliz. B. R. Withy and Saunder's Caſe*, 1 *Leon.* 23. Yet it is ſaid to be the Opinion of the Court, that if one contract with the Parſon for the diſcharge of the Tithes of his Lands for years, and then demiſes his Lands to another, he ſhall not have Tithes of his Leſſee for the diſcharge runs with the Land; but if one takes a Leaſe of his Tithes by Deed, and makes a Demiſe of his Land, he ſhall have Tithes of his Leſſee, *Mich.* 3 *Car. B. R. Booth* v. *Franklin*, *Hetley* 31. So 'tis held, that the Aſſignee of a Leaſe may take advantage of a Contract by Parol made by the firſt Leſſor for him and his Aſſigns, *Trin.* 21 *Jac. B. R. Honycomb* v. *Sweet*, 2 *Cro.* 668. 2 *Rolls Abr.* 63. But though it be admitted by the laſt Caſe, that the Parſon's Contract to retain Tithes for ſeven or more years be good to bind him, yet it is generally held that if the Contract of Retainer for the Parſon's Life be by Parol only, that ſuch Contract is void, *Trin.* 30 *Eliz. Woodward and Bagg's Caſe*, 2 *Leon.* 29. *Paſch.* 5 *Eliz. Small's Caſe*, *Noy* 121. *Mich.* 8 *Jac. C. B. Brownl. and Goulsborough* 2 *part p.* 17. where *Coke* ſaid, that it was ſo adjudged in *B. R. in Parſon Booth's Caſe, and in C. B. in Wellow's Caſe, Trin.* 32 *Eliz. B. R. Bagg and Nelſon* v. *Woodward*, 3 *Cro.* 188. *and Paſch.* 4 *Jac. B. R. Hawkes and Brayfield's Caſe*, 2 *Cro.* 137. *and Yelverton* 94. So if a Parſon doth let his Glebe for ſo many years as he ſhall be Parſon of the Church, this is void for the incertainty, 1 *Inſt.* 45. Alſo where a Parſon did aſſume that the Owner of the Land and his Aſſigns ſhould be diſcharged of the Tithes thereof during the Parſon's Life, and the Aſſignee of the Land being ſued in the Spiritual Court for the Tithes, and a Prohibition granted, it was reſolved that a Conſultation ſhould be awarded, *Aldriſh* v. *Ray. Palmer* 36. and 'twas ſaid that 31 *Eliz.* it was ſo adjudged in *Woodward's Caſe.*

When a Parſon did contract by Parol only with *A.* his Executors and Aſſigns, that for ten Shillings yearly to be paid, he his Executors and Aſſigns ſhould be quit from the payment of Tithes of certain Lands during the Parſon's Life, the Executor demiſes the Land at Will to one whom the Parſon ſued in the Spiritual Court; and by *Lea*, *Dodderidge* and *Houghton*, a Prohibition lies, becauſe the Parſon hath remedy againſt the Executors upon the Compoſition, by Action upon the Caſe; and *Dodderidge* ſaid that during the Life of the Parſon the Contract is on foot, but that the Aſſignee could not ſue the Parſon upon this Contract, yet may have a Prohibition to ſtop him in the Spiritual Court, and ſo drive him to ſue the Executor at the Common Law for his ten Shillings upon the Contract; for that he hath no remedy againſt the Tenant at Will; but the Executor hath his remedy againſt the Tenant at Will, *Trin.* 21 *Jac. B. R. Snell and Bennet's Caſe*, *Palmer* 377. A Prohibition was prayed to a Suit for Tithes, ſuggeſting a Parol Agreement to retain; the Court inclined to grant it, but being an unſetled Point it was adjourned; but reſolved that in an Action brought upon the Statute of 2 E. 6. *c.* 13. to recover the treble value, and *Nil debet* pleaded, ſuch an Agreement is good Evidence to excuſe the Defendant from the Penalties of that Statute, and is ſuch an Agreement on which an Action of the Caſe may be grounded, tho' it do not transfer the Intereſt of the Tithes; alſo if Execution of ſuch an Agreement by ſeveral years be ſuggeſted, a Prohibition ought to be, *Paſch.* 13 *Car.* 2. *C. B. Barnard* v. *Ewen*, 1 *Keb.* 21. *Raymond* 14. *Paſch.* 24 *Car.* 2. *Knight & al'* v. *Peeps*, 3 *Keble* 24. But I am informed that the conſtant Practice of the Courts of *Weſtminſter* at this day, is not to grant Prohibitions upon the ſuggeſtion of ſuch an Agreement, but to leave it to the Spiritual Court to determine, and if the Party think himſelf there grieved, he may

appeal. And the Law is holden as I take it according to the Caſes firſt cited, *viz.* that a Parol Agreement to retain Tithes for more years than one is void, and not only for all the years after the firſt, but in the whole; for the Contract being entire muſt be void in all, or good in all, and ſhall not be made good and void by parcels; but however theſe Doubts concerning Leaſes by Parol, and their Continuance ſeem to be much taken away by Act of Parliament; for it is Enacted, **That from and after the four and twentieth day of June, which ſhall be in the year of our Lord, one thouſand ſix hundred ſeventy and ſeven, all Leaſes, Eſtates, Intereſts of Free-hold, or Terms of years or any uncertain Intereſt of, in, to, or out of any Meſſuages, Manors, Lands, Tenements or Hereditaments made or created by Livery and Seiſin only, or by Parol, and not put in Writing, and ſigned by the Parties ſo making or creating the ſame, or their Agents thereunto lawfully authorized by Writing, ſhall have the force and effect of Leaſes, or Eſtates at Will only, and ſhall not either in Law or Equity be deemed or taken to have any other or greater force or effect; any conſideration for making any ſuch Parol Leaſes or Eſtates, or any former Law or Uſage to the contrary notwithſtanding.**

Except nevertheleſs all Leaſes not exceeding the term of three years from the making thereof, whereupon the Rent reſerved to the Landlord, during ſuch term, ſhall amount unto two third parts at the leaſt of the full improved value of the thing demiſed. Stat. 29 Car. 2. c. 3. Entituled, *An Act for prevention of Frauds and Perjuries.*

Secondly, Leaſes made by Eccleſiaſtical Perſons to bind their Succeſſor muſt be made to begin from the making, or day of the making thereof, for ſo we find the Statutes are ſeverally penned; but the Exceptions of the Statutes of 1 *Eliz.* & 13 *Eliz.* do differ from the Statute of 32 *H.* 8. in that the Leaſes for years to be made according to the Exceptions of the Statutes of 1 & 13 *Eliz.* muſt begin from the making and not from the day of the making, but by force of *Stat.* 32 *H.* 8. from the day of the making, 1 *Inſt. f.* 45.

For the better underſtanding whereof, theſe things are to be known touching Commencement of Leaſes; that if the *Habendum* be for one and twenty years without mentioning when it ſhall begin, it ſhall begin from the Delivery; ſo where the *Habendum* is for one and twenty years from the making, or from henceforth, which is as much as to ſay from the making, for the Delivery is the making; and in theſe Caſes the day of the Delivery ſhall be taken incluſive, ſo that if a Leaſe be delivered the 20*th* of *June*, that ſhall be taken for one day and the Leaſe ſhall end upon the 19*th* of *June*, and though the Leaſe was delivered at four of the Clock or after in the ſaid 20*th* day, yet ſhall that be accounted a whole day; for the Law in this Computation rejects all Fractions, or Diviſions of a day for the incertainty. So when a Leaſe in Reverſion was made to commence *ad Feſtum Annunciationis* after the former Leaſe ſhould be determined, it was objected, that it ought to be *a Feſto Annunciationis*, yet the Court held it to be all one, for that there ſhall be no fraction of a day, *Trin.* 14 *Car. B. R. Lloyd* v. *Gregory*, 1 *Cro.* 502. But if the *Habendum* be for one and twenty years *a die Confectionis*, or from the Date, or *a die datus*, then it ſhall not begin till the next day after the day of Delivery in the firſt Caſe, and the next after the day that it bears date in the other Caſe; ſo that the day of the making, and the day of the date in the ſaid Caſes ſhall be taken excluſive, and not part of the Term; ſo that if the Deed be delivered upon the 20*th* of *June*, or bear date the 20*th* of *June*, the Term ſhall not be ended till the 20*th* of *June*, 1 *Inſt.* 46. *b.*

When

When a Leaſe by Indenture was made by a Parſon of the Tithes of 200 Acres of Land, to the Owner of the Land, of which he, his Wife, and his Heirs were ſeized, *Habendum* from *Michalmas* next following, to him and his Heirs, during the Life of the Parſon; the Queſtion was, whether the Leaſe was void, becauſe it was to commence from a day to come, and was for Lives, and by *Flemming*, *Fenner* and *Williams*, the Leaſe was void, for although Tithes be Spiritual and be not extinct in the Land, yet in the Conveyance of them they ought to follow the nature of the Land, and of other Hereditaments which be in *Eſſe*, as 8 *H.* 7. 3. is, and cannot be granted for Life, to commence from a day to come; and as 21 *H.* 6. 46. Tithes be always in *Eſſe*, but *Yelverton* and *Croke contra*; For the Leaſe (ſaid they) being made to the Owner of the Land, doth not enure by way of Intereſt, but by way of Diſcharge and Retainer, and a Diſcharge may well commence from a day to come; but by *Flemming* and *Williams*, as the Leaſe is pleaded, it cannot be taken to enure by way of Diſcharge; for the Plaintiff pleaded by force of which the Owner of the Land was ſeiſed of the Tithes to him and his Heirs for the Life of the Parſon, ſo that the Plaintiff having pleaded it by way of Intereſt, they as Judges cannot conſtrue it otherwiſe. And by *Flemming* this Leaſe cannot enure by way of Diſcharge, for there be not any ſuch Words in the Leaſe; which proves that it was not intended by the Parties to operate, but by way of Intereſt, and this was more beneficial to the Leſſee, for if it ſhall enure by way of diſcharge only, this is ſuch a Privilege annexed to the Land which cannot be granted over, and this appears was the intention of the Parties in this Caſe; for the Leſſee being dead, his Wife had the 200 Acres of Land out of which the Tithes iſſued by way of Joynture, but his Son took upon him to be Owner of the Tithes, which could not be if the firſt Leaſe had enured by way of Diſcharge; and *Yelverton* inclined much to this, that the pleading of the Leaſe and of the Seiſin by force of the Leaſe, was not good, *Trin.* 6 *Jac. B. R. Edmonds* v. *Booth*, *Yelverton* 131.

The Rule that a Leaſe muſt begin from the making, or day of the making thereof, doth not hold as to Leaſes for years of Houſes, which by the Statute of 14 *Eliz.* are permitted to be letten for forty years; for though by the Statute of 43 *Eliz.* Leaſes muſt be made according to this Rule, yet 14 *Eliz.* as to Houſes there ſpoken of, is a new Law, and Leaſes thereof made, for a time to come are good thereby, *Hill.* 35. *Eliz. Thomſon* v. *Strafford*, *Popham* 8.

Note, that a Leaſe for Lives being avoided at Common Law, for that it was to commence from a time to come, an Injunction was granted out of *Chancery* to continue Poſſeſſion, 23 *Eliz. Bury* v. *Conisby*, *Tothil* 180.

A third Rule to be obſerved is, that if there be an old Leaſe in being it muſt be ſurrendred, or expired, or ended within a certain time after the making of a new Leaſe, according as the Caſe ſhall be; therefore if any Biſhop, Archdeacon, or other ſole Corporation, (except Parſons and Vicars, who are excepted out of the Statute of 32 *H.* 8.) do make their Leaſes according to the liberty given them by the ſaid Statute, *viz.* for one and twenty years, or three Lives, without any Confirmation of the Dean and Chapter, and an old Leaſe be in being, it muſt be ſurrendred, expired, or ended within a year after the making of the new Leaſe.

But to begin with the Biſhop, if he hath made a new Leaſe of Lands for one and twenty years, and after, *viz.* when four years of the ſaid Term are to come, doth let the ſame Leaſe to another perſon for one any twenty years, and his latter Leaſe be confirmed by the Dean and Chapter, the Confirmation makes it a good Leaſe, although the old Leaſe was not to end within a year of the making of the new one, 28 *Eliz. C. B. Grindal Biſhop of York's Caſe*,

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4 *Leonard* 78. For the Statute of 32 *H.* 8. which ſet this Rule, that the old Leaſe muſt be expired, ſurrendred, or ended within one year after the making of the new Leaſe to make the new Leaſe good, being a Statute made meerly to enable the perſons aforeſaid, who before without Confirmation could not grant, or leaſe any thing to bind their Succeſſors, doth enable them to grant Leaſes for one and twenty years, or three Lives, under the qualifications therein mentioned, without the Confirmation of any: But we muſt ſo underſtand it, that the ſaid qualifications, of which this is one, are not by vertue of this Statute of neceſſity to be obſerved in all Leaſes, *viz.* when the liberty given by the Statute is not uſed, but that the Leaſe is confirmed according to the Common Law; for after the making of the Statute of 32 *H.* 8. Biſhops and others mentioned therein, by Confirmation might have let their Lands for a thouſand years, and have made concurrent Leaſes at their pleaſure, until as touching Biſhops the Statute of 1 *Eliz.* was made as a reſtraining Statute, which being the ſole Statute that reſtrained their power, (for Biſhops are not in the Statute of 14 or 18 *Eliz.* as hath been ſhewed) if the latter Leaſe before mentioned was void, as being made four years before the Expiration of the former, it muſt be made void by this Statute, in reſpect of the Letter or intent thereof, and 'tis not void by the Letter, for the Words of the Statute are not that the Leaſe ought to be for one and twenty years ſimply, without ſaying more, but for one and twenty years from the time as ſuch Leaſe, Grant, or Aſſurance ſhall begin, and this is a Leaſe for twenty one years from ſuch time, for it is not all one in common Senſe, for a Man to ſay that he hath a Leaſe for twenty one years, and to ſay that he hath a Leaſe for twenty one years from ſuch a day which is before the making of the Leaſe, no more than a Leaſe abſolute and a Leaſe upon Condition ſhall be intended to be the ſame Leaſe, 14 *H.* 8. 18. *a.* 1 *Anderſon* 66. For in caſe a Leaſe being made to a Perſon for twenty one years from the Feaſt of St. *Michael* laſt, and the Leſſee doth enter, and is outed, and brings his *Ejectione firmæ*, he ought to declare upon the Leaſe as it is, *viz.* for twenty one years from ſuch a day, and not upon a Leaſe for twenty one years without ſaying more, for then he hath failed of his purpoſe, for the Defendant may plead Not-guilty, and he ſhall be found Not-guilty; and as ſuch concurrent Leaſe is not void by the Letter of the ſaid Statute, ſo neither by the intent of it, becauſe it is not prejudicial to himſelf or Succeſſor, who may make the like Leaſe; for there is not a longer Eſtate granted againſt the Succeſſor than for twenty one years, or three Lives according to the Statute; nor is the Leſſor, or his Succeſſor, by ſuch concurrent Leaſe bar'd of their annual ancient Rent; and though they have by this means but one Rent in Intereſt, yet they have another for the four years by Eſtoppel, *Fox and Collier's Caſe*, 1 *Anderſon* 65. *Moor* 107. *Hill.* 22 *Jac. Evans and Aſcough's Caſe*, *Latch* 242. *&* *Palmer* 466. So that if a Biſhop doth make a Leaſe for years, which is confirmed by the Dean and Chapter, and after doth make a Leaſe of the ſame Land to another for twenty one years, to commence after the firſt years ſhall be determined, and after, and before any Confirmation of the ſecond Leaſe is had, the Biſhop doth make a third Leaſe for Lives to a third Perſon of the ſame Lands, to commence immediately, and the laſt Leaſe is firſt confirmed, and then the ſecond Leaſe in Reverſion is alſo confirmed, in this Caſe, the ſecond Leaſe is good; and the Confirmation of it made it effectual, although the laſt Leaſe was firſt confirmed, becauſe no Intereſt is given by the Confirmation, but that is only to make the Leaſe durable and effectual, *Trin.* 6 *Eliz.* *Moor* 66.

Although a Leaſe for years is in being, and is not ſurrendred, or ended within, four, five, or more years, yet a Biſhop may make another Leaſe for years,

years, to commence after the firſt Term ſhall be expired, if ſuch Leaſe be confirmed, but not for Lives, to bind the Succeſſor though it be confirmed by the Dean and Chapter; ſo if there be a Leaſe for Life in being, and the Biſhop doth make a Leaſe for years, the Leaſe for years may be avoided, by *Whitlock, Hill.* 22 *Jac. Evans and Kiffin* v. *Aſcuith, Palmer* 468. Firſt, becauſe the Statute of 1 *Eliz.* is in the disjunctive, for twenty one years, or three Lives, and therefore the Biſhop cannot make both. Secondly, becauſe the Rent reſerved upon ſuch Leaſe for years is not payable within the meaning of the ſaid Act, *viz.* annually; for that if the Rent be not paid, neither the Leſſor, nor his Succeſſor, can diſtrain, or have their Action of Debt for it, during the Continuance of the Leaſe for Lives. And though *ex vi termini* the Rent is payable, becauſe that after the Leaſe for Lives determined, the Leſſor ſhall diſtrain for all the Arrerages of Rent reſerved upon the Leaſe for years; yet it is not payable ſo, as was intended by the Statute, for the Statute was made to maintain Hoſpitality, and to avoid Dilapidations, and that cannot be by Poſſibilities without a continual Revenue yearly payable, and not in Expectancy, or in future Poſſibilities; and in this Caſe the Biſhop ſhall have no more but a Poſſibility, *Trin.* 30 *Eliz. B. R. Elmer's Caſe,* 5 *Co.* 2. *Mich.* 30 & 31 *Eliz. Marler* v. *Wright,* 1 *Anderſon* 193. *the ſame Caſe,* 3 *Cro.* 141. *and More* 253 But *Coke* is ſaid to have argued, that ſuch Leaſes for Lives are good, becauſe the Biſhop hath a Poſſibility of recovering the Rent, and *Egerton Solicitor General* is ſaid to aſſent to this, *Paſch.* 29 *Eliz. B. R. Bunny* v. *Wright and Stafford,* 1 *Leonard* 59. But the former Caſe is more to be depended upon; and it ſeems alſo in this Caſe to be held, that if there be a Leaſe for years, that ſhall be ſurrendred, expired, or ended within one year after a Leaſe for Lives is made, that the Leaſe for Lives is good, without Confirmation, by the Statute of 32 *H.* 8. *Quære.*

This Rule, that if there be an old Leaſe in being it muſt be ſurrendred, expired or ended within a certain time after the making of the new Leaſe, holds good, not only when Biſhops, and other Corporations ſole mentioned in 32 *H.* 8. make Leaſes by Authority of that Statute, for twenty one years, or three Lives without the aſſent, or Confirmation of others; but alſo when any Spiritual or Eccleſiaſtical Corporation ſole (other than Biſhops) do make Leaſes with the Aſſent and Confirmation of thoſe who are by Law to confirm the ſame; and alſo when any Spiritual, Eccleſiaſtical or Collegiate Corporation aggregate make Leaſes of their Poſſeſſions, whoſe Leaſes were never to be confirmed by any; for though by the Statute of 13 *Eliz.* theſe were not reſtrained from making concurrent Leaſes, no more than Biſhops were by 1 *Eliz.* yet by 18 *Eliz.* they are reſtrained, though Biſhops are not reſtrained from making any Leaſe of any of their Lands, *&c.* whereof any former Leaſe is in being, not to be expired, ſurrendred or ended within three years next after the making of any ſuch new Leaſe. And it is ſaid by *Coke,* Juſtice, that if there be but two years in being of a former Leaſe, and a Leaſe for Lives is made, this Leaſe for Lives is void by 18 *Eliz.* and alſo he ſaith, that if a Dean and Chapter, or others reſtrained by the Statute of 18 *Eliz.* from making concurrent Leaſes, unleſs the firſt ſhall be expired, ſurrendred, and ended within three years of the making of any ſuch new Leaſe, do make a new Leaſe for years of Lands of which there was a Leaſe in being for four, five, or more years at the making thereof, that this Leaſe in Reverſion may be made good, if the Leſſor doth at any time within three years after the making thereof, cauſe the former Leaſe to be ſurrendred, *Paſch.* 10 *Jac. C. B. in Water's Caſe,* v. *Dean and Chapter of Norwich, Brownlow, and Gouldsborough* 2 *part,* 164.

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Though Deans and Chapters, Maſters and Fellows, Maſters and Wardens of any Hoſpitals, Archdeacons, Prebendaries, Parſons, Vicars or other of like Order, having any Spiritual Living, may make concurrent Leaſes of their Lands, *&c.* generally ſpeaking, in caſe the firſt Leaſe ſhall be expired, ſurrendred, or ended within three years after the making of the new Leaſe; yet of ſuch Houſes as by 14 *Eliz.* they may let for forty years, and of ſo much Land as they may, and ſhall let with them for the ſame Term, they may not make Leaſes in Reverſion, or concurrent Leaſes; and the reaſon is, becauſe, that after the Statute of 13 *Eliz.* was made, the Parſons aforeſaid might or did make concurrent Leaſes at their pleaſure that Statute notwithſtanding, and then for the preventing ſuch concurrent Leaſes at pleaſure, comes the 18 *Eliz.* which ſays, that the firſt Leaſe made by the Perſons aforeſaid muſt be expired, ſurrendred, or ended within three years before the making of the new Leaſe, or that the new Leaſe ſhall be void. But then this Statute of 18 *Eliz.* hath relation only to the Statute of 13 *Eliz.* which hath not any reſpect to the Statute of 14 *Eliz.* by which the ſaid Perſons are expreſly and abſolutely forbidden to make Leaſes in Reverſion of ſuch Houſes and Land to them belonging as are therein mentioned; and the Statute of 18 *Eliz.* is only a diſabling Statute, and makes no ſhew of giving power to theſe Perſons to make Leaſes in Reverſion, or concurrent Leaſes of Houſes againſt the Statute of 14 *Eliz.* for then there muſt have been Words ſufficient to repeal the ſame as to this particular, and that the Statute of 18 *Eliz.* toucheth not the Statute of 14 *Eliz.* was adjudged, *Trin.* 14 *Jac. Crane* v. *Taylor*, *Hobart* 296. And ſo was the Opinion of three Judges, *Trin.* 25 *Car.* 2. *in Baily and Munn's Caſe*, 1 *Ventris* 246. *and* 3 *Keble*, 107. But the Lord Chief Juſtice *Hales* doubted, and inclined to be rather of a contrary Opinion, *viz.* that the Statute of 18 *Eliz.* doth extend to the 14*th* of *Eliz.* Firſt, Becauſe the 14*th* of *Eliz.* is as an Appendix to the 13*th* of *Eliz.* and doth enlarge it as to Houſes in Cities, Market-Towns, *&c.* wherefore, the 18*th* reciting the 13*th* doth by conſequence recite the 14*th* alſo. His ſecond Reaſon was, upon the Connexion betwixt all the Statutes concerning Leaſes of Eccleſiaſtical Perſons, that they have been taken into the Conſtruction of one another. Thirdly, From the great Romage it would make in Leaſes, if a Leaſe ſhould be void, when there was never ſo little of a former Leaſe unexpired. Fourthly, There is no Authority to the contrary; *Crane and Taylor's Caſe* being concerning Covenants only. See *the Dean and Chapter of Weſtminſter's Caſe*, 16 *Car.* 2. *C. B. Carters Rep.* 9.

And let it be noted, that though the Statute of 14 *Eliz.* doth only prohibit Leaſes in Reverſion, and doth not mention concurrent Leaſes, yet if an Houſe be let for forty years to commence immediately, when there is a former Leaſe in being for ten years, this Leaſe for forty years (though properly ſpeaking it be a concurrent Leaſe as it preſently commences in Intereſt) yet is in Law a Leaſe in Reverſion, and ſo within the Words of the Statute, and therefore void, as was adjudged, *Paſch.* 39 *Eliz. Hunt* v. *Singleton*, 3 *Cro.* 564. And on the other hand, if an Houſe, that by 14 *Eliz.* may be let for forty years, be let but for twenty years, and ten years before the Expiration thereof, another Leaſe is made for twenty years, not to commence preſently but after the Expiration of the former Leaſe, this is properly a Leaſe in Reverſion, and yet ſaid to be good, and to ſtand well with the Statute of 14 *Eliz.*, for that theſe Contracts do not intermix, but the one doth well ſtand with the other, and both Leaſes do not exceed the forty years comprized in that Statute, which doth not hinder Leaſes from being made from a day to come, *Hill.* 35 *Eliz. Thomſon* v. *Strafford*, *Popham* 8. But this Opinion in *Popham* is denied

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to be Law, *In the Dean and Chapter of Weſtminſter's Caſe, Carters Rep.* 12, 15. and alſo in *Baily and Munns Caſe* before cited, 1 *Ventris* 246. *and* 3 *Keb.* 107.

Note alſo, that this Statute of 14 *Eliz.* doth not extend to Biſhops, ſo as either to enable them to let any Houſe for forty years, or to reſtrain them from making Leaſes of their Houſes in Reverſion, or concurrent Leaſes for years, nor may they hereby alien their Houſes by way of Exchange, or for any Recompence, and the reaſon why they are not within this Statute, is becauſe they are not as hath been ſhewed within the Statute of 13 *Eliz.* to which this of the 14*th* of *Eliz.* hath immediate relation.

And note, that in all Caſes when concurrent Leaſes are made, the new Leaſe although it be made *a die Confectionis* is not to take effect in Intereſt till the old Leaſe be expired, ſurrendred or ended, that is, the new Leſſee cannot enjoy the Land, *&c.* till ſuch time; for the new Leaſe does commence preſently by Eſtoppel only, not in Intereſt, yet it ſeems that the Rent is due from the firſt Commencement of the Leaſe, ſo that the Biſhop, *&c.* Leſſor is intituled to two Rents, and may bring an Action of Debt to recover the Rent reſerved upon the ſecond Leaſe during the Continuance of the former; for the Rent muſt be reſerved and made payable during the Term, and not only from the determination of the former Leaſe, elſe ſuch concurrent Leaſes will be void as contrary to the Statute, and being a Rent reſerved upon a Leaſe for years, an Action of Debt or Covenant will lie for it; and there can be no other remedy to recover it during the Continuance of the firſt Leaſe; for which reaſon a concurrent Leaſe for Lives is not good, by reaſon Debt will not lie for ſuch Rent, and there is no other remedy to recover it during the firſt Term, though it ſeems according to *Elmer's Caſe*, 5 *Co.* 2. that after the firſt Leaſe ended the Leſſor may diſtrain for all the Arrears grown due before ſuch Leſſee came into poſſeſſion, *Trin.* 21 *Eliz. Fox* v. *Collier*, *Moor* 107. *Trin.* 25 *Eliz.* 1 *Anderſon* 65. *ſame Caſe*, *Paſch.* 9 *Eliz. C. B. Dyer* 261. *Degg's Parſons Counſellor*, 116. So if a Perſon hath a Leaſe for years in being, and afterwards doth take another Leaſe for years to himſelf of the ſame Land, *&c.* the latter Leaſe is not a concurrent Leaſe, or a Leaſe in Reverſion, and therefore ſuch ſecond Leaſe of the ſame Land, made by a Biſhop, or other perſon enabled by 32 *H.* 8. to make Leaſes for twenty one years, or three Lives, is a good Leaſe without Confirmation, although it be made divers years before the former Leaſe would have expired. So if any perſon enabled by 14 *Eliz.* to make Leaſes of Houſes for forty years, doth firſt make a Leaſe for twenty years, and ſeven years after doth make another Leaſe to the ſame perſon of the ſame Houſe for twenty years, to commence from a day to come, the ſecond Leaſe cannot be ſaid to be a concurrent Leaſe, or a Leaſe in Reverſion, becauſe by the Tenants acceptance of the ſaid Leaſe, the firſt Leaſe is *ipſo facto* ſurrendred, determined and gone, for the laſt Contract with the ſame perſon doth diſſolve the firſt, when the one and the other cannot ſtand together, as they cannot here, becauſe the one doth intermix with the other; nor doth the firſt Leaſe remain good to the day to come on which the ſecond Leaſe is to commence, but by the Leſſees acceptance of his new Leaſe, doth immediately become void in the whole; for the firſt Contract which was intire cannot be diſſolved in part, as to that which the Party hath, (by *Popham*, *Clinch*, and *Gawdy*) to which the Juſtices of the *Common Bench* agreed, and ſo was the Opinion of the *Common Bench* about 1 *Eliz.* *in the Caſe of the Abbey of Barking*, ſaith *Popham*, *Hill.* 35 *Eliz. Thomſon* v. *Troford*, *Popham* 8. And from hence we may note, that Leaſes may be ſurrendred by two means, that is, not only by Deed, which is when an Eſtate, whether for years, or Lives is yielded up by expreſs Words into the Poſſeſ-

ſion of him who hath the next or immediate Remainder, or Reverſion thereof, and is called *a Surrender in Deed*, but alſo by Operation of Law, and this is called *a Surrender in Law*; which is done by taking of a ſecond or new Leaſe of the ſame Eſtate; therefore if a Leſſee for twenty years preſently take a Leaſe for ten years this is in Law a Surrender of the whole Term of twenty years, and the ſame Law it is, though the ſecond Leaſe be made to begin ten years after, becauſe by his acceptance of ſuch ſecond Leaſe to begin at a day to come within his former Term, he doth affirm that the Leſſor hath power to make ſuch ſecond Leaſe, which he cannot have without Surrender of the former; and as hath been ſaid, there ſhall not be any fraction of the Eſtate, ſo as to make the former Leaſe good for the firſt ten years, and ſurrendred for the reſidue, 5 *Co.* 11. *b. Ives Caſe*, *Paſch.* 40 *El. Maton* v. *Hutchins*, 2 *Rolls Abr.* 496. Yea the acceptance of a voidable Leaſe is a good Surrender of a good, and ſure Leaſe, *Dyer* 140. (43.) but if the new Leaſe accepted of be meerly void, the acceptance thereof makes no Surrender of a former Leaſe, *Mich.* 13 *Car. B. R. Flood* v. *Gregory*, *Per Curiam*, 2 *Rolls Abr.* 495.

But what hath been thus ſaid of Surrenders, is not to be extended generally to all Perſons, for Infants having a future Intereſt in a Leaſe, cannot ſurrender it by Deed, but ſuch Surrender is void; ſo if an Infant that hath a Leaſe that is to take effect at a day to come, ſhould before ſuch day accept a new Leaſe for the ſame Term upon the ſame Rent and Covenants, this acceptance of a new Leaſe by the Infant is void, and no Surrender in Law of the former Leaſe, becauſe it is without Increaſe of his Term, or Decreaſe of his Rent; and where there is no apparent benefit or ſemblance of a benefit to the Infant his Acts are void; and though the Caſe be, that the Infant come of Age before the Leaſe can take effect, and then the former Leaſe being expired, enters and claims by the ſecond Leaſe, and pays the Rent for divers years, which is accepted, yet the ſecond Leaſe is void, and the firſt not ſurrendred, by reaſon of the Infancy, *Trin.* 14 *Car. B. R. Lloyd* v. *Gregory*, 1 *Cro.* 502. *ſame Caſe*, *Jones* 405. If a Leaſe be ſurrendred by Deed in order to the having of a new Leaſe, or that the Eſtate may be granted to another, the Surrender ought to be abſolute, not conditional, for a conditional Surrender is not ſufficient within 32 *H.* 8. and the other Statutes; for the mind of the Makers of theſe Laws was, that the Surrender ſhould be effectual, not illuſory, which might be avoided, *Trin.* 30 *Eliz. C. B. Elmer's Caſe*, 5 *Co.* 11. And ſuch an abſolute Surrender may be ſafely made unto a Corporation aggregate upon their Promiſe to make a new Leaſe; for though no Action at Law can be brought againſt ſuch a Corporate Body grounded barely upon a Promiſe, as in ſuch Caſe it might be againſt any ſingle Perſon; yet the Court of *Chancery* will compel to make ſuch new Leaſe; as for inſtance, A Dean and Chapter hath made a Leaſe to one, who upon their Promiſe of a new Leaſe doth abſolutely ſurrender it, and then the Dean and Chapter will not perform their Promiſe, but lets the Eſtate to another Perſon, although in this Caſe no Action at the Common Law doth lie againſt the Dean and Chapter upon the breach of this their Promiſe as *Coke* ſaid; for that a Corporation cannot be bound without Deed, yet the Party who ſurrendred may well ſue in a Court of Equity for a ſpecifick performance of ſuch their Promiſe, to compel them to make the new Leaſe, and as is ſaid, may bring his Suit againſt any particular Perſon of the Corporation, for the Coporation it ſelf cannot be ſo ſued; and in this Caſe if their ſecond Leſſee be one of their Body, yet he may be ſo ſued, although he was not one of them at the time of the Promiſe made, becauſe the Corporation never dies, and this new Member having the Leaſe

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is the Cauſe of the Grief, *Mich.* 12 *Jac. B. R. Sir G. Frevil* v. *Ewebank*, 1 *Rolls Rep.* 82.

And here let it be noted, that it hath been Enacted, **That no Leaſes, Eſtates or Intereſts either of Freehold or terms of years, or any uncertain Intereſt not being Copyhold or Cuſtomary Intereſt of, in, to, or out of any Meſſuages, Mannors, Lands, Tenements or Hereditaments ſhall at any time after the ſaid four and twentieth day of** June **be aſſigned, granted or ſurrendred, unleſs it be by Deed, or Note in Writing ſigned by the Party ſo aſſigning, granting or ſurrendring the ſame or their Agents thereunto lawfully authorized by Writing or by Act and Operation of Law.** Stat. 29 Car. 2. Entituled, *An Act for prevention of Frauds and Perjuries.*

A fourth Rule to be obſerved for the making of theſe Leaſes good in Law, is, that they do not exceed three Lives, or twenty one years from the making thereof; therefore if a Leaſe be made by a Biſhop for four Lives, and one of them doth die in the Life of the ſame Biſhop, ſo that when the Biſhop dies there is but three Lives in being, yet the Leaſe is void againſt the Succeſſor; for being void by 1 *Eliz.* at the time when it was made, no ſucceeding accident can make it good, *Trin.* 11 *Jac. the Biſhop of Salisbury's Caſe*, 10 *Co.* 62. Or if new Leaſes be made for three Lives, thus, to one for Life, the Remainder to a ſecond for Life, the Remainder to a third for Life, this Leaſe is void by the Statutes, *Mich.* 3 *Car. C. B. Owen* v. *Thomas Ap Reeves*, 1 *Cro.* 95. *Dorothy Owen's Caſe*, v. *Owen Price*, *Trin.* 3 *Car. C. B. Hetley* 22. So if an Archdeacon doth make a Leaſe for three Lives according to the Statutes, and the Leſſees do make a Leaſe for an huudred years, which is confirmed by the Archdeacon, Biſhop, Dean, and Chapter, yet ſuch Leaſe ſhall not bind the Succeſſor, for if that ſuch Conveyances ſhould not be conſtrued to be againſt the Statutes, the Statutes would be of no effect, and the good intent and purview thereof would eaſily be defeated, and defrauded; ſo in like manner it is ſaid to have been adjudged that if a Biſhop makes a Leaſe for three Lives, reſerving the ancient Rent, and then he makes a Leaſe for an hundred years, if three Men ſo long live, which is confirmed by the Biſhop and Chapter, the Succeſſor may avoid this Leaſe, *the Biſhop of Hereford and Stacy's Caſe vouched in the Biſhop of Chicheſter and Freelands Caſe*, *Paſch.* 1 *Car. Ley* 74. So if a Leaſe be made for ninety nine years determinable upon three Lives, it is ſaid that this Leaſe is not good within any of the Statutes, 8 *Co. f.* 70. But in 26 *Car.* 2. *B. R. Threadneedle and Lineham's Caſe*, 3 *Keb.* 595. there it was ſaid by the Court, that they would not diſpute, whether a Leaſe made by a Biſhop for ninety nine years determinable on three Lives was good or not (which doth imply that the Law is not ſettled as to ſuch a Leaſe) But if a Leaſe be made to *A.* for the Life of *B*, *C.* and *D.* it is a good Leaſe; and it is held, that a Leaſe to one for the Lives of three others, and a Leaſe to three for their three Lives is all one within the intent of the Statute, *Trin.* 3 *Jac. B. R. Baugh* v. *Haynes*, 2 *Cro.* 76. And a Leaſe being made for forty years by the Maſter and Brethren of an Hoſpital was allowed good in *Chancery*, *Tothil p.* 140. *tit. Leaſe.* But *Quære* whether the Leaſe was for Houſes or Land, and if for Lands, upon what reaſon it was made good?

And note, That though by the Words of the Statutes, **All Leaſes let, other than for twenty one years, or three Lives from the making, ſhall be void**; yet a Leaſe for fewer years or lives is good, for that it was the only intent of the Statute to reſtrain Churchmen from making Leaſes for longer Terms, and not from making them for fewer years or lives, *Mich.* 32 *&* 33 *Eliz. C. B. Carter and Chaycole's Caſe*, 1 *Leonard* 306. If a Leaſe be made to one for three years, and ſo from three years to three years, and ſo from three

years to three years during the Leſſor's life, this is a good Leaſe for twelve years, *Per Cur. Mich.* 13 *Jac. Wrathbone* v. *Newberry*, 3 *Bulſt.* 158. See 28 *H.* 8. *Dyer f.* 24. *and Plowd. f.* 273. Or if the Leaſe be for three years, and ſo from three years to three years ſo long as he ſhall be Parſon, this is a good Leaſe for ſix years, and for the reſidue uncertain, and but an Eſtate at Will, 1 *Inſt.* 45. *b.* But if the Leaſe be for three years, and from three years to three years till nine years be expired, this is a Leaſe for nine years, *Paſch.* 1 *Jac. C. B. Wilcox's Caſe*, 1 *Rolls Abr.* 850. And if a Leaſe be made for three years, and after for three years, and ſo from three years to three years until ten years be expired, it is a Leaſe but for nine years, and the odd year ſhall be rejected and not accounted, becauſe it cannot happen to be determined by three years, the ſame if it had been for twenty years, *&c.* the odd years ſhall be rejected, *Noy* 143. And if a Leaſe be made for three years, and at the end of thoſe three years, for other three years, and ſo for thirty nine years *in tres annos* during the life of the Leſſor, this is not a Leaſe for life, but a Leaſe for twelve years, *Hill.* 13 *Jac. B. R. Newberry & Wrothbone*, 1 *Rolls Rep.* 287.

If a Leaſe had been made for the life of one, or more other Perſons, and the Leſſee had died *Ceſtuy que vie* being living, he that firſt entred ſhould have held the Land during the life of him for whoſe life it was taken as general Occupant; ſo if Tenant for his own life had granted over his Eſtate to another, if the Grantee had died before the Leſſee of whom he had the Eſtate, he that firſt enters ſhould have had it during the life of the firſt Leſſee, 2 *Bulſtrode f.* 11, 12. *Blunt's Dictionary, occupant.* Or if a Tenant for anothers life makes a Leaſe for years and dies, the Leſſee for years being in Poſſeſſion ſhould have had the Term as Occupant, *Chamberlain* v. *Ewre*, 2 *Rolls Abr.* 151. But if the Leſſee for years had made a Leaſe at Will, and after that the Leſſee for the others life had died, the Leſſee at Will being in Poſſeſſion ſhould have been the Occupant, and not the Leſſee for years, but he ſhould have had it in the nature of a Reverſion, and ſo the Leaſe for years not extinct. But if Tenant for anothers life had died, not having made any Grant of his Eſtate, he that firſt enters, albeit he claimed it in the Right of another, ſhould have been the Occupant upon the account that he firſt entred, and not he in whoſe Name he claimed, *Mich.* 10 *Jac. B. R. Chamberlain* v. *Ewre*, 2 *Rolls Abridg.* 151. But at this day in all theſe Caſes beforementioned concerning general Occupancy the Law by Act of Parliament is changed, and it ſhall go to the Executors or Adminiſtrators of the Party ſo dying that had the Eſtate thereof by virtue of the Grant, and ſhall be Aſſets in their hands, that is, in caſe there be no ſpecial Occupant thereof; and ſpecial Occupancy is, where an Eſtate for lives is made to a Man and his Heirs, in ſuch Caſe the Heir ſhall have the Eſtate after the deceaſe of the Anceſtor as ſpecial Occupant, or as a Perſon particularly deſcribed to whom the ſaid Eſtate ſhall go after the Leſſee's death, and ſuch Leaſe ſhall be as Aſſets by deſcent in the Hands of the Heir, *Stat.* 29 *Car.* 2. Entituled, *An Act to prevent Frauds and Perjuries*, which is as followeth: **Be it farther enacted by the Authority aforeſaid, That from henceforth any Eſtate** pur auter vie **ſhall be deviſable by a Will in Writing, ſigned by the Party ſo deviſing the ſame, or by ſome other perſon in his preſence, and by his expreſs directions, atteſted and ſubſcribed in the preſence of the Deviſor by three or more Witneſſes; and if no ſuch Deviſe thereof be made, the ſame ſhall be chargeable in the Hands of the Heir, if it ſhall come to him by reaſon of a ſpecial Occupancy, as Aſſets by deſcent, as in caſe of Lands in Fee-ſimple; and in caſe there be no ſpecial Occupant thereof, it ſhall go to the Executors or Adminiſtrators of** the

the Party that had the Eſtate thereof by vertue of the Grant, and ſhall be Aſſets in their Hands.

A fifth Rule to be obſerved in the making of theſe Leaſes, is, that it muſt be of Lands, Tenements, or Hereditaments manurable or corporeal, which are neceſſary to be letten, and whereout a Rent by Law may be reſerved, and not of things that lie in Grant whereout a Rent cannot be reſerved; therefore if a Biſhop by Deed indented doth make a Leaſe of a Fair parcel of the Poſſeſſions of his Biſhoprick with all Profits thereof for three lives, rendring the old accuſtomed Rent, though this Leaſe be confirmed by the Dean and Chapter, yet the Succeſſor ſhall avoid it,by 1 *Eliz.*for a Fair is but a Franchiſe or Liberty not manurable out of which a Rent cannot be reſerved, and for the Rent reſerved out of ſuch Fair,the Leſſor or his Succeſſors have not any remedy, either by Diſtreſs, or Aſſize; and all Leaſes of ſuch Inheritances out of which the antient and accuſtomed Rent cannot be well and lawfully reſerved and made payable to the Succeſſor, during the Continuance of ſuch Leaſe for twenty one years, *&c.* the Succeſſor ſhall avoid it; for although in ſuch Leaſes the Rent reſerved may be good by way of Contract between the Leſſor and Leſſee, yet it is not incident to the Reverſion, nor ſhall go with it, therefore the Succeſſor ſhall not be bound by ſuch Leaſe, *Trin.* 30 *Eliz. B. R. Jewel's Caſe,* 5 *Co.* 3. If a Biſhop be ſeiſed of a Mannor, and hath by Grant from the King *primam tonſuram ſive veſturam* of certain Acres of Land belonging thereunto (but not the Feeding thereof, which was to another;) here the Biſhop hath not the Soil; for though in the Caſe of a common Perſon by the Grant *de prima veſtura* the Soil ſhall paſs, yet not in the Caſe of the King; but if the Grant had been of the firſt Veſture to ſuch a day certain, the Soil had paſſed; and when the Biſhop hath only *primam tonſuram* and not the Soil, and makes a Leaſe thereof for three lives rendring Rent, this Leaſe is void, as not being an Hereditament within the Statute to be leaſed; but where the Grant is *de veſtura,* from a certain time to a certain day, it is then an Hereditament that may be letten, and may be fed with Cattel, and upon which the Succeſſor may diſtrain in caſe the Rent be not paid, *Paſch.* 19 *Jac. B. R. the Biſhop of Oxford's Caſe, Palmer* 174. Upon this account alſo it is, that if a Biſhop be ſeized of Tithes in the Right of his Biſhoprick, and doth by Indenture demiſe them for three lives rendring the ancient Rent, this is a void Leaſe againſt the Succeſſor; by *Yelverton, Williams* and *Tanfield,* becauſe the Leaſe being made for lives, and nothing demiſed but Tithes which lie in *prender,* there is not any remedy for the Rent, for there is not any place wherein a Diſtreſs may be taken, nor can an Action of Debt be brought becauſe it is a Freehold, nor an Aſſize, becauſe there is not any Seiſin; and if there was Seiſin, yet the Aſſize would fail, becauſe there is not any Land to be put in view; but if the Leaſe had been made for years it had been good, becauſe then an Action of Debt lies for the Rent; and ſo it is of all other things which lie in *Prender* or *Render,* where no Diſtreſs can be taken, *Hill.* 3 *Jac. B. R. Tailentine* v. *Denton,* 2 *Cro.* 111. *ſame Caſe, Moor* 778. *Trin.* 5 *Jac. B.R. Rickman* v. *Garth,* 2 *Cro.* 173. *Hill.* 19 & 20 *Car.*2. *Holden* v.*Smalbrook, Vaughan* 204. *the Biſhop of Oxford's Caſe, Paſch.* 19 *Jac. B. R. Palmer* 175. & *Paſch.* 15 *Car.* 2. *Scacc. Morice* v. *Antrobus, Hardres Rep.* 326. & *Hill.* 26 & 27 *Car.* 2. *Cartwright* v. *Pinkney,* 3 *Keb.* 488. Note, that it being admitted that a Leaſe for years of Tithes made by a Biſhop rendring Rent, is good againſt the Succeſſor, that doth admit that it is ſuch a Rent as ſhall go along with the Reverſion, and not as a Sum in groſs by reaſon of the Contract only; for if ſo, it could not go to the Succeſſor, for a ſucceeding Biſhop is not privy to the Contracts of his Predeceſſor, but hath a Privity of Eſtate, only, *viz.* the

the Reverſion, as was argued by *Saunders*, to which the Court ſeem'd to incline, *Hill.* 22 & 23 *Car.* 2. *Dean & Chapter of Windſor* v. *Gover*, 2 *Saunders* 304. *ſame Caſe*, 2 *Keble* 737. *Trin.* 13 *Car.* 2. *Tipping* v. *Grover*, *Raymond* 18. *ſame Caſe*, 1 *Keble* 62.

If a Biſhop, *&c.* grant the next Avoidance of a Benefice to another, although the Grant be confirmed by the Dean and Chapter, yet it is void againſt the Succeſſor by *Stat.* 1 *Eliz.* becauſe 'tis ſuch an Intereſt out of which a Rent cannot be reſerved, *Trin.* 11 *Jac. the Biſhop of Salisbury's Caſe*, 10 *Co.* 60. *Paſch.* 32 *Eliz. Sale and the Biſhop of Coventry and Marſh*, 1 *Anderſon* 241. And for the ſame reaſon it hath been held, 37 & 38 *Eliz. in a Caſe betwixt the Dean and Chapter of Hereford and the Biſhop of Hereford and Bullard*, that a Grant of a next Avoidance of a Benefice by a Dean and Chapter is within the purview of the Statute of 13 *Eliz.* and ſo void, 3 *Cro.* 440. 1 *Mod. Rep.* 204.

If a Biſhop doth create a new Office, or doth grant a new Fee, or a Rent Charge, *&c.* out of his Land, the Statute doth extend to make them void by the Equity thereof as againſt the Succeſſor; for if the Biſhop might grant Rents or Fees out of the Land, at his pleaſure the Statute would be to little or no purpoſe, for the Land by ſuch Grants might be made of ſmall or no value to the King and Succeſſor, *Paſch.* 32 *Eliz. Sale* v. *the Biſhop of Coventry and Marſh*, 1 *Anderſon* 241. *Trin.* 12 *Jac. Humphry* ---- v. *Powel*, *Brownlow & Gouldsborough* 1 *part* 182. Yet if an ancient Office be granted, and the ancient Fee be increaſed, the Grant is notwithſtanding good for the Office, and for ſo much of the Fee as hath been antiently granted with the Office, and void for the reſt that is new, *Mich.* 8 *Car. Young* v. *Stowel*, 1 *Cro.* 280. 1 *Car. George Biſhop of Chicheſter* v. *Freeland*, *Bridgman* 32. *Mich.* 9 *Jac. C. B. the Biſhop of Ely's Caſe*, *Brownlow*, & *Gouldsborough* 2 *part* 137. But this it ſeems is to be underſtood, where the Office and ancient and new Fee are as ſeveral Grants, and not conjoyned or mixed in the ſame Sentence, or in ſeveral Sentences the one depending upon the other. But if an Office be granted with a Fee of five Pounds, when the ancient Fee was a leſs Sum, becauſe it is entire in the Grant, it is void for all, by *Hutton and Yelverton, Mich.* 2 *Car. C. B. George Biſhop of Chicester* v. *Freeland*, 1 *Cro.* 50. So when a Biſhop having the Inheritance of the diſpoſal of two Offices, as of Steward and Under-Steward, did grant both to two Perſons, whereof one is within age, and after the Grant was confirmed at his full age in the life of the ſame Biſhop, yet the Grant was adjudged void, and 'twas alſo then ſaid, when two Offices are granted to one Man by one Grant, that they are void, for the Statute hath been ſtrictly expounded, *Scambler and Wat's Caſe*, 41 *Eliz.* vouched in *the Biſhop of Chicheſter and Freeland's Caſe*, *Ley* 76. & 1 *Cro.* 50.

Alſo if a Dean and Chapter do grant Rent Charge out of their Poſſeſſions, this is reſtrained by the Equity of *Stat.* 13 *Eliz.* and yet the Rent is not any part of their Poſſeſſion within the Words thereof, *Elmer's Caſe*, 5 *Co.* 2. Or if a Biſhop being ſeized of a Rent doth grant the ſame in Fee, this Grant is void as to the Succeſſor, *Paſch.* 44 *Eliz. in the Caſe of Fines*, 3 *Co.* 85. the like may be ſaid of all other Eccleſiaſtical Perſons that are within the ſaid Statute of 13 *Eliz.* If an Annuity be granted to one for his life *pro Conſilio impenſo & impendendo*, this Grant is void againſt the Succeſſor by an equitable Conſtruction of the Statutes, *Biſhop of Salisbury's Caſe*, *Trin.* 11 *Jac.* 10 *Co.* 60. And generally all Leaſes and Grants not permitted by the Words in the Statute of 13 *Eliz.* **Other than for the Term of one and twenty years or three Lives from the time as any ſuch Leaſe or Grant ſhall be made or granted, whereupon the accuſtomed yearly Rent or more ſhall be reſerved and payable yearly during the ſaid Term,** are void againſt the Succeſſors, being reſtrained by this

this Statute and Statute 1 *Eliz.* and for that reaſon, if the Grant of an Office by a Biſhop, whether it be an Office that is exerciſeable by the Biſhop himſelf, as Chancellorſhip, or any other Office that concerns the Biſhoprick, as Steward, *&c.* cannot be made for twenty one years or three lives within the Exception of 1 *Eliz.* nor by a Dean and Chapter or other Eccleſiaſtical Corporation within 13 *Eliz.* But a Biſhop by 1 *Eliz.* or others by 13 *Eliz.* may grant an antient Office for one life, and that upon the account of neceſſity, as being no diminution of the Revenue; but this being a Grant at Common Law muſt be confirmed. But it ſeems that a Commiſſariſhip, *&c.* is not grantable for life with Confirmation to bind the Succeſſor, for ſo it hath been held; The Caſe was thus, The Deanry of *Wolverhampton* annexed to the Deanry of *Windſor* being a Peculiar, and having Ordinary Juriſdiction, the Dean makes a Commiſſary, which is confirmed by the Chapter; the Dean dies; the Queſtion was if this was good to bind the Succeſſor? By *Dodderidge* 'twas ſaid, that ſuch a Juriſdiction is judicial, and that Grant is but a Commiſſion and Authority all times remaining in the Ordinary. 'True it is, that Eccleſiaſtical Juriſdiction in judicial Acts may be executed by Subſtitute, but in Law they are the Acts of them that ſubſtitute the other, by 11 *H.* 4. 64. *a.* 7 *E.* 4. 14. 20 *H.* 6. 1. A Commiſſary may excommunicate and prove a Teſtament, but that ſhall be in the Name of the Ordinary, 20 *E.* 3. And a Grant of that by the Biſhop is not good but during his life, and ſhall not bind his Succeſſor; for the Law hath appointed who ſhall execute ſuch Jurisdiction *ſede vacante*, *viz.* the Archbiſhops in their ſeveral Provinces, by 17 *E.* 3. 23. The Archbiſhop and the Dean and Chapter cannot grant the Juriſdiction of the Warden of the Spiritualties, to hold after the death of the Archbiſhop, which is a more ſtrong Caſe. And if the Subſtitute as aboveſaid offends, the Ordinary ſhall be puniſhed for it, which is unreaſonable, and the Grant being void cannot be made good by the Confirmation of the Chapter. And by *Coke* Chief Juſtice, if that ſhould be a good Grant to bind the Succeſſor, then the Succeſſor cannot remove him, and yet the Succeſſor ſhall anſwer for the Acts and Offences of the Commiſſary which would be too hard, *the Prebend of Hatcherly's Caſe*, *Noy* 153. And it is ſaid, that an Office judicial, or partly judicial, and partly miniſterial cannot be granted in Reverſion, though an Office miniſterial may, 11 *Co.* 4. *Auditor Curl's Caſe*, 2 *Rolls Abr.* 154. However the Dean and Chapter's Confirmation will not make valid the Biſhop's Grant of an Office for two Lives; for the ſame neceſſity which makes the Grants of Offices good for one Life, will not extend to Grants for two or more Lives, 1 *Car. George Biſhop of Chicheſter* v. *Freeland*, *Bridgman* 30. *Trin.* 8 *Car. B. R. Walker* v. *Sir John Lamb*, 1 *Cro.* 259. And if the Grant be made for two Lives, and one of them die before the Biſhop, ſo that there is but one Life in being againſt the Succeſſor, yet the Grant being originally void, cannot be made valid by any after accident; by *Harvy* and *Croke the ſaid Caſe of the Biſhop of Chicheſter* v. *Freeland*, 1 *Cro.* 50. Neither may the Biſhop grant an Office with the antient Fee to one, and after make a Grant of it in Reverſion to another, becauſe there is no neceſſity for the ſecond Grant; and if ſuch Grants were good by the ſame reaſon they might be made in Tail or in Fee, which would be directly againſt the meaning of the Statute, nor can any ſuch Grant be made good by any after Act of the Grantee, as by Surrender, Releaſe, or the like. But if by Preſcription time out of mind a Biſhop, or other Eccleſiaſtical Corporation hath uſed to grant an Office in Reverſion, *Habendum* after the death of the preſent Grantee for Life, ſuch Grant is good with Confirmation, (and that without the recital of the former Eſtate, 2 *Rolls Abr.* 154.) By *Dyer*, to which *Manwood* ſaid, that it is the Order in the Arches, and in the Prerogative

tive Court, and of all the Courts of *Pauls* to grant the Offices in Reverſion, and that every Office which doth belong to the Spiritual Courts are granted in Reverſion; to which *Dyer* replyed, I do not care nor regard what they do, but what they ought to do; and according to his Opinion he ſaid it had been there lately adjudged, and that a Preſcription ought to be laid, *Mich.* 15 *Eliz. C. B.* 3 *Leon.* 31. *and the Biſhop of Salisbury's Caſe vouched in the Biſhop of Chicheſter and Freeland's Caſe, Paſch.* 2 *Car.* 1 *Cro.* 49. *Mich.* 8 *Car. B. R. Young* v. *Stowel*, 1 *Cro.* 279. *and Jones* 310. *Trin.* 15 *Car. B. R. Young* v. *Fowler*, 1 *Cro.* 555. *and Marſh* 38. *Trin.* 8 *Car. B. R. Walker* v. *Lamb*, *Jones* 263. But if no Preſcription be for ſuch Grant, it is void againſt the Succeſſor, by *Harvy & Croke*, 1 *Cro.* 49. And when the Queſtion was whether an Office had been uſually granted in Reverſion, the Plaintiff to prove it ſhewed a Grant of 4 *Ed.* 6. to one in Reverſion, and confirmed 1 *Eliz.* and that the 7*th* of *Eliz.* the Reverſioner ſurrendred and took a new Grant to him and another; it was held by all the Court, that this was a good inducement to believe that the Office was anciently ſo granted in Reverſion, but being Matter of Fact it was left to the Jury and they found for the Plaintiff, who after exhibited a Bill in the *Chancery* to be eſtabliſhed in Poſſeſſion according to the Verdict, *Mich.* 8 *Car. B. R. Young* v. *Stowel*, 1 *Cro.* 279. *and Jones* 310. But a Biſhop may grant a new Office that is neceſſary with a reaſonable Fee, the ſame being confirmed by the Dean and Chapter, and it ſhall bind his Succeſſor, as is ſaid to be adjudged 10 *Jac. C. B. in the Caſe of the Biſhop of Ely*, who granted the Office of keeping of his Houſe and Garden for life with the Fee of 3 *l. per annum*, 1 *Cro.* 48.

If a new Biſhoprick be founded (as divers were in the time of *H.* 8.) the Biſhops of ſuch new Biſhopricks are reſtrained by 1 *Eliz*, as others of old Foundation, and may be even as they grant Offices of neceſſity for life with Confirmation of the Dean and Chapter, that is in Poſſeſſion with a reaſonable Fee; (the reaſonableneſs of which Fee ſhall be decided by the Courts of Law in which an Action concerning it ſhall depend, as excepted out of the general reſtraint of the ſaid Statute, *Trin.* 20 *Eliz. Boulton's Caſe vouched in the Biſhop of Chicheſter and Freeland's Caſe*, 1 *Cro.* 50. *Paſch.* 27 *Car.* 2. *Ridley* v. *Founel*, 3 *Keb.* 472, 506.

A Biſhop of a new Biſhoprick cannot grant an Annuity *pro Conſilio impenſo & impendendo* to bind the Succeſſor though it be confirmed; for when ſuch an Annuity was granted by the Biſhop of *Cheſter*, which is a new Biſhoprick, and the Grantee brought a *Writ of Annuity* againſt the Succeſſor, and did declare that the Predeceſſors of the ſaid Biſhop had granted reaſonable Fees, but did not aver that this Fee had been granted before; the Opinion of the Court was againſt the Plaintiff, *Trin.* 30 *Eliz. Bolton's Caſe vouched in the Biſhop of Chicheſter and Freeland's Caſe, Bridgman* 30. But *Croke* Juſtice vouching this *Bolton's Caſe in the Biſhop of Chicheſter and Freeland's Caſe, Paſch.* 2 *Car. Ley* 75. ſaith, that *Bolton* averred in this Caſe that it was the ancient Fee, and the reaſon for which Judgment was given againſt him was, for that this was a voluntary thing, and not an Office, to elect one Man to be of his Council, and it was not of neceſſity to have this Man, or that Man of his Council, for peradventure the Succeſſor would not make ſuch Election. And what is ſaid of a Biſhop with reſpect to the Statute of 1 *Eliz.* is alſo true with reſpect to the Statute of 13 *Eliz.* as to Eccleſiaſtical Perſons reſtrained by that Statute, with this difference, that though a Biſhop or other ſole Corporation cannot grant an Office for one life without Confirmation, as being a Grant at Common Law; yet a Dean and Chapter or other Corporation aggregate may make ſuch Grant without the Confirmation of any, *Trin.* 11 *Jac. C. B. the Biſhop of Salisbury's Caſe*, 10 *Co.* 60. *Paſch.* 32 *Eliz. Sale* v. *Biſhop of Coventry and Marſh*, 1 *Anderſon*

ſon 241. And note, that neither Biſhops by the 14*th* of *Eliz.* nor other Eccleſiaſtical or Collegiate Corporation by the 13*th* of *Eliz.* are reſtrained from making Grants of Copyholds in Fee, in Tail, or for Lives, or for any number of years according to the Cuſtom of the Mannor, nor is Confirmation neceſſary to make ſuch Grants good, though it be made by a ſole Corporation, as by Biſhop, Prebendary, *&c.* 4 *Co.* 23, 24.

A ſixth Rule to be obſerved in the making of theſe Leaſes is, that it muſt be of Lands or Tenements which have moſt commonly been letten to Farm, or occupied by the Farmers thereof by the ſpace of twenty years next before the making of ſuch Leaſe, for that it is ſaid in *Stat.* 32 *H.* 8. (**Which have moſt commonly been letten**) And it is ſaid by my Lord *Coke*, that if the Lands of which the Leaſe is made, have been letten for eleven years at one, or at ſeveral times within twenty years next before the making of ſuch Leaſe it is ſufficient, 1 *Inſt.* 44. *b.* But where Lands belonging to the Archbiſhop of *York*, had been anciently and uſually demiſed till within twenty years, in which time they had been in the Hands of the King and of the Archbiſhop, but for the two laſt years only, had been leaſed by the late Archbiſhop; It was held by *Keeling* Chief Juſtice, and *Twiſden*, that this was a good Leaſe within the Statute of 32 *H.* 8. to bind the Succeſſor, for that the Statue did not intend to introduce a Diſability as to the Lands to be leaſed, but only of the Eſtate to be granted out of Lands, and that it would be contrary to the Intent of the Statute to make other conſtruction; and if Lands had been leaſed for eleven years only, that is not ſufficient within the Statute, and that the Collection of the Lord *Coke*, 1 *Inſt.* 44. was falſe, and not warranted by the Statute, for that the firſt part of the Statute ſeems to refer to a more ancient time of being leaſed than eleven years only: But *Windham* and *Moreton* Juſtices, were of a contrary Opinion, that the Statute ought to be obſerved in all its circumſtances which was not in this Caſe, the Lands having been out of Leaſe for above twenty years; and if other Conſtruction ſhall be made of the Statute, a great Inconvenience might enſue, for under colour of Land being anciently leaſed, Biſhops may leaſe all they have, and leave nothing for the Succeſſor wherewith to maintain Hoſpitality, and therefore in their Opinions the Land ought to have been both anciently and newly leaſed, otherwiſe the Succeſſor ſhall not be bound; but *Windham*, dying the two Judges gave Judgment according to their Opinion, *contra Moreton*, *Paſch.* 21 *Car.* 2. *B. R. Pemble* v. *Stern*, 1 *Sid.* 316, 416, *ſame Caſe*, 2 *Keb.* 325. *and Raymond* 165. And by *Vaughan* Chief Juſtice, Lands long ſince leaſed for 500 years, are Lands uſually demiſed though they have not been more than that once demiſed, for that the more received Senſe of the Words (**Land uſually demiſed**) is, the common Continuance of Lands in Leaſe, though the Words may be taken in another Senſe, *viz.* for the oftner Farming, or repeated Acts of Leaſing Lands, *Vaughan's Rep.* 34. *ſame Caſe*, *Sir Tho. Jones's Rep.* 37. And it is ſaid, that Copyhold Lands that have been granted by Copy of Court Roll in Fee, for life, or years according to the Cuſtom of the Mannor, have been ſufficiently let to Farm within this Statute, although an Eſtate granted by Copy is in Judgment of the Common Law, but an Eſtate at Will, yet all Lands that have been accuſtomably uſed to be demiſed at Will, by thoſe who have the Inheritance of the Lands, are Lands let to Farm within this Statute, ſo if they be leaſed by Indenture, or the Reverſion of them only, *Paſch.* 3 *Jac. Heydon's Caſe*, 3 *Co.* 7. *Trin.* 2 *Jac. B. R. in the Dean and Chapter of Worceſter's Caſe*, 6 *Co.* 37. And it is ſaid to be often ſo adjudged, *Trin.* 3 *Jac. B.R. Baugh* v. *Hayns*, 2 *Cro.* 76. *Raymond* 167. So Lands that have been but twice letten are ſaid to be Lands uſually letten; but otherwiſe it is if they have been

but once letten, or if they have been leaſed by one Contract from year to year for three years, for that this is but one Leaſe, *Paſch.* 2 *Jac. B. R.* 2 *Rolls Abr.* 261, 262. *Vaughan* 33.

But if the Temporalties have for divers years been in the King's Hands, as for fifty years, or if it cannot be made to appear that the Lands let, were let by the Biſhop, although Leaſes have been made of them out of the *Exchequer*, yet upon this account a Leaſe by a new Biſhop of ſuch Lands will be void; for the King making Leaſes upon the Eſtate that he hath during the Vacation, ſhall not make the Biſhop's Lands, *&c.* be demiſable within the Statute, becauſe the King hath not an Eſtate of Inheritance thereof, *Paſch.* 19 *Jac. B. R. the Biſhop of Oxford's Caſe*, *Palmer* 176.

And this Rule is not only to be obſerved by Perſons that make Grants or Leaſes by vertue of the Statute of 32 *H.* 8. *viz.* without Confirmation, but alſo by Biſhops, and other ſole Corporations, although Confirmation be made of their Leaſes, and alſo by Corporations aggregate, that need no Confirmation; for though by the Statute of 32 *H.* 8. which enables Perſons Eccleſiaſtical to make Leaſes for three lives or twenty one years without Confirmation, is the only Statute that expreſly puts this Condition upon Leaſes made by Eccleſiaſticks, and ſo it may be thought that Lands not uſually let, may be well letten with Confirmation, yet both the reſtraining Statutes of 1 *Eliz.* and 13 *Eliz.* do implicitely reſtrain from making Leaſes of Lands not uſually let, becauſe they both require that the antient Rent ſhall be reſerved; by which it is clearly hinted and intended, that the Land letten ſhall be ſuch Land as hath been uſually demiſed, for otherwiſe the ancient Rent cannot be reſerved for it, *Hill.* 44 *Eliz. C. B. the Biſhop of Hereford and Scory*, 3 *Cro.* 874.

A ſeventh Rule to be obſerved is, that upon every ſuch Leaſe there muſt be reſerved ſo much yearly Rent or more as hath been moſt accuſtomably yielded and paid for the Lands within twenty years next before ſuch Leaſe thereof made, to be due and payable yearly to the Leſſors and their Succeſſors during the Continuance of ſuch Leaſe. This is an expreſs Condition in the Statut of 32 *H.* 8. *c.* 28. and in the Statutes of 1 *Eliz. c.* 10. 13 *Eliz. c.* 20. ſo that no Leaſe can be made by any Eccleſiaſtical or Collegiate Corporation to bind Succeſſion, but with Conformity to this Rule, no not with Confirmation, in Caſes when Confirmation is neceſſary, for though the Exception in the 1*ſt* and 13*th* of *Eliz.* concerning the accuſtomed Rent is more general than that of the 32 of *H.* 8. yet muſt the Pattern of the 32 of *H.* 8. be followed, 1 *Inſt.* 45. *Hardres Rep.* 326.

This Rule contains ſeveral things to be particularly noted, as Firſt, There muſt be a Rent reſerved upon every ſuch Leaſe. *Carter and Cleypole's Caſe*, *Moor* 593. So that the Leaſe muſt not be of things that lie meerly in Grant, as is before ſaid out of which no Rent can be reſerved, and this is the ground or reaſon of the fifth Rule before laid down.

Secondly, There muſt be ſo much Rent reſerved for the things let as hath been moſt accuſtomably yielded and paid within twenty years next before ſuch Leaſe made; and if there hath been different Rents reſerved upon ſeveral Leaſes the accuſtomed Rent mentioned in the Statute ought to be underſtood of the Rent reſerved upon the laſt Leaſe, and not upon any former Leaſe, for that Rent having been altered ſince, cannot be called the accuſtomed Rent, by *Hale Chief Baron in Morice and Antrobus Caſe*, *Paſch.* 15 *Car.* 2. *in Scaccar. Hardres* 326. but if one of three Mannors formerly let together for a certain Rent be let alone, and in the new Leaſe no certain Rent be reſerved, but it is only ſaid, rendring to the Leſſor and his Succeſſors the uſual and accuſtomed yearly Rent and Services, at the days and times accuſtomed, in this Caſe no Rent

Rent at all is reſerved, and therefore the Leaſe is void, *Mich. 3 Car. C. B. Owen* v. *Thomas Aprees*, 1 *Cro.* 94. So if a certain Parcel of Land hath been accuſtomably letten for a certain Rent, and in a new Leaſe of the ſame Lands one Acre of Land more, not accuſtomably letten, is demiſed with the other Parcel, although that ſo much more than the old Rent be reſerved, as the Lands added which were not uſually letten be worth yearly according to the extended value thereof, yet this Leaſe will not hold good by the Statutes, becauſe here is Land let, not uſually let, and the Rent iſſueth out of the whole, ſo that the accuſtomable Rent for the Lands that had been accuſtomably letten is not reſerved; or if the accuſtomable Rent of Lands accuſtomably letten be reſerved in a new Leaſe thereof, and one Acre of Land be added in the Leaſe, though that Acre was of Lands alſo uſually letten, yet the Leaſe is void for the whole. So if Leaſes have been formerly and uſually made of Land wherein was an Exception of all the great Trees, as Oaks, Aſh, Crab-Trees, *&c.* and after a Leaſe is made without the ſaid Exception, ſuch after Leaſe is void, *Paſch. 15 Jac. B.R. Smith* v. *Bowles*, 3 *Bulſtr.* 290. The Reaſon given is, becauſe there is more let by the laſt Leaſe than was anciently let by the former, *viz.* Trees and the Profits of them, as, the Maſt and Fruit, the Boughs and the Soil on which they ſtand; for when the Trees were formerly excepted the Boughs, Fruit, *&c.* were alſo excepted thereby, *Hill. 15 Jac.* 2 *Cro.* 458. So a Leaſe was made of a Rectory rendring forty Pounds *per Annum*, and a Couple of Capons, and upon the Expiration of that Leaſe a new Leaſe was made to Husband and Wife, reſerving forty Pounds *per Annum*, and the Husband covenanted to pay a Couple of Capons, or ſix Shillings eight Pence in Mony over and above the ſaid Rent. And by *Hale* Chief Baron, this ſecond Leaſe was not good, by reaſon that in the former Leaſe the Capons were reſerved, and ſo part of the Rent; in the ſecond Leaſe the Husband only covenants to pay them, which Covenant of his will not bind his Wife, if ſhe ſurvive him, therefore his Covenant will not amount to a Reſervation; otherwiſe, if both had covenanted, or if the Leaſe had been made to the Husband alone, with ſuch a Covenant, *Paſch. 15 Car. 2. Scaccar. Morrice* v. *Antrobus*, *Hardres* 325. Yet if one ſeized of a Parſonage doth let a portion of the Tithes for one and twenty years rendring 8 *l.* Rent, and doth reſerve the Paſturage of a Colt in the Land of the Leſſee; and the Leaſe being expired, the Succeſſor doth let the Tithes in the like manner for one and twenty years omitting the Paſturage of the Colt; in this Caſe the ſecond Leaſe is good, notwithſtanding the Omiſſion of the Paſturage; for that was a thing only reſerved to the firſt Leſſor and his Aſſigns, for that it was reſerved out of the Land of the Leſſee, and the Succeſſor could not reſerve Paſturage out of the Land of the firſt Leſſee, he not being his Tenant of the Tithes, and ſuch Reſervation is void; but otherwiſe it had been, if the Reſervation of the Paſturage had been general, *Per Curiam*, *Paſch. 17 Jac. B. R. Euſden* v. *Denny*, *Palmer* 106. So if ſeveral Parcels of Land, *&c.* have formerly and uſually been letten together for a certain Rent, and then one part or parcel of the ſame Land is let alone, and a Rent *pro rata* is reſerved, this is good, becauſe in Subſtance the accuſtomable Rent is reſerved, and the Succeſſor hath no prejudice, 1 *Inſt.* 44. *Mich. 26 Car. 2. B. R. Threadneedle* v. *Lineham*, 3 *Keb.* 380. But if a full proportion of the Rent be not reſerved according to the value of the part let alone, eſtimating it with the other part not let with it, it follows, that the Leaſe of this part alone is void.

Or if Copyhold Lands demiſeable for three Lives rendring a certain Rent and heriotable upon the death of every Tenant dying in Poſſeſſion, be let by Indenture for three Lives, rendring the ancient Rent, but without the reſerva-

tion of any Herriot, yet the Non-reſervation of the Herriot ſhall not impeach the Leaſe; for the Statutes are, that the ancient Rents ſhall be reſerved, which is intended only of the very ancient Rent, and doth not extend to caſual and accidental Services, as Herriots, *&c.* and an Herriot is not an annual thing, nor depending upon the Rent, *Trin.* 3 *Jac. B. R. Baugh* v. *Haynes*, 2 *Cro.* 76. *Trin.* 3 *Jac. B. R. Dean and Chapter of Worceſter's Caſe*, 6 *Co.* 37. But if the Demeſnes of a Mannor have been uſually demiſed excepting the Copyhold Lands (for Copyhold Lands are accounted as part of the Demeſns of a Mannor, 1 *Co.* 46. *b.*) but the Services have not been demiſed, and a Leaſe be made of the whole Mannor reſerving the ancient Rent, this Leaſe is void, *adjudged in Chief Baron Tanfield & Foxe's Caſe vouched in the Biſhop of Chicheſter and Freeland's Caſe*, *Ley* 77. But a Biſhop ſeized of two Mannors, Copyhold, and Free, leaſeth them to *B.* for three lives, reſerving the ancient Rent; *B.* afterwards grants the Demeſns of one of the Mannors to *D.* for ninety nine years if the lives live ſo long; and after that grants and aſſigns all his Term and Intereſt to *N* who ſurrenders to the Biſhop, and takes a new Leaſe for three lives of both the Mannors (except the Lands granted to *D.*) at the old Rent, then a new Biſhop is made, and all the lives of the firſt Leaſe die; whether the Leaſe made to *N.* upon the Surrender was a good Leaſe to bind the Succeſſor of the Biſhop that made it or not was the Queſtion; adjudged that it was a good Leaſe, by reaſon there was no prejudice but an advantage to the Succeſſor by the ſecond Leaſe: But *Vaughan* and *Ellis* were of a contrary Opinion, becauſe the old Rent could not be ſaid to be reſerved, when the Demſns of one of the Mannors were excepted out of the ſecond Leaſe, *Mich.* 26 *Car.* 2. *B. R. Thredneedle* v. *Lineham*, 3 *Keb.* 372, 595. *the ſame Caſe*, 1 *Mod. Rep.* 203. *&* 2 *Mod. Rep.* 57. So if a Biſhop doth leaſe parcel of the Demeaſns of a Mannor for life, not warranted by the Statute of 1 *Eliz.* and after doth leaſe the Mannor to another for life, the ſaid Parcel ſo before leaſed for life ſhall paſs with Atturnment of the firſt Leſſee, for that the ſaid Leaſe did not make any Diſcontinuance, but the Reverſion thereof continued parcel of the Mannor, *Paſch.* 11 *Car. B. R. Walter* v. *Jackſon upon a Writ of Error*; and by *Barkley* it had been formerly ſo adjudged in *C. B.* 2 *Rolls Abr.* 58.

Note alſo from this Rule, that to let Lands, *&c.* for more than the ancient or accuſtomed Rent, makes no Avoidance of a Leaſe, for that may be done by the very Letter of the Statutes.

Alſo by the Leaſe, the Rent muſt be due and payable yearly, and therefore if the Rent hath been by the former Leaſes made due and payable at four days in the year, or at two days in a year, and after is made due and payable yearly, or but at one day in each year, it is ſufficient and hurts not the Leaſe; for the Statutes are that the Rent be reſerved and payable yearly, and therefore if the Rent be yearly reſerved the Statutes are ſatisfied, *Trin.* 3 *Jac. Dean and Chapter of Worceſter's Caſe*, 6 *Co.* 37. *Trin.* 3 *Jac. Baugh* v. *Haines*, 2 *Cro.* 76. So if the Rent in former time was uſually reſerved to be paid upon the Land, and now by a new Leaſe it is reſerved to be paid at any remote place, yet it is well enough, by *Clench* 28 *Eliz. C. B. Grindal Biſhop of York's Caſe*, 4 *Leon.* 78. But the Rent muſt be reſerved payable every year to the Leſſor as well as to the Succeſſor, for though the reſtraining Statutes were made for the Benefit of the Succeſſor; yet it is not ſufficient to reſerve the antient Rent to the Succeſſor, and none at all or leſs Rent to the Leſſor himſelf, for that by the Letter of the Statute of 32 *H.* 8. the Rent muſt be payable yearly during the whole Term of twenty one years, or three lives. Alſo the Leaſe muſt be ſuch which may not only reſerve a yearly Rent, but alſo

ſuch

ſuch as thereby the Rent muſt be payable, or recoverable yearly, both by the Leſſor and the Succeſſors, and this a ground or reaſon of the fifth Rule, and of ſome of the Caſes relating thereunto. If a Leaſe be let for one and twenty years from *Michaelmas* reſerving the Rent during the Term payable at the uſual Feaſts or within ten days after, although by the Reſervation the laſt Quarter Rent ſeems not to be payable within the Term, but ten days after the Term ended, yet this is a good Leaſe, and the Rent being reſerved payable during the Term, there ſhall not be allowed ten days to the Leſſee for the payment of it the laſt Quarter, *Trin.* 25 *Car.* 2. *B. R. Baily* v. *Murin*, 1 *Ventris* 245.

An eighth Rule to be obſerved in making Church or College Leaſes is, that they muſt not be made without Impeachment of Waſte; this is alſo an expreſs Condition in the Statute of 32 *H.* 8. *cap.* 28. but is not mentioned in the Statute of 1 *Eliz.* or 13 *Eliz. c.* 10. yet as to 13 *Eliz.* it has been held and reſolved, that the Perſons thereby reſtrained from making long and unreaſonable Leaſes, are by the Equity of the ſaid Statute reſtrained to make Leaſes diſpuniſhable of Waſte; for the Preamble ſpeaks, that unreaſonable Leaſes were the chiefeſt Cauſes of Dilapidations and the decay of all Spiritual Livings and Hoſpitality, ſo that the Statute was made to prevent ſuch unreaſonable Leaſes that had ſuch ill effects, and by conſequence to cure ſuch ill effects, *Trin.* 3 *Jac. B. R. the Dean and Chapter of Worceſter's Caſe*, 6 *Co.* 37. But I find not that any ſuch conſtruction hath been made of the Statute of 1 *Eliz.* which concerneth Biſhops alone, yet that Statute being made alſo to reſtrain their making of unreaſonable Leaſes muſt be thought to bear the ſame conſtruction, See 1 *Inſt.* 45. *a.* and by *Whitlock*, *Hill.* 22 *Jac. Evans and Kiffin* v. *Aſcue*, *Palmer* 468. However Leaſes made by them without Impeachment of Waſt and not confirmed by the Dean and Chapter are void by *Stat.* 32 *H.* 8. *c.* 28. And if ſuch Leaſes being ſo confirmed ſhall not be thought to be made void by the Statute of 1 *Eliz.* yet I apprehend, that if ſuch Tenant go about to commit Waſte, however his Leaſe be made, he may be ſtopped by Prohibition, and after attached if he perſiſt, for ſo may the Biſhop himſelf or any other Churchman in caſe he doth Waſte on the Churches Dower, *Mich.* 12 *Jac. Richard Liford's Caſe*, 11 *Co.* 49. And this may be not only to prevent Waſte in cutting down Trees, but for pulling down or defacing Houſes or the like, *Mich.* 13 *Jac. the King* v. *Zakar*, 3 *Bulſtr.* 91. Yet a Prohibition being moved for, to hinder a Parſon from digging Lead Mines within his Glebe; the Court doubted of it, but inclined that this was not ſuch a Waſte for the which he ought to be prohibited, for it ought to be ſuch Waſt as was to the deſtruction of the Church, for the which a Parſon ought not only to be prohibited, but may be deprived as a Dilapidator, *Mich.* 15 *Car.* 2. *the Lord Rutland* v. *Green or Gee*, 1 *Sid.* 152. *and* 1 *Keb.* 557. See for this Matter 2 *H.* 4. 3. *Moor* 917. *Godb.* 259. 3 *Bulſtr.* 154. 2 *Bulſtr.* 279. And a Biſhop's Leaſe cannot bear out the Tenant in doing that which he himſelf could not lawfully do were the thing leaſed in his own Poſſeſſion, yet if Land hath been accuſtomably letten by a Biſhop, *&c.* without any Exception of Timber Trees, as Oak, Aſh, *&c.* growing thereupon, ſuch Leaſe is good, for the Tenant may only by ſuch Leaſe take the Boughs and Maſt thereof, he not having an abſolute propriety in the Trees themſelves by ſuch Leaſe, but only the Fruit and Boughs; nor hath the Biſhop, *&c.* himſelf a greater Right in them as may be collected from *Smith and Bole's Caſe*, *Hill.* 15 *Jac.* 2 *Cro.* 458. *ſame Caſe*, 3 *Bulſtr.* 290. Yet 'tis ſaid that a Parſon hath ſuch an Eſtate and Intereſt as he may maintain an Action of Waſte, for Waſte in cutting down Trees, *&c.* by his Termor, 10 *H.* 7. 5. *b.*

And

And note, that Leaſes may be made without Impeachment of Waſte two ways, *viz.* either expreſly by expreſs Words in the Leaſe declaring the ſame, or implicitly by conſtruction of Law, as if a Leaſe be made for life the Remainder for life, this is diſpuniſhable of Waſte, and ſo not warranted, at leaſt by the Statute of 13 *Eliz. c.* 10. *Trin.* 3 *Jac. B.R. Dean and Chapter of Worceſter's Caſe*, 6 *Co.* 37. But if a Leaſe be made to one for three lives, this Leaſe is good, becauſe 'tis not diſpuniſhable of Waſte, and the Occupant if any happen ſhall be puniſhed for Waſt; for the Statute of *Glouceſter c.* 5. gives an Action of Waſt againſt any one that holds in any manner for Term of life or years, and an Occupant in this Caſe holds for Term of life.

Now concerning Colleges in the two Univerſities, the Colleges of *Wincheſter* and *Eaton* there is a particular Statute which to the making good a Leaſe to be made by them, doth enjoin one thing more, for by it is Enacted:

That no Maſter, Provoſt, Preſident, Warden, Dean, Governor, Rector or chief Ruler of any College, Cathedral Church, Hall, or Houſe of Learning in any of the Univerſities of Cambridge and Oxford, nor any Provoſt, Warden, or other Head officer of the Colleges of Wincheſter or Eaton, nor the Corporation of any of the ſame, by what Title, Stile or Name ſoever they now be, ſhall or may be called, after the end of this preſent Seſſion of Parliament, ſhall make any Leaſe for life, lives or years, of any Farm or any their Lands, Tenements or other Hereditaments to the which any Tithes, Arable Land, Meadow or Paſture, doth or ſhall appertain, except that the one third part at the leaſt of the old Rent be reſerved in Corn for the ſaid Colleges, Cathedral Church, Halls and Houſes; that is to ſay, in good Wheat after the rate of vj s. viij d. the Quarter, or under, and good Malt at v. s. the Quarter, or under, to be delivered yearly upon days prefixed, at the ſaid Colleges, Cathedral Church, Halls or Houſes; and for default thereof, to pay to the ſaid Colleges, Cathedral Church, Halls or Houſes, in ready Money, at the election of the ſaid Leſſees, their Executors, Adminiſtrators and Aſſigns, after the rate of the beſt Wheat and Malt in the Market of Cambridge, for the Rents that are to be paid to the uſe of the Houſe or Houſes there; and in the Market of Oxford, for the Rents that are to be paid to the uſe of the Houſe or Houſes there; and in the Market of Wincheſter, for the Rents that are to be paid to the uſe of the Houſe or Houſes there; and in the Market of Windſor, for the Rents that are to be paid to the uſe of the Houſe or Houſes at Eaton, is or ſhall be ſold the next Market day before the ſaid Rent ſhall be due, without fraud or deceit. And that all Leaſes otherwiſe hereafter to be made, and all collateral Bonds, or Aſſurance to the contrary by any of the ſaid Corporations, ſhall be void in Law to all intents and purpoſes. The ſame Wheat, Malt or Mony coming of the ſame, to be expended to the uſe of the relief of the Commons and Diet of the ſaid Colleges, Cathedral Church, Halls and Houſes only, and by no fraud or colour, let or ſold away from the Profit of the ſaid Colleges, Cathedral Church, Halls and Houſes, and the Fellows and Scholars in the ſame, and the uſe aforeſaid, upon pain of deprivation of the Governour and chief Rulers of the ſaid Colleges, Cathedral Church, Halls and Houſes, and all other thereunto conſenting.

But this Act, or any thing therein contained, ſhall not extend, or be in any wiſe prejudicial to any Leaſe to be made of a Barn called Mouncken Barn, with a certain portion of Tithes, riſing, growing and being in the Pariſh of Southweek in the County of Suſſex, being parcel of the Poſſeſſions of Maudlin College in Oxford, ſo that the Term demiſed in and by the ſaid

ſaid Leaſe exceed not the number of ten years, from and after the Feaſt of St. Michael the Archangel next coming.

Neither ſhall this Act extend to any Leaſe to be made by the Preſident and Scholars of the College of Saint John Baptiſt in Oxford, to any Heir-male of Sir Thomas White, late Knight and Alderman of London, Founder of the ſaid College; which Leaſe ſhall be made according to the meaning of the Foundation and Statutes of the ſaid College of the Manor of Fifield, and no other Hereditaments. Stat. 18 Eliz. cap. 6.

CHAP. XLIII.

Leaſes by Parſons, Vicars and others of their Eccleſiaſtical Beneſices.

IT follows next to be ſhewed particularly, what the Law is at this day as to Leaſes made by Parſons, Vicars or others having Benefices or Promotions with Cure of Souls. As to which theſe things are to be noted.

Firſt, That Parſons and Vicars are expreſly excepted out of the Statute of 32 *H.* 8. *c.* 28. ſo that they are not as other ſole Corporations enabled by that Statute to make any Leaſe to bind their Succeſſors without the Confirmations of their Patrons and Ordinaries.

Secondly, That they are not reſtrained by the Statute of 13 *Eliz.* or other Statute from making Leaſes (ſuch Confirmation being had) for twenty one years, or three lives, of Lands, *&c.* accuſtomably letten, reſerving the accuſtomable yearly Rent; but by the ſaid Statute of 13 *Eliz.* they are as others reſtrained from making Leaſes for longer time, or without regard to the Limitations therein mentioned.

Thirdly, That all theſe Leaſes muſt be made with Conformity to the eight Rules before ſet down even as others. But it is no neceſſary qualification in the Leſſor that he be a Prieſt; for if a meer Lay-man be admitted, inſtituted and inducted into a Benefice uſually let, *&c.* and doth make a Leaſe thereof for years or lives, which is confirmed by the Patron and Ordinary, and then he is deprived, for that he was but a meer Lay-man, yet this Leaſe ſhall bind the Succeſſor, becauſe he was Parſon *de facto*, and ſuch a one whereof the Law takes Cognizance by his Induction, and the People cannot take notice of any other, by *Gaudy*, *Popham* and *Fenner*, *Paſch.* 42 *Eliz. B. R. Coſtard* v. *Windet*, 3 *Cro.* 775 *ſame Caſe*, *Moor* 606. So it is not material, whether the Incumbent, be he Clerk or Lay-man be of the age of one and twenty years; for his Leaſe ſhall be good though he be of leſs Age, *Brooks Abr tit. Age numb.* 80. but though, as hath been ſaid, it be not a neceſſary qualification that he be a Prieſt, or of ſuch an Age to bind the Succeſſor, yet it is neceſſary that he be an Incumbent *pro tempore* at leaſt. If he that is a legal Incumbent makes a Leaſe, *&c.* and after is deprived for not reading the Articles in two Months, or for other cauſe, yet the Leaſe is good, 1 *Rolls Abr.* 476, 477. But if he that makes the Leaſe be but a ſuppoſed Incumbent, or be in a Church by a Super-Inſtitution or the like ſeeming Title, and ſo be reputed the legal Incumbent, he cannot make a Leaſe to bind after his death, or the death of the true Incumbent; Accordingly the Caſe was, that *A.* being made Biſhop in the time of *Edward the Sixth*, and he living and not deprived, *B.* was con-

conſecrated Biſhop of the ſame Dioceſs in the time of Queen *Mary*, *B.* makes a Leaſe of Land parcel of the Poſſeſſions of the Biſhoprick, and then both theſe Biſhops dye, (though the laſt ſurvived) it was adjudged, that albeit all judicial Acts done by *B.* as Inſtitutions, Certificates, *&c.* were good, yet not ſuch voluntary Acts as tend to the impoveriſhing of the Succeſſor; therefore the Leaſe was held to be void, *Mich.* 17 *Jac. Obrian, &c.* v. *Kinivan*, 2 *Cro.* 552.

Though Leaſes by Parſons or Vicars be in all reſpects well made and firm, yet they may become void before the Term limited in them be expired; for it hath been Enacted as followeth, **That the Livings appointed for Eccleſiaſtical Miniſters, may not by corrupt and indirect dealings be transferred to other uſes, Be it enacted by the authority of this preſent Parliament, that no Leaſe after the fifteenth day of May, next following the beginning of this Parliament, to be made of any Benefice or Eccleſiaſtical Promotion with Cure, or any part thereof, and not being impropriated, ſhall endure any longer than while the Leſſor ſhall be orderly reſident, and ſerving the Cure of ſuch Benefice without abſence above fourſcore days in any one year, but that every ſuch Leaſe, (ſo ſoon as it, or any part thereof ſhall come to any poſſeſſion or uſe above forbidden, or) immediately upon ſuch abſence, ſhall ceaſe and be void; and the Incumbent ſo offending, ſhall for the ſame loſe one years profit of his ſaid Benefice, to be diſtributed by the Ordinary among the Poor of the Pariſh: And that all chargings of ſuch Benefices with Cure, hereafter with any Penſion or with any Profit out of the ſame to be yielded or taken, hereafter to be made, other than Rents to be reſerved upon Leaſes hereafter to be made, according to the meaning of this Act, ſhall be utterly void.**

Provided, that every Parſon by the Laws of this Realm allowed to have two Benefices, may demiſe the one of them upon which he ſhall not then be moſt ordinarily reſident, to his Curate only, that ſhall there ſerve the Cure for him; but ſuch Leaſe ſhall endure no longer than during ſuch Curates Reſidence, without abſence above forty days in any one year. Stat. 13 Eliz. cap. 20.

And by the Statute of 14 *Eliz. cap.* 11. it is Enacted, **That theſe Words, (So ſoon as it, or any part thereof, come to any poſſeſſion or uſe above forbidden, or,) which Words are contained in the ſaid Statute made in the ſaid thirteenth year, touching Leaſes of Benefices, and other Eccleſiaſtical Livings with Cure, ſhall not be revived by this Act, but remain diſcontinued, and ſhall from henceforth be omitted out of the ſaid Act; any thing in the ſaid Act, or in this Act to the contrary notwithſtanding.**

Notwithſtanding this Statute of 13 *Eliz.* if a Parſon or Vicar have made a Leaſe of his Glebe, or Tithes, and being not reſident in the Parſonage or Vicarage Houſe, as the Statute of 21 *H.* 8. *cap.* 13. doth require he ſhould, or doth not uſually dwell in the ſame Pariſh, and yet doth upon all occaſions reſort to his Pariſh, read Divine Service in his Church, and ſerve the Cure thereof duly, the Leaſe made by him is not void upon the account of Non-reſidence, for then he ſhould have been abſent for eighty days together at one time in one year, *Paſch.* 9 *Jac. Sheppard* v. *Twoulſie*, 1 *Bulſtr.* 111. Yet before this time it was adjudged upon ſpecial Verdict found, that a Parſon being abſent for ſeveral Quarters in one Year, ſixty Days in every Quarter that this was ſuch an abſence as would make void his Leaſe, 5 *Jac. B. R. Jennings* v. *Haithwaite*, *Yelverton* 106. *ſame Caſe*, 1 *Brownlow* 208. So it is ſaid to be adjudged, that if the Parſon be abſent at ſeveral times, *viz.* ten days at one time, and at other times in the ſame year for above the ſpace of eighty

eighty days, that thereby he is Non-reſident within the Statute, *Sidner and Calvert's Caſe*, *Noy* 116. And note that this Statute of 13 *Eliz. c.* 20. is a general Law, as was adjudged in the ſaid Caſe of *Jennings and Haithwaite.*

If a Parſon or Vicar hath with the conſent of his Patron and Ordinary made a Leaſe for twenty one years, or three lives of their Benefices or part thereof, and then the Benefice doth become void by death, in this Caſe the Leaſe is not made void by this Statute, by *Shute and Gawdy* v. *Wray and Clinch*, *Mich.* 30 & 31 *Eliz.* *Mote* v. *Hales*, *Moor* 270. But *Croke* who alſo reports this Caſe, ſaith, that it was adjudged that this Leaſe was void by the death of the Incumbent, 3 *Croke* 123. And my Lord Chief Juſtice *Hales* ſaith that this Caſe was adjudged according as 'tis reported by *Croke*, by the Opinion of three Judges againſt one, but ſaith that it was a hard Opinion,and that in 38 *Eliz. B. R. Moor* 448. the very Point was adjudged contrary, *Trin.* 25 *Car.* 2. *B. R. Baily* v. *Murrin*, 1 *Ventris* 245. *ſame Caſe.* 3 *Keb.* 107, 194 where this very Point is ſolemnly ſetled and adjudged contrary to the Caſe reported by *Croke*, *viz.* that Death doth not make ſuch a Non-reſidence as ſhould avoid a Leaſe, for that the intention of the Statute was to oblige the Incumbents to Reſidence; Firſt by impoſing a Forfeiture upon them of a years value of their Benefice if they did not reſide; Secondly, by making their Leaſes void; and 'tis plain the Statute meant a wilful negligence, becauſe it ſays, **The Party ſo offending,** &c. Beſides, the Statute 14 *Eliz.* that allows Leaſes of Houſes, *&c.* in Market-Towns for forty years, would be of no effect, if Death ſhould be interpreted a Non-reſidence; and the Confirmation of Patron and Ordinary would be to no purpoſe; beſide one cannot be ſaid be abſent who is not in being, for there is no ſuch Perſon; and 'tis plain, the Statute intended ſuch Non-reſidence as might be made by one that remains Incumbent, by reaſon of the Forfeitures therein contained; for immediately upon the Death of the Incumbent all the Profits of the Living, except for the ſupply of the Cure in the Vacation, do belong to the Succeſſor, how then ſhall the Statute be executed by the Biſhop after a Leaſe made, who is to ſequeſter them for the uſe of the Poor upon a Non-reſidence againſt the ſaid Statute? and if death be a Non-reſidence within the meaning of that Statute, in vain are Parſons and Vicars permitted to leaſe Lands, *&c.* uſually let for one and twenty years or three lives with the Conſent or Confirmation of their Patrons and Ordinaries.

But if a Parſon doth let a Leaſe for years or lives which is not confirmed by the Patron and Ordinary, this Leaſe is void at the Death of the Parſon; not by the Statute of 13 *Eliz. c.* 20. but by the Death, at Common Law; becauſe as *Dodderidge* and *Haughton* ſaid, it was not intended by that Statute to make Leaſes void that were void before at the Common Law; So that if ſuch Leaſe be made for a Term of years abſolutely, without ſaying, if the Parſon ſhould ſo long live, and the Term is not expired at the Parſon's Death, the Leſſee may recover Damages in an Action of Covenant againſt the Executors of the Parſon, for not enjoying his Term; and if they plead the Statute of 14 *Eliz.* to make the Leaſe and Covenants void, it will nothing avail them. The Law is the ſame,if during ſuch Leaſe the Church doth become void by Reſignation or Deprivation, *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas* 3 *Bulſtr.* 202. 1 *Rolls Rep.* 403. *Paſch.* 42 *Eliz. B.R. Coſtard* v. *Windet*, 3 *Cro.* 775. *ſame Caſe*, *Moor* 606. So if a Parſon doth make a Leaſe for a certain number of years, if he ſo long live, he doth thereby take upon himſelf that he will do no Act by which the Leaſe ſhall be determined, but only by his Death, therefore if he doth reſign or otherwiſe void the Living, an Action of Covenant will lie againſt him; but if this Clauſe be added, (*And ſhall ſo*

long continue Parſon,) then he may reſign without danger, by *Haughton, Trin.* 11 *Jac. Wheeler* v. *Heyden, Brownlow & Goulsb.* 1 *part* 125.

Though the Statute of 13 *Eliz. c.* 20. doth allow a Parſon or Vicar that hath two Benefices, to demiſe the one of them upon which he ſhall not be ordinarily reſident to his Curate; yet it is thought from 14 *Eliz. c.* 11. That if ſuch Curate leaſe the ſame over to another, although that he be not abſent above forty days in any one year, yet the Incumbent being abſent above eighty days in the ſame year, the Leaſe is thereby void; For it is Enacted, **That all Leaſes, Bonds, Promiſes and Covenants of and concerning Benefices and Eccleſiaſtical Livings with Cure to be made by any Curate ſhall be of no other nor better force, validity or continuance than if the ſame had been made by the beneficed perſon himſelf, that demiſed or ſhall demiſe the ſame to any Curate.** Stat. 14 Eliz. c. 11. Yet by *Tanfield*, when a Parſon leaſeth to his Curate, who leaſeth over, the Statute doth not make the Leaſe void by any abſence of the Parſon, but of the Curate by forty days, (but of this I doubt,) otherwiſe, the deſign of the Statute might be eaſily fruſtrated, which was, that he that ſerved the Cure ſhould be the Occupier of the Glebe and Tithes belonging to the Church and none other. And I conceive, that the Curate to whom the Parſon may make a Leaſe of his Glebe or Tithes (being abſent from his Benefice by above eighty days) muſt be a Curate legally admitted by the Ordinary of the place according to the Laws of the Land, for otherwiſe he is no Curate, although he ſerves the Cure and is reſident; therefore, by ſuch Leaſe made to him the Tithes or Glebe then will be forfeited upon the Incumbents abſence, and if they ſhould be ſequeſtred in this Caſe according to the Statute, the Parſon cannot plead that they are let to his Curate, becauſe he is no Curate in Law, and his having the Cure there is an Offence againſt the Law of which it is not reaſonable that either the Incumbent or Curate ſhould take advantage.

Note, That a Parſonage may be a Mannor, by *Mead* and *Windham* Juſtices; as if before the Statute of *Quia Emptores terrarum* the Parſon with the Patron and Ordinary did grant parcel of the Glebe to divers perſons, to hold of the Parſon by divers Services, the ſame makes the Parſonage a Mannor, *Paſch.* 22 *Eliz. C. B. Hughes Abr. p.* 4. And if the ſame be a Copyhold Mannor, then notwithſtanding all the Statutes before rehearſed, Parſons and Vicars, as well as all other Eccleſiaſtical Perſons, may grant Copies for Life, Lives, in Tail, or in Fee according to the Cuſtom of the Mannor; for the Copyholder doth not derive his Eſtate, out of the Eſtate or Intereſt of the Lord only, but from the Cuſtom, and is ſaid to be in by the Cuſtom without any regard to the Intereſt or Perſon of the Grantor, 4 *Co.* 23, 24. And theſe Grants by Copy are good without the Confirmation of the Patron and Ordinary, and are not voided by the Non-reſidence or Death, *&c.* of the Parſon. Neither do any of the Statutes aforeſaid extend or relate to Rectories and Tithes that are impropriated and become Lay Fee and remain in the Hands of Lay-men, but that they may do with them as with any other Inheritance whereof they are ſeized; but Appropriations in the Hands of Biſhops, Colleges or other Eccleſiaſtical Perſons, are lyable to the aforeſaid Statutes and Rules, even as other Inheritances whereof they are ſeiſed; and ſo are Impropriations, if by Preſentation, *&c.* the Vicarages be reſtored to the Church out of which it was endowed

If an Information be upon the Statute of 13 *Eliz. c.* 20. or if that Statute be pleaded to avoid a Leaſe, Bond or Covenant for the Enjoyment thereof, it ought to be ſaid, that the Incumbent was abſent eighty days *& ultra*; for to ſay, eighty days and nothing more, is not ſufficient within this Statute, which ſays,

above

above eighty days, and he may be abſent eighty days, and come again in the night of the eightieth day, and if ſo, is no Offender within this Statute, *Hill* 30 *Eliz. B. R. Goſnal* v. *Kindlemarſh*, 3 *Cro.* 88. So it muſt be ſaid, that he was abſent eighty days *& ultra* in a year, or it will not be good, *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas*, 3 *Bulſtr.* 202. And its ſafeſt alſo to ſay (if the Caſe will bear it) that he was abſent above eighty days together, by reaſon of the differences in the Caſes before ſet down. Alſo it muſt be ſhewed that the Incumbent was voluntarily abſent, for if he be abſent, or did not ſerve the Cure by reaſon of Sickneſs, Suſpenſion, or becauſe he was inhibited by the Ordinary from ſerving the Cure, or was ejected by any out of the Parſonage-Houſe, or upon the account of other reſtraint, he is not abſent in the meaning of this Statute, *Trin.* 30 *Eliz. William Collins* v. *Edward Vaughan*, 3 *Cro.* 100. *Hill.* 38 *Eliz. Robbins* v. *Prince*, *Moor* 438. Alſo care muſt be taken that the Statutes be truly recited, as well as the abſence fully alledged; for when the Statute of 13 *Eliz.* was recited with this Clauſe therein, *Tam diu* (where the Words are *tam cito*) *quam*, &c. *aut aliqua pars inde veniret ad aliquam poſſeſſionem vel uſum inhibitum vel*, &c. which Words by the Statute of 14 *Eliz. c.* 11. as hath been ſhewed are repealed and appointed to be omitted. Judgment was given againſt the Party that did ſo miſrecite, *&c. Mich.* 38 *&* 39 *Eliz. B. R. Henry Earl of Lincoln* v. *Hoskins*, 3 *Cro.* 490. And it is ſaid, that this Statute of 13 *Eliz. c.* 20. is a general Law, 4 *Co.* 120. *b. Dumpor's Caſe*, *Trin.* 5 *Jac. B. R. Jennings and Harthwait*, 2 *Rolls Abr.* 465.

Evaſions having been found out to fruſtrate the deſign of the aforeſaid Statute of 13 *Eliz. cap.* 20. It was afterwards Enacted, **That where ſundry evil diſpoſed perſons have defrauded the true meaning of the Statute made in the ſaid thirteenth year, by Bonds and Covenants of ſuffering other perſons to enjoy Eccleſiaſtical Livings, and the Fruits thereof, for that ſuch Bonds and Covenants are not in Law taken to be Leaſes, although indeed they amount to as much: Be it therefore Enacted, That all Bonds, Contracts, Promiſes, and Covenants hereafter to be made for ſuffering or permitting any perſon to enjoy any Benefice or Eccleſiaſtical Promotion with Cure, or to take Profits or Fruits thereof, other than ſuch Bonds and Covenants as ſhall be made for aſſurance of any Leaſe heretofore made, ſhall be to all intents and purpoſes, adjudged of ſuch force and validity, and not otherwiſe, as Leaſes by the ſame perſons made of ſuch Benefices and Eccleſiaſtical Promotions with Cure.** Stat. 14 Eliz. c. 11.

And after theſe Statutes of 13 *Eliz. c.* 20. and 14 *Eliz. c.* 11. this Clauſe following by way of Addition thereunto was Enacted by *Stat.* 43 *Eliz. c.* 9. (**That all Judgments hereafter to be had for the intent to have and enjoy any Leaſe contrary to the ſaid Statutes, or any of them, ſhall be deemed void, in ſuch ſort, as Bonds and Covenants are appointed to be void, which are made for that purpoſe.**)

Accordingly, when a Clerk did enter into an Obligation, the Condition of which was, That he being preſented, inſtituted and inducted to a Benefice then void, ſhould upon requeſt of the Patron, reſign; and afterwards did make a Leaſe to the Patron, which by the Clerk's abſence did become void, and then upon requeſt by the Patron to the Clerk to reſign, and he refuſing, the Patron brought an Action of Debt upon the Bond, unto which the Clerk pleaded the Statutes of 13 and 14 *Eliz.* aforeſaid, and that after his Induction he did let the Leaſe to his Patron the Plaintiff, and then was abſent above eighty days in one year; and averred, that the Obligation was made for the enjoying of the Benefice let by the ſaid Leaſe, and to the intent to compel him not to avoid the Leaſe by abſence for fear of being required to

reſign, and demanded Judgment, *&c.* And by the whole Court, (the Plaintiff demurring) the Plea was held good, and the Averment to be very apt, becauſe the Obligation being made generally to reſign upon requeſt, might be averred to be for this particular purpoſe and ſo void, *Mich.* 43 & 44 *Eliz. Web* v. *Hargrave*, *Moor* 641.

If the Parſon's Leſſee doth aſſign over to another what the Parſon hath let to him, and the Parſon be abſent above eighty days in the ſame year, the Leſſee alſo may plead the Statutes of 13 & 14 *Eliz.* for the avoiding of his Aſſignment of what the Parſon had granted to him, *Paſch.* 7 *Jac. B. R. Shepherd* v. *Twolſey*, 1 *Bulſtr.* 111.

As to the Statutes of 14 *Eliz. c.* 11. and 43 *Eliz. c.* 9. this is a certain Rule; That where Leaſes are made void by the Statute of 13 *Eliz.* there all Bonds, Covenants and Judgments for the enjoying ſuch Leaſes are made void by theſe Statutes; but if the Leaſes be void at Common Law, and not by the Statute of 13 *Eliz.* there Bonds and Covenants for the enjoying of ſuch Leaſes are not made void by the Statute of 14 *Eliz.* nor Judgments by 43 *Eliz.* therefore if the Parſon covenants, that another ſhall injoy his Benefice, or part thereof, not uſually let, for ſeven years abſolutely, not ſaying, if he ſhould ſo long live and continue Incumbent; and before the Expiration of the Term doth reſign his Benefice, and ſo becomes abſent above eighty days, and doth not ſerve the Cure; in this Caſe, although the Leaſe be void, yet an Action of Covenant well lies for the Leſſee upon the Covenants in the Leaſe; and the reaſon is, that though the Incumbent becomes abſent, and ceaſeth to ſerve the Cure, the Leaſe is not voided thereby, but by his Reſignation, and conſequently the Leaſe become void by the Common Law at the ſame inſtant that the Benefice was void by the Reſignation, and before his abſence had commenced; and by *Dodderidge* and *Haughton* the Statutes of 13 & 14 *Eliz.* do not meddle with Aſſurances at the Common Law, nor were intended to make any Leaſes void, which were void at Common Law, to which *Coke* agreed, *Trin.* 14 *Jac. B R. Rudge* v. *Thomas*, 1 *Rolls Rep.* 403. *ſame Caſe*, 3 *Bulſtr.* 202. But if a Parſon doth let his Rectory for three years, and covenants that the Leſſee ſhall have and enjoy it during the ſaid Term without Expulſion, or any thing done, or to be done by the Leſſor, and is alſo bound in an Obligation to the Leſſee to perform the ſaid Covenants, and afterwards for not reading the Articles is deprived *ipſo facto* by the Statute of 13 *Eliz.* ſo that the Leaſe becomes void thereby, yet the Obligation is not forfeited; for that the Leſſee was not ouſted by any Act done by the Leſſor, but rather for *Non feaſance*, and ſo out of the compaſs of the Covenant aforeſaid, *Per Curiam*, *Paſch.* 19 *Eliz. C. B.* 4 *Leon. Caſe* 104. But otherwiſe it would have been, if the Leſſor had covenanted not to omit the doing of any thing whereby the Leaſe ſhould become void. So by *Coke*, if he be bound by his Obligation to make ſuch a Leaſe, this is good, as it was adjudged in *the Dean and Chapter of Norwich's Caſe*, to which *Dodderidge* and *Haughton* agreed, *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas*, 3 *Bulſtrode* 202.

When Leaſes, Bonds, *&c.* are voided by reaſon of the aforeſaid Statutes upon the account of abſence, and not ſerving the Cure of the Benefice let for above eighty days, we muſt not underſtand ſuch Leaſes and Bonds, *&c.* to be void *ab initio*, but only from the time that ſuch abſence of eighty days ſhall be compleated; for the Words of the Statute of 13 *Eliz. c.* 20. are, **Shall not endure any longer, but while the Leſſor ſhall be ordinarily reſident** (ſo that ſo long it ſhall endure) **as he ſerves the Cure of ſuch Benefice without abſence above fourſcore days in any one year, but that every**

every ſuch Leaſe immediatly upon ſuch abſence ſhall ceaſe and be void; therefore till ſuch abſence of above eighty days be accompliſhed the Leaſe is good and in being, accordingly it hath been adjudged, that if ſuch Leaſe by Indenture be made containing Covenants on the Leſſor and Leſſees part, and after by abſence for above eighty days, both the Leaſe and Covenants do become void; yet an Action of Covenant doth well lie for the Leſſor, or Leſſee, for any Covenant broke before the end of the eighty days abſence, 26 *Eliz. Wallis* v *Cox*, 3 *Cro.* 78. Therefore, if in ſuch Caſe an Action of Covenant be brought, the Defendant muſt not only plead the Statutes which make the Leaſe and Covenants void, but muſt alſo plead the performance of Covenants to the time of the eighty days abſence expired, *Mich.* 22 & 23 *Eliz. Dyer* 372, 373.

CHAP. XLIV.

Leaſes by Eccleſiaſtical Perſons by whom to be confirmed, and what Confirmations are good. Of Variances in Leaſes, &c. *and miſnaming Corporations.*

IT hath hitherto been ſhewed what Rules Eccleſiaſtical Perſons are to obſerve in making of Leaſes, eſpecially to bind their Succeſſors, *viz.* with reſpect to the aforeſaid Statutes; It follows to be ſhewed, what Rules before the making of the ſaid Statutes, and notwithſtnnding the ſaid Statutes are at this day to be obſerved by them with reſpect to the Common Law. Firſt then, in many Caſes the Conſent and Confirmation of others muſt be obtained to make a Leaſe good againſt the Succeſſor. But when we ſpeak of the neceſſity of Confirmation we ſpeak only in the Caſe of ſole Corporations, for Corporations aggregate of many, as Deans and Chapters, Maſter and Fellows of a College, may by the Common Law make any Grant of, or out of their Poſſeſſions which they hold in common, although the Dean, *&c.* were preſentable; but no ſole Corporation had ever that liberty allowed them by the Common Law. The Prudence of the Law thinking it not convenient to truſt any ſingle perſon alone with the ſole diſpoſition of his Eſtate which he held in the Right of his Church, and therefore ſubſtituted ſome whoſe Aſſent and Confirmation is of neceſſity to the making good of all Grants to be made by them, 3 *Co.* 75. And theſe Corporations as to this purpoſe are of two ſorts; Firſt, ſuch who have the whole Eſtate and Right of the Land in them, as Biſhops, who might at the Common Law before the reſtraining Statute of 1 *Eliz.* was made have granted any manner of Eſtate with the Confirmation of the Dean and Chapter, which Confirmation was to be made; Firſt, by Deed in the life time of the Biſhop; and the Confirmation in this Caſe is but a Confirmation of the Deed, or as an aſſent given to the Biſhop to make ſuch Deed, and not of the Eſtate, for there is a diverſity as to that; for if a Diſſeiſor doth make a Charter of Feoffment to *A.* with a Letter of Attorney to give Seiſin, and before Seiſin given the Diſſeiſee doth confirm the Eſtate of *A.* or the Deed made to *A.* this is clearly void, though Livery be made after; for this muſt enure as a Confirmation of the Eſtate, which cannot be good before the Eſtate paſſed, which it did not before Livery made. But if a Biſhop makes a Charter of Feoffment with a Letter of Attorney, and the

the Dean and Chapter before Livery do confirm the Deed, this is a good Confirmation, and the Livery made after is good. The ſame Law is of a Confirmation of a Deed of Grant of a Reverſion before Attornment, 1 *Inſt.* 300, 301. See more fully of this Matter afterwards in this Chapter.

But out of this Law of Confirmations at the Common Law, was excepted, That a Biſhop might grant Copyhold Eſtates in Fee, in Tail, or for Life or Lives according to the Cuſtom of the Mannor, without any Confirmation by the Dean and Chapter; and the ſame Law was of Parſons, Prebends, Vicars, *&c.* without the Conſent of their Patron, *&c.* and the Ordinary, 4 *Co.* 22.

The ſecond ſort of ſole Corporations are ſuch which have not the abſolute Fee in them, as Parſons, Prebends, Vicars, and the like, and to their Grants, Leaſes, *&c.* at the Common Law, the Patron and Ordinary both muſt give their Conſent; wherein is to be noted (as is ſaid of the Biſhop) that the Confirmation is but a meer aſſent to the Grant, and therefore if the Patron and Ordinary give Licenſe by Deed to the Parſon to grant a Rent Charge out of the Glebe, and the Parſon doth it, this is good and binding to the Succeſſor, and yet is not a Confirmation ſubſequent, but a Licence precedent, *Brokes Novel Caſes* 201. 7 *H.* 4. 15. Secondly, the Ordinary alone without the Dean and Chapter may agree thereunto, either by Licence precedent, or Confirmation ſubſequent; for the Dean and Chapter have nothing to do with that which the Biſhop doth as Ordinary, in the life time of the Biſhop, 1 *Inſt. f.* 300.*b.* Though before the Statute of 32 *H.* 8. *c.* 28. was made, no ſole Corporation could have made any Leaſe or Grant which ſhould have bound the Succeſſor without Confirmation of thoſe *quorum* Intereſt; yet by that Statute Biſhops, Deans, Archdeacons, Prebends, Chancellors of Churches, Treaſurers, Precentors, and all other ſuch like ſole Corporations, (Parſons and Vicars only excepted) are enabled to leaſe their Poſſeſſions for twenty one years or three lives without the Confirmation of any; but then their Leaſes muſt be made purſuant to the eight Rules before remembred in *Chapter* 42. or Confirmation is neceſſary notwithſtanding the ſaid Statute, *Trin.* 11 *Jac. C. B. the Biſhop of Salisbury's Caſe*, 10 *Co.* 60. Yet it is to be noted, That if a Biſhop or other Eccleſiaſtical perſon enabled to grant without Confirmation by the Statute of 32 *H.* 8. *c.* 28. doth make a Leaſe for longer Term than twenty one years or three lives; or two Leaſes, the one for twenty one years, the other for three lives of the ſame Eſtate; or if the Leaſe be not made to hold from the time of the making, but from the day of the making thereof; or that the old accuſtomed yearly Rent or more be not reſerved, and made payable yearly during the Term of the ſaid Leaſe, and by conſequence be not made of things uſually let; or of things out of which a yearly Rent may be reſerved, Confirmation will not make ſuch Leaſe good to bind the Succeſſor, by reaſon of the reſtraining Statutes of 1 *Eliz. c.* 19. 13 *Eliz. c.* 10. And therefore, as to ſuch who are within the Statute of 32 *H.* 8. the uſe of Confirmation ſeems to be chiefly, if not only this; that if the thing demiſed be not all in Poſſeſſion, or that the old Leaſe be not expired, or ſurrendred within one year after the making of the new Leaſe, ſuch new Leaſe muſt be confirmed, or the Succeſſor will not be bound thereby, *Trin.* 11 *Jac. C. B. the Biſhop of Salisbury's Caſe*, 10 *Co.* 60. And that in ſuch Caſes Confirmation is ſtill of uſe and neceſſity appears, becauſe Biſhops before the 1*ſt* of *Eliz.* and other Eccleſiaſtical Perſons before the 13*th* and 18*th* of *Eliz.* might have made concurrent Leaſes with Confirmation; and by the Statute of 1 *Eliz.* Biſhops are not reſtrained from granting Leaſes in Reverſion, or concurrent Leaſes at any time after the firſt Leaſe made; nor are other Eccleſiaſtical Perſons reſtrained from granting like Leaſes; by the Statute of 13 *Eliz.*

liz. c. 10. or by the Statute of 18 *Eliz. c.* 11. If a former Leaſe for years be ſurrendred, or ended within three years next after the making of ſuch new Leaſe; and therefore though the Statute of 32 *H.* 8. doth not enable them to leaſe without Confirmation, unleſs the old Leaſe be expired, ſurrendred avoided, or ended within one year next after the making of a new Leaſe; yet with Confirmation a Biſhop, or other Eccleſiaſtical ſole Corporation may make concurrent Leaſes, reſpect being had to the aforeſaid Statutes, even as Corporations aggregate may do without Confirmation, *Trin.* 21 *Eliz. Fox* v. *Collier*, *Moor* 107. But if an ancient Office be by a Biſhop granted to one, altho with no more than the ancient Fee, it ſhall not bind his Succeſſor if it be not confirmed by the Dean and Chapter; for ſuch Grants remain as they were at the Common Law, as was adjudged in *the Biſhop of Salisbury's Caſe*, *Trin.* 11 *Jac. C. B.* 10 *Co.* 60.

But as for Parſons and Vicars, they being excepted out of the Statute of 32 *H.* 8. Confirmation is neceſſary in all Caſes, if any Leaſe or Grant be made by them to bind their Succeſſors. And that the Confirmation may be ſuch as may ſerve its end; it muſt be made by proper Perſons, and all muſt concur who have intereſt in the thing of which the Grant is made; accordingly the Grant of an Archbiſhop or Biſhop is to be confirmed (when Confirmation is neceſſary) by the reſpective Dean and Chapter; and if there be two Deans and Chapters, both of them are to confirm all Grants, or they will be void againſt the Succeſſors, for both are but one in reſpect of the Biſhop, if the Biſhop is choſen by both, *the Biſhop of Coventry and Lichfield's Caſe*, *Statham Abr. tit. Aſſize*, *Co.* 1 *Inſt.* 301. *a. Trin.* 8 *Jac.* 12 *Co.* 71. But if two Biſhopricks that were originally diſtinct, be by lawful Authority united, and the Uſage hath been time whereof, *&c.* ſince the Union, that the ſeveral Deans and Chapters have made Confirmations ſeverally, that is, each Dean and Chapter, of Grants made of the things belonging to their Biſhoprick before the Union, the Union not being extant, it ſhall be intended that the Union was made ſpecially and in ſuch manner that notwithſtanding the ſame, Eſtates made, ſhall be ſeverally confirmed as before that Union, and ſuch Confirmations ſhall then be good, *Trin.* 8 *Jac.* 12 *Co. p.* 71. So if there have been two Deans and Chapters belonging to one Biſhoprick, who have both uſed to confirm the Grants of their Biſhop, and one Dean and Chapter hath ſurrendred their Church and Poſſeſſions to the King, and then the Biſhop doth grant Lands with the Confirmation only of the remaining Dean and Chapter; this Grant binds his Succeſſors; yea, and although after ſuch Confirmation, the Dean and Chapter that had ſurrendred and was thereby diſcharged, be again erected, as was held by the greater part of the Juſtices in *Ireland*, and by five Juſtices in *England*, who certified their Opinion to be ſo into *Ireland*, *Paſch.* 11 *Eliz. Dyer* 282. *b.* 1 *Inſt.* 301. *a.* But if a Biſhop hath no Dean and Chapter, his Grants are to be confirmed by the Clergy of his Dioceſs, *Trin.* 2 *Jac. in the Exchequer*, *the King* v. *Sir Ambroſe Forth*, *Davis f.* 1.

Whenever a Dean and Chapter doth confirm; that the Confirmation may be good, the Dean muſt joyn with the Chapter, and not one who is Deputy or Sub-Dean only, who is a Stranger and not one of the Chapter, for ſuch Perſon is uncapable of being a Dean ſubſtitute, or Proctor; and alſo its generally ſaid that the Common Law will not ſuffer that the Members of a Corporation ſhould give their aſſents by Proctors, or Subſtitutes, for which is cited 11 *H.* 4. *f.* 64. where upon a Compoſition for Tithes a Parſon granted an Annuity to the Abbey of *Battel*, which Grant was confirmed by the Biſhop, and Dean and Chapter being Patrons; but it appears by the Deed of Confirmation, that the Dean was abſent, and did not put his Seal thereto, but that the Chantor,

tor who was his Commiſſary did it for him; and there it was held, that tho' the Dean might have a Deputy to exerciſe his Spiritual Juriſdiction, yet that ſuch Deputy cannot charge the Poſſeſſion of the Church, *Paſch* 5 *Jac. B. R. in Pemerton and Allen's Caſe*, *Davis f.* 47. 11 *H.* 4. 84 *Latch* 251. And when the Caſe was, that a Leaſe was made by the Free Chapel and College of *Winſor* under the Common Seal, yet the Dean or Warden himſelf was not Party to the Leaſe, but one that was his Deputy in his abſence, and upon Suit to avoid the Leaſe, a Statute of the College was ſhewed for the Authority of the Deputy to exerciſe and perform the Office of the Dean in all things *in Perſon' & Collegium, &c.* yet the Judges did hold, that the Confirmation was not good by the Deputy, for that he had no Authority to confirm this Leaſe by the College Statute ſhewed, and this was chiefly upon the Expoſition of the Word *Collegium*, for thereby all the Poſſeſſions of the College are not to be underſtood, but only the Scite and Circuit of the College or place of its Scituation, *Mich.* 6 & 7 *Eliz. Dyer* 233 *b.* From which Caſe it ſeems to follow, that if by the Statutes of a Church the Deputy Dean may confirm Grants and joyn in the making of Leaſes, as if the Dean himſelf was preſent and did the ſame, that ſuch Confirmation and Grants ſhall be good.

As a Deputy-Dean generally ſpeaking cannot confirm, ſo neither can he that is but a meer Commendatory Dean, *viz.* a Dean by *Recipere in Commendam*, although that he may with the Chapter chuſe a Biſhop; becauſe that he is but *Depoſitarius*, yet ſuch Commendatory Dean may be ſued by that Name, and may take the Profits, and exerciſe the Juriſdiction, and yet is not a Dean compleat, See 27 *H.* 8. 15. *Hill.* 22 *Jac. B. R. Evans and Kiffin* v. *Alſmith*, *Noy* 93. *and Palmer* 460, 480. *Latch* 237, 250, 251. But if a Dean be elected Biſhop, and before his Conſecration doth obtain Diſpenſation to hold his Deanry in *Commendam*, ſuch Dean may well confirm, *&c.* And if he be tranſlated to another Biſhoprick, and after his Election, and before Confirmation doth obtain Diſpenſation to hold the ſame Deanry in *Commendam* with his ſecond Biſhoprick, his old Title remains, and Confirmations and other Acts done by him as Dean, are as good in Law as if he had never been made Biſhop, *Trin.* 3 *Jac. B. R. Evans and Kiffin* v. *Alſmith*, *Palmer* 460. *Jones* 158. *Trin.* 2 *Car. Thornborough's Caſe*, *Bendlows* 187. The Law I ſuppoſe to be the ſame, as to Commendatory Biſhops in both Caſes; and when there is a meer Commendatory Biſhop of a Dioceſs the Archbiſhop confirms; but *Quære* who confirms the Biſhop's Grants and Leaſes when there is a meer Commendatory Dean, if not the Clergy of the Dioceſs, as in the Caſe when there is no Dean and Chapter.

Though one that is Dean, be Dean *de jure*, as well as *de facto*, yet neither he, nor any other of the Corporation hath a negative Voice; but Confirmations and other Grants are good if made by the major part of the whole Corporation; for the Dean and major part of the Corporation makes the Corporation though the reſt diſſent, 14 *H.* 8. 29. 21 *E.* 4. 27. 15 *E.* 4. 2. *a.* 9 *H.* 6. 32. And for this purpoſe it hath been Enacted as followeth. **Albeit that by the Common Laws of this Realm of** England, **all Aſſents, Elections, Grants and Leaſes had, made and granted by the Dean, Warden, Provoſt, Maſter, Preſident or other Governour of any Cathedral Church, Hoſpital, College, or other Corporation, by whatſoever name they be incorporate or founded, with the aſſent and conſent of the more or greater part of their Chapter, Fellows or Brethren of ſuch Corporation, having Voices of aſſent thereunto, be as good and effectual in the Law to the Grantees and Leſſees of the ſame, as if the reſidue of the whole number of ſuch Chapter, Fellows and Brethren of ſuch Corporation, having Voices of aſ-**

ſent,

ſent, had thereunto conſented and agreed; yet the ſaid Common Laws notwithſtanding divers Founders of ſuch Deanries, Hoſpitals, Colleges and Corporations within the ſaid Realm, have upon the Foundation and Eſtabliſhment of the ſame Deanries, Hoſpitals, Colleges and other Corporations, eſtabliſhed and made amongſt other their peculiar Acts, local Statutes and Ordinances, that if any one of ſuch Corporation, having power or authority to aſſent or diſaſſent, ſhould and would deny any ſuch Grant or Grants that then no ſuch Leaſe, Election, or Grant ſhould be had, granted or leaſed, and for the performance of the ſame, every perſon having power of Aſſent to the ſame, have been and be daily thereunto ſworn, and ſo the reſidue may not proceed to the perfection of ſuch Elections, Grants and Leaſes, according to the courſe of the Common Laws of this Realm, unleſs they ſhould incur the danger of Perjury: For the avoiding whereof, and for the due Execution of the Common Law univerſally within this Realm, and every place in one conformity of reaſon to be uſed: Be it ordained, eſtabliſhed and enacted by the authority of this preſent Parliament, that all and every peculiar Act, Order, Rule and Eſtatute heretofore made, or hereafter to be made by any Founder or Founders of any Hoſpital, College, Deanry or other Corporation, at or upon the foundation of any ſuch Hoſpital, College, Deanry, or Corporation, whereby the Grant, Leaſe, Gift or Election of the Governor or Ruler of ſuch Hoſpital, College, Deanry or other Corporation, with the aſſent of the more part of ſuch of the ſame Hoſpital, College, Deanry, or Corporation, as have or ſhall have Voice or Aſſent to the ſame, at the time of ſuch Grant, Leaſe, Gift or Election hereafter to be made, ſhould be in any wiſe hindred or let by any one or more, being the leſſer number of ſuch Corporation, contrary to the form, order and courſe of the Common Law of this Realm of England, ſhall be from henceforth clearly fruſtrate, void, and of none effect. And that all Oaths heretofore taken by any perſon or perſons, of ſuch Hoſpital, College, Deanry, and other Corporation, ſhall be, for and concerning the obſervance of any ſuch Order, Eſtatute or Rule, deemed void and of none effect. And that from henceforth no manner of perſon or perſons of any ſuch Hoſpital, College, Deanry, or other Corporation, ſhall be in any wiſe compelled to take an Oath for the obſerving of any ſuch Order, Eſtatute, or Rule, upon the pain of every perſon giving ſuch Oath, to forfeit for every time ſo offending five pound: The one Moiety thereof to be to the uſe of our Sovereign Lord the King; and the other Moiety thereof to any of the King's Subjects, which will ſue for the ſame, in any of the King's Courts of Record, by Action of Debt, Bill, Plaint, Information or otherwiſe wherein the Defendant ſhall not be admitted to wage his Law, nor any Protection nor Eſſoign, or any other dilatory Plea admitted or allowed. Stat. 33 H. 8. cap. 27.

Though it be ſaid before, that Confirmations and other Grants are good if they be made by the major part of the Dean and Chapter, yet as well the other Members conſenting as the Dean muſt be perſonally preſent to give their Conſents; for it is generally ſaid, that when a Corporation ſhall paſs any Intereſt, the Common Law will not ſuffer that the Members of the Corporation ſhall give their Aſſent by Proctors, or Subſtitutes, but that they ought to be *Capitulariter Congregati* in one certain place; otherwiſe if they be ſcattered in ſeveral places, that which they ſhall do, ſhall not be ſaid to be the Act of the Corporation, but the Deed of them in their ſingular and private Capacity, and ſhall not bind; yet it was agreed, that the Dean and Chapter are not confined to the Chapter-Houſe, but may aſſemble and make their

Acts in any other place, ſo it be a place certain, See 21 *E.* 4. 26. 27 *Aſſ.* 23. *The Caſe of the Dean and Chapter of Pernes, Paſch.* 5 *Jac. Davis* 48.

As the major part of the Corporation muſt give their Conſents to Confirmations, and other Acts, in one place, ſo at one time *ſimul & ſemel*, and not ſcatteringly, or on ſeveral days; for the conſent of the Corporation being expreſſed by the putting their Seal to the Deed of Confirmation, or other Writing; if the major part be not preſent to conſent when the Conſent is ſo expreſſed, what is then done is void for want of the Conſent of the major part of the Chapter; and in ſuch Caſe the particular Conſents of their Members given after, ſhall not make it good. Alſo the major part of the Members being aſſembled, ought to give their Voices, and Conſents ſingly and diſtinctly, and not in a confuſed and uncertain manner. as may be done in the Choice of Knights of the Shire, *&c.* and when the majort part doth ſo conſent, their Conſent ought to be expreſſed by the fixing of their Seal to the Deed of Confirmation or other Grant, 4 *H.* 6. 17. See for theſe Points *Davis* 48.

If a Grant or Leaſe is made by a Corporation aggregate, as for inſtance, If a Leaſe be made by a Maſter, Brothers and Siſters of an Hoſpital, and the Words of the Indenture be, *Hæc Indentura inter Magiſtrum, Fratres & Sorores, &c. teſtatur*, that the Maſter with the Aſſent of the Brothers and Siſters aforeſaid, have leaſed to *A. In cujus rei Teſtimonium* the ſaid Maſter with the aſſent of the Brothers and Siſters aforeſaid, have put to their Common Seal, ſuch Leaſe is void; for here the Brothers and Siſters being one entire Body with the Maſter, are not Parties to ſuch Indenture, but give their Conſent only, and a Corporation aggregate is but one Perſon in Law, *viz.* one Body (30 *Eliz. the Provoſt of Queens College in Oxford's Caſe*, 4 *Leon.* 45.) and a Body cannot be diſtinct, ſo as one part can conſent to the Acts of the other; for this is not like the Caſe of Joyntenants, nor like the Caſe of a Parſon, Patron and Ordinary, where the Parſon with the Aſſent of the Patron and Ordinary doth grant, *&c.* for there the Parſon is the Principal Grantor, and the others have not any real intereſt in the Land, by *Ayliff and Clench* v. *Gawdy. Trin.* 26 *Eliz. C. B. Clark's Caſe*, 4 *Leon.* 11.

When a Dean of a Cathedral doth make a Grant, or Leaſe of any of his Poſſeſſions of which he is ſolely ſeized to bind his Succeſſors, which doth want Confirmation, this as is ſaid, regularly muſt be confirmed by the Biſhop and Chapter of the ſame Church, and not by the King, although that he be Patron of ſuch Deanry. But there is ſome doubt whether the Biſhop's Confirmation be neceſſary to ſuch Grants; I find it laid down as a Rule, that the Biſhop's Confirmation, as well as the Confirmation of the Chapter, is neceſſary in all Leaſes or Grants made by the Dean, *Parſon's Counſellor, fol.* 124. *cap.* 10. and what is ſaid by *Fitzherbert in his Natura Brevium tit. Sine aſſenſu Capituli*, that the Biſhop and Chapter are but in Law looked upon as one Body, ſeems alſo to favour this Opinion; for 'tis reaſonable, that the whole Body ought to conſent to the granting their Poſſeſſions, and not, that the Biſhop who is the Head of the Body ſhould be unconcerned therein; alſo the Poſſeſſions of the Dean are ſaid to be derived from, and carved, out of the Biſhoprick, and the Biſhop *de Jure* is ſaid to be the Patron of the Deanry, 17 *E.* 3. 40. *b.* which are all ſtrong Argumenrs for the Biſhops Confirmation; yet I have not met with any Book Caſe expreſly to warrant the Opinion laid down by *Parſon's Counſellor*; but rather the contrary, that the Confirmation of the Chapter without the Biſhop, is ſufficient to make good the Dean's Leaſes or Grants that need Confirmation, as *Dyer* 40. 273. 349. *pl.* 18. *Plowd.* 538. 1 *Rolls Abr.* 478. 481. therefore *Quære*; and ſee *Regiſt. Orig.* 230. *b.* But if ſuch

ſuch Deanry be meerly donative, then the King's Conſent and Confirmation is to be obtained; but whether the King's Confirmation without the Chapter in ſuch caſe be ſufficient *Quære.* However I conceive, that the Biſhop's Confirmation is not neceſſary in ſuch caſe, nor to the Grants of any Incumbent of a Parſonage or Vicarage that is meerly donative, but only the Patrons thereof.

The Dean of *Wells* might anciently have paſſed his Poſſeſſions belonging to his Deanry with the Aſſent of the Chapter without the Biſhop's Confirmation, and after this Deanry of *Wells* was ſurrendred by the Dean thereof with all Poſſeſſions thereunto belonging, and ſo diſſolved; and by Act of Parliament this Diſſolution was confirmed, and a new Deanry erected, and the Nomination (by Letters Patents) of a new Dean and his Succeſſors given to the King and his Succeſſors, and thereby alſo enacted, that the new Dean and his Succeſſors might grant, demiſe and part with their Poſſeſſions in the ſame manner and form as the ancient Deans might and uſed to do; in this caſe it is not needful to have the Biſhop's Confirmation of a Grant made by the new Dean, but of the Chapter only; for that his Confirmation of the Grants of the old Dean was not neceſſary, neither is the Confirmation of the King of the new Dean's Grants neceſſary, becauſe this Deanry it ſeems was not a meer Donative before the Diſſolution thereof, and by the Statute the new Deanry is made to be of the ſame nature as the old Deanry was, *Paſch.* 10 *Eliz. C. B. Walrond* v. *Pollard*, *Dyer* 273. 1 *Rolls Abr.* 478.

If an Archdeacon, or Prebendary do make Grants to bind their Succeſſors which do want Confirmation, they are to be confirmed by the Biſhop, Dean and Chapter, *Paſch. & Trin.* 15 *Jac. B. R. Smith* v. *Bowles*, 1 *Rolls Abr.* 479. *and* 481. *Trin.* 7 *Eliz. C. B. Hodskins* v. *Tucker*, *Dyer* 239.

If a Parſon Vicar, Prebendary, *&c.* that have not the Feeſimple in them doth make a Grant to bind his Succeſſor, it is to be confirmed by the Patron; but if a Corporation aggregate of many, as Dean and Chapter, *&c.* or any ſole Corporation that hath the abſolute Fee, as a Biſhop, *&c.* doth make a Grant, this is good without their Founder or Patron, although the Dean, *&c.* were preſentable, 1 *Inſt.* 300.*b.* And if the Parſonage or Vicarage be a Donative, then the Confirmation is to be by the Patron only, *Paſch.* 16 *Eliz. Dyer* 273. *b.* But if not, and the Biſhop be not Patron, by the Patron and Ordinary, but the Confirmation of the Dean and Chapter in ſuch Caſe is not neceſſary.

It is ſaid that though the Guardian of the Spiritualties may inſtitute, yet he cannot confirm, 7 *H.* 4. 97.

If an Appropriation be made to the Patron of the Church by the Aſſent of the King and Biſhop, this is ſufficient without the Confirmation of the Dean and Chapter, and ſhall bind the Biſhop's Succeſſor; for the Biſhop gave nothing by his Aſſent, not having any Right as Patron, but only as Ordinary, 1 *Rolls Abr.* 481. *contra* 46 *Aſſ.* 4. *Brook Dean and Chapter* 18. However, if the Biſhop be Patron of any Deanry, Archdeaconry, Prebend, Parſonage or Vicarage, *&c.* and the Incumbents Grant be to be confirmed, the Biſhop himſelf muſt confirm (as I conceive,) and his Confirmation alone without the Confirmation of the Dean and Chapter ſhall make the ſame good to bind the Succeſſor, as it is ſaid to be agreed, *Paſch.* 13 *Jac. B. R. Smith* v. *Bowles*, 3 *Bulſt.* 290. For which is cited 33 *H.* 8. *Brook's Caſe* 46. But this Confirmation it ſeems to me, ſhall only ſtand good during the Life of the Biſhop that did make it, and of the Succeſſor Incumbent that found the Church charged, becauſe the Advowſon is part of the Poſſeſſions of the Biſhoprick, 11 *H.* 6. 9. 33 *H.* 8. *Broke Leaſe* 64. *Paſch.* 9 *Eliz. Dyer f.* 357.*a.* See 1 *Rolls Abr.* 481. 1 *Inſt.* 300. *b.* And it is ſaid, that if a Biſhop be Patron and Ordinary, and doth confirm a Leaſe made by the Parſon without the Dean

and Chapter, and after the Parſon dieth, and the Biſhop collateth another, and then is tranſlated, yet this Confirmation remaineth good, for that the Revenues that are to maintain the Succeſſor are not thereby diminiſhed, and ſo it is if the Biſhop doth reſign, yet ſuch Leaſe will be void by the Biſho- Death; but when by the Biſhop's Grant the Revenues of the Biſhoprick be impaired that ſhould maintain the Succeſſor, there the Privation or Tranſlation of the Biſhop is all one with his Death, 1 *Inſt.* 329. *a.*

If the Biſhop of *A.* be Patron of the Church preſentative of *B.* which lies within his Dioceſs, and this is the Corps of a Prebend in the Church of *A.* and the Biſhop of *A.* is alſo Patron of the Church of *C.* which is alſo Preſentative and lies in the Dioceſs of the Biſhop of *D.* and afterwards the Church of *C.* is lawfully annexed and united by the Aſſent of the Biſhops, Deans and Chapters of both Dioceſſes to the ſaid Prebend of *B.* and afterward the Biſhop of *A.* doth collate *J. S.* to the ſaid Prebend, which now by the Union doth conſiſt of both Churches, and doth inſtal him in the Cathedral Church of *A.* and then the Prebendary doth make a Leaſe for years, which is confirmed by the Biſhop, Dean and Chapter of *A.* and not by the Biſhop of *D.* yet this is a good Confirmation; for by the Union, the Biſhop of *D.* hath annexed the Church of *C.* to the Prebend of *B.* and ſo hath deprived himſelf of the power of Confirmation as Ordinary, for after the Union the Prebendary is inveſted in both Churches by his Inſtalment without any other Preſentment, Admiſſion, Inſtitution or Induction to the Church of *B.* or *C. Paſch.* 10 *Jac. B. R. Leigh* v. *Hellyer*, 1 *Rolls Abr.* 479. *Mich.* 39 & 40 *Eliz. B. R. Dr Herbert* v. *Munday*, 3 *Cro.* 587. & *Paſch.* 14 *Car.* 2. *B. R. Gie* v. *Rider*, 1 *Siderfin* 75. 1 *Keb.* 280.

That the Patrons Confirmation may be ſufficient, no other Perſon ought to have any Intereſt in the Patronage, but the Patron or Patrons that do confirm; for thoſe Grants that are confirmed, being to bind Succeſſors, are in the nature of a Charge upon the Advowſon, and therefore ought to be directed by the Eſtate which the Confirmer hath, and being derived out of the Eſtate of the Advowſon, can endure no longer than the Eſtate of the Patron confirming doth abide, 1 *Inſt.* 300. *b. Maund and Frenche's Caſe, Hill.* 13 *Jac.* 1 *Rolls Rep.* 361. 1 *Rolls Abr.* 480. Accordingly if there be a Patron paramount, as well as an immediate Patron, Confirmation of the immediate Patron without the others Confirmation is not good; for inſtance, if a Parſon be Patron of the Vicarage of the ſame Church, and the Vicar doth make a Leaſe confirmed by the Parſon and Ordinary only, this is not good, without the Confirmation of the Patron of the Rectory alſo. So if the Patron's Eſtate in the Advowſon that confirms be conditional, and after the Condition is broken, thereby the Confirmation is void, as determining with the Eſtate of the Confirmer, 1 *Inſt.* 300. *b.* Or if the Patron that confirms be but Tenant in Tail, or Tenant for Life, his Confirmation ſhall only bind ſuch Incumbents as come into his Church during his own Life, 31 *Ed.* 3 *tit. Grants* 61. and accordingly it was agreed by *Coke* and *Dodderidge*, that if a Parſon doth make a Leaſe for years, which is confirmed by Patron and Ordinary, the Patron being Tenant in Tail, the Patron and Parſon both die, and the Iſſue in Tail doth preſent another, his Preſentee ſhall hold the Rectory diſcharged of ſuch Leaſe. And alſo they agreed, that although the Iſſue in Tail after a Preſentation doth levy a Fine, yet the Preſentee of the Conuſee when the Church becomes void again, ſhall hold it diſcharged alſo; for that the Confirmation was defeated by the Preſentation of the Iſſue in Tail, *Paſch.* 14 *Jac. B. R. Maund* v. *French*, 1 *Rolls Rep.* 361. *the ſame Caſe, Hill.* 13 *Jac. Bridgman* 95. But if the Patron that is Tenant in Tail doth diſcontinue the Eſtate in Tail, the Leaſe ſhall ſtand good

good during the Diſcontinuance, or if the Eſtate Tail be barred, it ſhall ſtand good for the whole Term, 1 *Inſt.* 300. *b.*

If the Chaplain of a Chantry or Free Chapel that was a Donative had made a Leaſe for years before 32 *H.* 8. and the Patron of the Chapel being ſeized of the Patronage in Tail, had confirmed it, this ſhould not have bound the Chaplain of the Iſſue in Tail, *Dyer* 8 *Eliz.* 252. And if in ſuch Caſe, the Patronage of the Donative came to the King by the Statute of Chantries, neither the King, nor his Clerk ſhould be bound by the ſaid Leaſe; but if the Donor levied a Fine after the Confirmation, by which the Iſſue in Tail was bound from avoiding the Leaſe, the King alſo ſhould be barred. 1 *Rolls Abr.* 480. If Tenant in Tail of an Advowſon and his Son and Heir Apparent do join in a Grant of the next Avoidance, and after the Tenant in Tail dies, the Son ſhall avoid the Grant, becauſe he had nothing in the Advowſon at the time of the Grant made, *Mich.* 12 *Jac. Wyvil and Scroop* v. *Ewbank and Topſhal*, 1 *Rolls Abr.* 482.

If there be three Coparceners or Tenants in Common of an Advowſon, the Confirmation muſt be made by all of them, elſe it will not bind the next Incumbent, becauſe they are all but one Parron (by *Coke.*) But if there be a Compoſition to preſent by turns, *Quære*, if a Leaſe confirmed by him that hath the next Term when the Church voids, ſhall not be good to bind his Preſentee; But if of the three Coparceners or Tenants in Common, one be a Feme Covert and ſhe confirms, her Act is void, and ſhall not bind het, her Heirs or Clerk, but only during the Coverture, 1 *Rolls Abr.* 479.

Quære if the Succeſſor of the Incumbent that made the Leaſe be collated upon the Title of Laps by the Succeſſor of the Biſhop that confirmed it, whether ſuch Clerk be bound, (it ſeems not;) for that the Ordinary hath no Intereſt, but preſents in Right of the Patron, and ſo his Clerk ſhall be ſo far bound and no farther, then the Clerk of him that ſuffered the Laps ſhould have been, *Mich.* 32 *&* 33 *Eliz. B. R. Lancaſter* v. *Lucas*, 1 *Leon.* 233.

Though he that confirms as Patron hath the Fee ſimple of the Advowſon in him, yet if before he confirms, he hath granted away the next Avoidance, his Confirmation of the Preſentees Leaſe will not be good to bind the Preſentee of the Grantee of the next Avoidance, unleſs ſuch Grantee doth alſo confirm, By *Brown*, *Trin.* 6 *Eliz. Moor* 67. *Mich.* 3 *&* 4 *Ph. & Mar. Dyer* 133. *a.* And if the Preſentee of him that hath the next turn doth enter and void ſuch Leaſe (as he well may) and then dying, the Patron of the Fee doth preſent a new Incumbent, this new Incumbent ſhall hold the Benefice diſcharged of the Leaſe which was confirmed by his Patron, as his Predeceſſor ſhould have done, for the Leaſe was fully avoided by the Entry of his Predeceſſor, and not for his time only, becauſe the Predeceſſor that avoided it had the intire Fee (as much as any Parſon may have of a Rectory preſentative) and when he was in and had evicted the Leſſee, it was an abſolute Eviction of the intire Term without expectation of Revivor, and was an Eviction, not only for himſelf and his own time, but alſo for all his Succeſſors, *Per Curiam*, upon a Writ of Error, *Paſch.* 16 *Car. B. R. Plowden* v. *Oldford*. 1 *Cro.* 582. *the ſame Caſe*, *Jones p.* 454. *See the Earl of Bedford's Caſe*, 7 *Co. f.* 8. *Trin.* 11 *Jac. Spendlow* v. *Burket*, *Hob.* 7. 1 *Inſt.* 46. *a.* So if the Incumbent of an Uſurper doth make a Grant, which is confirmed by the Uſurper, and the Ordinary, and in a *Quare Impedit* the true Patron doth recover, and remove the Incumbent, the Grant thereby is defeated, becauſe it was not made and confirmed by thoſe that were Parſon, and Patron in Right, 1 *Rolls Abr.* 480. where he cites 9 *H.* 6. 33. (which warrants not what he ſays but the contrary.)

But

But note, that a Patron may not only confirm explicitely by his Deed or Writing, but alſo by conſequence of Law; for if a Parſon doth make a Leaſe for years to the Patron who doth grant over or aſſign it to another, this is a Confirmation in Law by the Patron; but without ſuch Aſſignment the Ordinary's Confirmation ſhall not make the Leaſe good to the Patron to bind the Succeſſor according to *Mewcomb's Caſe, cited in the Caſe of Eccleſiaſtical Perſons*, 5 *Co.* 15. *a.* 1 *Cro.* 38. *Paſch.* 14 *Jac. B. R. Maund* v. *French*, 1 *Rolls Rep.* 361, 171. 1 *Inſt.* 301. *b.* 302. *a.* But then the Patron ought to be abſolutely ſeized of the Advowſon, otherwiſe it ſhall bind but according to the Eſtate that he hath therein.

As by conſequence of Law Confirmation may be without Writing, ſo if it be by Writing, by conſtruction of Law it may be for longer Term than is thereby expreſſed; as if a Patron doth at this day make a Leaſe for twenty one years, and the Patron and Ordinary do confirm his Eſtate for ſeven years, this by the Conſent of all, is a Leaſe well confirmed for the ſeven years, *Mich.* 16 & 17 *Eliz. C. B. Dyer* 338. and by ſome ſhall amount to a Confirmation of the whole Term of twenty one years, as by *Richardſon*, who took a difference where the Eſtate is confirmed, and where they confirm the Land for ſeven years; in the firſt Caſe, the Confirmation confirms all the Eſtate; but where they confirm the Land for ſeven years, that Confirmation ſhall not inure but according to the Term limited, and that difference was agreed by *Croke* and all the Serjeants at the Bar; but *Hutton* doubted, *Hill.* 3 *Car. C. B. Tomlinſon's Caſe*, *Hetley* 75. And accordingly when a Prebend demiſed a Rectory parcel of his Prebend for ſeventy years, and after the Biſhop confirmed the ſame Demiſe for fifty one years, and the Dean and Chapter likewiſe confirmed the ſame for fifty one years and no more. It was held by all the Juſtices, that they might confirm ſeverally, and that their Confirmations were available for the reſt of the Term after fifty one years, *viz.* for the whole ſeventy years; for when the Biſhop, Dean and Chapter reciting the Demiſe of ſeventy years, do confirm *Dimiſſionem prædictam in forma prædicta*, theſe Words *pro termino* fifty one years & *non ultra*, come too late; and the Leaſe being for ſeventy years, it is repugnant to confirm *Dimiſſionem prædictam* for fifty one years. But if the Biſhop, Dean and Chapter had recited the Leaſe, and had confirmed the Land to the Leſſee for fifty one years, the ſame had been good for that Term only, for then there ſhall not be any ſuch repugnancy in the Confirmation. And a difference is in this ſame Caſe made, between a bare Aſſent without any Right or Intereſt, and an Aſſent coupled with a Right or Intereſt; for the Termor who is to perfect a Grant by his Attornment cannot aſſent for a time, nor upon Condition, nor for part of the thing granted, but it ſhall abſolutely enure to all, becauſe he hath but a bare Aſſent which cannot be qualified or apportioned; but the Biſhop who is Patron, and the Dean and Chapter have an Intereſt in the Prebend, and every part of it, 3 *Cro.* 79. For the Patron hath *Jus conferendi*, and a Releaſe unto the Patron of an Annuity in the time of Vacation is good, as it is holden in 21 *H.* 7. 41. 8 *E.* 3. 28. *Perſey's Caſe*, 33 *E.* 3. *Aid de Roy* 103. 8 *H.* 6. 24. And alſo it is holden in 31 *E.* 2. *Grants* 90. 16 *E.* 3. *Annuity* 23. 8 *R.* 2 *Annuity* 53. that the Patron and Ordinary may charge the Glebe in time of Vacation; and *Fitz N. B.* 49. ſaith, that the Right is in the Patron and Ordinary, *Litt. cap. Diſcontinuance ſect.* 144, 145. So if a Leaſe be made of twenty Acres, they may make a Confirmation as to part of the Land, *viz.* to one or more Acres, ſo they may confirm part or all upon Condition; by which it appeareth, that they have not a bare Aſſent as in Caſe of Attornment, but an Aſſent clothed

clothed with an Intereſt. Another difference was taken between a Leaſe for years, and a Leaſe for life, a Gift in Tail or a Feoffment in Fee; for if a Prebendary make a Leaſe for years, Confirmation may be made of the Land, as hath been ſaid before, for a leſs number of years, for the years are ſeveral, although the Leaſe or Term be one. As if a Man make a Leaſe of Lands for five years, rendring Rent every year twenty Pounds; the years are ſeveral ſo that an Action of Debt will lye for the Rent every year, as it is adjudged in 45 *E.* 3. 8. But if a Prebendary make a Leaſe for life, or a Gift in Tail, or a Feoffment in Fee, and Confirmation is made of the Land to the Leſſee, Donee or Feoffee, for one hour, it is good for ever, for an Eſtate of Freehold or Inheritance is intire, therefore it is, that if he who hath a Freehold or Inheritance be diſſeiſed, and confirmeth the Land to the Diſſeiſor for one hour, it is good for ever; See for all theſe differences *Paſch.* 37 *Eliz. C.B. Foora's Caſe*, 5 *Co.* 81. *Paſch.* 38 *Eliz.* 1 *Anderſon* 47. and 1 *Inſt.* 297.

The time when a Confirmation is made is not generally to be regarded, for it is ſaid, that if a Biſhop doth make a Leaſe for years on the 2*d* of *May*, and the Dean and Chapter confirm it on the 1*ſt* of *May*, this is a good Leaſe after the Biſhop's death, By *Catlin* and *Southcot*, but *Wray* objected that a Leaſe cannot be confirmed before it be made. *Catlin* and *Southcot* replyed that the Aſſent before is a good Confirmation of a Leaſe made after, *Hill.* 18 *Eliz. Owen p.* 33. *and* 14 *Eliz. the Biſhop of Rocheſter's Caſe*, 4 *Leonard.* 23. So when a Biſhop made a Leaſe the 2*d* of *May*, which was confirmed the 3*d* of *May*, and ſealed the 4*th* of *May*, it was held that the Leaſe was well confirmed, *Juſtice Harper's Rep. Mich.* 14 & 15 *Eliz.* So when the Deed of Confirmation bore Date before the Deed confirmed, but by Agreement the Deed confirmed was firſt delivered, the Confirmation was held good, 1 *H.* 6. 8. For a Confirmation is but a meer Aſſent by Deed to the Grant, and therefore, if the Patron and Ordinary give Licence by Deed unto the Parſon to grant a Rent Charge out of the Glebe, and the Parſon doth ſo accordingly, this is good and binding to the Succeſſor, and yet is not a Confirmation ſubſequent, but a Licence precedent, 1 *Inſt. f.* 300. *b.* So if a Leaſe be made by a Biſhop to the King, and a Commiſſion doth iſſue out of the *Exchequer* to take this Leaſe, and after the taking thereof, and before the Inrolment the Dean and Chapter do confirm the Leaſe, the Confirmation is good, though it be before the Inrolment; becauſe Confirmation is but an Aſſent which may be as well before the Leaſe as after, *Evans and Aſcough's Caſe*, *Hill.* 22 *Jac. Latch* 240. *Trin.* 8 *Jac. Sir Edward Dimock's Caſe*, 1 *Rolls Abr.* 478. 1 *Inſt.* 301. *a.* But on the contrary it hath been held, that if a Confirmation be made and delivered before the Grant to be confirmed, this is not a good Confirmation; and in this Caſe it was ſaid, that if after the Grant, the Confirmation be delivered again, yet that will not make it good; for that it was a Deed by the firſt Delivery, and the ſecond Delivery will not make it good as an Aſſent, becauſe the Aſſent ought to be by Deed, and the firſt Delivery was void, 8 *H.* 6. 6. cited 1 *Rolls Abr.* 480.

If a Confirmation of a Biſhop's Grant be made by the Dean and Chapter, after the Death of the Biſhop, this Confirmation comes too late, *Harper's Rep.* 14 & 15 *Eliz.* But by *Clench*, if the Confirmation be made in the Vacation its good, 28 *Eliz. Grindal's Caſe*, 4 *Leonard* 78. but of this I much doubt, for the Death muſt void the Leaſe, which Confirmation cannot revive. And accordingly, when a Parſon did grant an Annuity, and then reſigned, and after the Patron and Ordinary did confirm the Grant, the Confirmation was of none effect, for that it was made after the Reſignation, and ſo not till after the Grant of the Annuity was determined, 21 *H.* 7. 1. And all Confirma-

tions

tions are to be made in the Life, and during the Incumbency of the Parſon, who makes the Grant, and ſo in like manner, in the Life of the Biſhop, and every other ſole Corporation, 1 *Inſt.* 301. *a.*

But if a Parſon doth make a Leaſe, which is not confirmed by the Biſhop, or Patron then in being, but by the ſucceeding Biſhop, and ſucceeding Patron, this is a good Leaſe againſt the Succeſſor according to *Newcomb's Caſe*, 5 *Co. f.* 15. *Trin.* 2 *Car. B. R. Sir Robert Banniſter's Caſe*, 1 *Cro.* 38. But if a Biſhop doth make a Leaſe for one and twenty years according to the Statutes, and after doth make a concurrent Leaſe for years of the ſame Land to another, and after and before any Confirmation of the ſecond Leaſe, the Biſhop doth make another concurrent Leaſe to a third Perſon, which is immediately confirmed, and after the ſecond Leaſe is confirmed alſo; in this Caſe the ſecond Leaſe ſhall be good and effectual by the Confirmation, although that the laſt Leaſe was confirmed before it; for the Confirmation doth not convey any Intereſt, but is only to make the Leaſe durable and effectual, by *Dyer*, *Weſton* and *Carus*, *Trin.* 6 *Eliz. Moor* 66. And upon this reaſon it hath been adjudged, that Leaſes made before the Statute of 13 *Eliz.* for more years than are allowed thereby, being confirmed after the ſaid Statute, are good, for the whole Term. And alſo becauſe the Statute of 13 *Eliz. c.* 10. doth only reſtrain from alienating, not confirming, *Mich.* 38 & 39 *Eliz. Arkingſal* v. *Denny*, *Moor* 459. *Paſch.* 25 *Eliz. C. B. Higgins* v. *Grant*, 3 *Cro.* 18. *Mich.* 23 & 24 *Eliz. in the High Court of Parliament, the Caſe of Eccleſiaſtical Perſons*, 5 *Co.* 14. And ſo it hath been held *per Curiam*, that the Statute of 1 *Eliz.* did not reſtrain Biſhops from confirming the Incumbent's Leaſes made for above one and twenty years, although the Biſhop was as well Patron as Ordinary of the Church to which the thing leaſed did belong, *Mich.* 37 & 38 *Eliz. Sir Edward Denny* v. *Egkenſtal*, 3 *Cro.* 430.

A ſecond Rule at Common Law to be obſerved by Eccleſiaſtical Perſons, or Corporations in making Grants and Leaſes, is truly to name the Corporations according to the Name by which they are incorporated; and this not only in making of Leaſes, but alſo Preſentations, Confirmations, *&c. Hill.* 11 *Jac. Dr. Array's Caſe*, 11 *Co.* 19. So of Obligations, *&c. l* 5 *E.* 4. 201. *Paſch.* 4 & 5 *Ph. & Mar. Bendlow* 2. In like manner in all Grants made by others to them, the Corporation muſt be truly named. And yet in Preſentations it ſeems not to be altogether neceſſary to name the Corporation by its true Name; for when the King preſented to the Deanry of *Norwich*, and did miſtake and miſrecite the Name of the Foundation of the Deanry, the Preſentation was held good, becauſe it was but a Commendation of a Perſon to the Dignity, and touched not the Inheritance, *Trin.* 8 *Jac. C. B. the King* v. ----- 2 *Cro.* 248.

If Land be given to *George* Biſhop of *Norwich*, where his Name is *John*, for that in this and the like Caſes there can be but one of that Dignity or Name, ſuch Grant is good, albeit the Name of Baptiſm be miſtaken: So if by Licence Lands be given to the Dean and Chapter of *Norwich*, this is good although that the Dean be not named by his proper Name, if there were a Dean at the time of the Grant; but in Pleading, his proper Name muſt be ſhewed; ſo on the other ſide, if the Dean and Chapter make a Leaſe without naming the Dean by his proper Name, the Leaſe is good, if there was a Dean at the time of the Leaſe made; but 18 *E.* 4. 8. *Br. Corporations f.* 59. is contrary. Yet a Leaſe being made by a Dean and Chapter in theſe Words, *Nos Decanus & Capitulum* without naming the Dean by his proper Name, the Leaſe for that reaſon was held to be void, *Mich.* 32 & 33 *Eliz.* 1 *Leon.* 307. See *Dyer* 106. 11 *Co.* 21. *Perkins* 8. 27 *H.* 6. 3. *Hobard* 32. *Litt. Rep.* 201.

11 *Co.*

11 *Co.* 20. *Owen* 35. *Dalliſon* 78. Note that any Man that alters his Name at Confirmation may purchaſe by his new Name, 1 *Inſt. f.* 3. *a.* 1 *Brownloe* 147. *Lit. Rep.* 182. And it is ſaid, that the Name of a Corporation is as the Name of Baptiſm which cannot be changed, 2 *Bendlow.*

But in theſe Caſes, it is not neceſſary that the Corporation be named according to the very Words, ſo that it be named according to the Senſe and Subſtance of the very Name although there be a Variation as to Circumſtances, *Mich.* 10 *Jac. C. B. the Caſe of the Major and Burgeſſes of Lyn Regis,* 10 *Co.* 120. and by *Gaudy, Trin.* 39 *Eliz. Sherborn* v. *Lewis, Gouldsborough* 120. *Hill.* 29. *Fanſhawes Caſe, Moor* 228. *Mich.* 10 & 11 *Eliz. Dyer* 278. *Trin.* 30 *Eliz. Fiſher* v. *Boys, Moor* 266. *Mich.* 36 & 37 *Eliz. Lord North's Caſe, Moor* 361. But the great Queſtion or Difference is, when the Name of a Corporation in any Grant or Deed ſhall be ſaid to vary from the true Name in Subſtance, and when in Circumſtance only; we muſt note that there are according to *Manwood* Chief Baron ſome things of Subſtance to be obſerved in every Corporation founded to pious Uſes. Firſt, It is needful that there be Perſons for the ſuport of the Corporation in which the Freehold and Government of it may remain, and they ought to have and be known by ſome Name, as Preſident and Scholars, or Maſter and Scholars, &c. and a Variance in this Name is a Variance in Subſtance.

Secondly, That the Perſons ſhall be appointed to one Houſe certain in which they ſhall be reſident, which Houſe alſo ought to have a Name known, as College, Hoſpital, or the like; and Variance in the Name of the Houſe is a Variance in Subſtance.

Thirdly, It ought to have the Name of a Saint to whom it is dedicated, or of the Perſon by whom it is founded, as *Collegium Petri*, or *Pauli*, or *Gonvel-Hall*, or *Chriſt-Church*, &c. and Variance in this Name of Dedication or Foundation is Variance in Subſtance.

Fourthly, It ought to have a place known in which the Houſe ſhall ſtand, known by ſome Name before the Foundation, as *Oxford, Cambridge, London*, &c. and Variance as to this place is an eſſential Variance, *Hill.* 29 *Eliz. Fanſhaw's Caſe, Moor* 228. But it ſufficeth that there be a ſufficient demonſtration of the place where the Corporation is, though it be not by preciſe Words comprized in the Charter, as in naming to ſay *Academia Oxon pro Villa Oxon*; ſo if a Town was incorporated by the Name of Major and Commonalty of ſuch a Town, as *Briſtol, Exeter*, &c. which afterwards are made Cities; it is good to ſay, Major and Commonalty of the City of *Exeter*, &c. after they became Cities; but more Preciſeneſs is uſed in the Body of the Name of the Corporation before the Place to which they are annexed; yet in them that which is but an Ornament to the Name comprehended in the Charter ſhall not hurt; as the Grant of St. *George* of *Windſor*, if it be of St. *George* the Martyr, &c. is good, becauſe the Martyr is but an addition of Ornament to the Name comprized in the Charter, and ſo in reality is the ſame Name, *Burton and Wrightmon's Caſe, Mich.* 36 & 37 *Eliz. B. R. Popham* 56.

Though Leaſes, &c. are void when there is Variance in the Subſtance of the Name of the Corporation; yet not when the Variance is only as to any of theſe four Circumſtances, *viz.* in Addition, Interpoſition, Omiſſion, or Commutation or altering the Order of the Words, ſo that they retain the four aforeſaid Principles of Subſtance, by *Manwood* Chief Baron in *Fanſhaw's Caſe, Hill.* 29 *Eliz. Moor* 231. *and Trin.* 6 *Eliz. Moor* 71. And generally albeit the Words in the Grant do not agree with the Words of Incorporation, yet if they agree in common Underſtanding it is good; but if in common

Underſtanding the Grant may not be taken according to the Foundation there it is not good, by *Popham in Sherburn and Lewis's Caſe, Trin.* 39 *Eliz. Gouldſborough* 123.

But if the Name of a Deed doth not import of it ſelf the true Name of the Corporation, yet if in Pleading, or by a ſpecial and expreſs Averment, or by the finding of the Jury, it ſhall be made apparent to the Court that the true Name of the Corporation, and the Name in the Leaſe, Grant, *&c.* are all one in effect, it will much enforce the Matter, although that in Words there be ſome appearance of Difference; by *Coke in the Caſe of the Mayor and Burgeſſes of Lyn Regis, Mich.* 10 *Jac. C. B.* 10 *Co.* 125.

And indeed the Judges ought in theſe Caſes (as generally they do) to make ſuch Conſtructions, if they may, that Grants do ſtand good, *Sherborn* v. *Lewis, Gouldsborough* 122. and it is great reaſon that Favour and Equity ſhould be mixt with Juſtice, for that Suits to avoid Grants upon the account of Miſ-noſmer are odious Suits; and a ſhameful thing it is that when Grantees or Leſſees who for the moſt part are illiterate Perſons have paid great Fines, Corporations that are preſumed beſt to know their Name of Foundation ſhould go about to avoid their own Grants under their Common Seal upon ſuch a ſleight miſtake: The Reader may ſee divers Caſes relating to this Subject, cited *in the Caſe of the Mayor and Burgeſſes of Lyn Regis, Mich.* 10 *Jac.* 10 *Co.* 120. *Hayward and Fulcher's Caſe, Palmer* 491. *and in Fanſhaw's Caſe, Moor* 228. *See the ſame Book* 71, 539. *and* 6 *Co.* 24. 1 *Leon.* 159. *Gouldsborrough* 121. *Plowden* 537. 1 *Anderſ.* 196, 201. However it ſeems that in ſuch Caſe remedy may be had in the Court of *Chancery*; for the Lord Chancellor ſaid it was fit to help ſuch Leaſes there, if for reaſonable time and made upon good Conſideration, otherwiſe not, 1 *Jac. Cary* 44. 32 *&* 33 *Eliz. Lord Audley* v. *Sidenham, Tothil* 136.

Many more things at the Common Law are to be regarded in making Grants by Spiritual Corporations which are here omitted, for that they are Common with them to all other Perſons making Grants in their natural Capacity.

CHAP. XLV.

Leaſes void and voidable. Voidable Leaſes how made good or actually void. Entries how to be made. Diſcontinuance and Aid Prayer. Judgments in Real Actions to whom binding.

HAving ſhewed what Eſtates Eccleſiaſtical Perſons or Corporations may at this day make, and what Rules are to be obſerved by them in the making thereof that they may not be void. It remains to be ſhewed againſt whom ſuch Grants or Leaſes are void, by what means, and in what Caſes they may be affirmed or made good by the Succeſſor, and by what means they may be made actually void that were but voidable.

Firſt then, although that by the Words of the Statute of 1 *Eliz. cap.* 19. Leaſes or other Grants made by any Archbiſhop or Biſhop that be not warranted by the ſame ſhall be utterly void; yet it hath been adjudged that if a Biſhop grant a next Avoidance which is not warranted by this Statute, becauſe

cauſe it is a thing lies meerly in Grant, out of which no Rent can be reſerved, it is not void againſt the Biſhop himſelf that makes the Grant, but only againſt the Succeſſor, *Paſch.* 32 *Eliz. Sale* v. *Biſhop of Coventry and Marſh*, 1 *Anderſon* 241. *Mich.* 37 & 38 *Eliz. Dean and Chapter of Hereford*, v. *the Biſhop of Hereford and Ballard*, 3 *Cro.* 440. *Mich.* 32 & 33 *Eliz. Smallwood and others* v. *the Biſhop of Coventry and Marſh*, 3 *Cro.* 207. *Trin.* 41 *Eliz. Armiger* v. *Biſhop of Norwich and Holland*, 3 *Cro.* 690. *Singleton's Caſe cited in Lincoln College Caſe*, 3 *Co. f.* 59. *b.* And ſo it is if a Biſhop doth make a Leaſe of the Advowſon of a Church, *Smalwood* v. *the Biſhop of Coventry and Litchfield, and Mary Savil's Caſe* 188. *Paſch.* 15 *Car.* 2. *Scaccar. Morrice* v. *Antrobus*, *Hardres* 366. *Scudamore* v. *Belliſon*, 1 *Keb.* 182. So if an Annuity be granted by a Biſhop out of the poſſeſſion of the Biſhoprick, this is not void againſt the Biſhop that makes the Grant thereof, *the Biſhop of Salisbury's Caſe*, *Trin.* 11 *Jac. C. B.* 10 *Co.* 60. Or if a Biſhop makes a Leaſe for above one and twenty years, this ſhall bind the Biſhop during his time, as was ſaid in *Sir Moyl Finches Caſe*, 33 *Eliz.* 2 *Leon.* 134. Or if a Biſhop doth let Tithes for three Lives, which is a void Leaſe againſt the Succeſſor, becauſe there is not any remedy for the Rent, or if the ancient Rent is not reſerved, and annually due and payable; yet it was adjudged this Leaſe was not void againſt the Biſhop himſelf that made it, *Trin.* 5 *Jac. B. R. Rickman* v. *Garth*, 2 *Cro.* 173. And when a Biſhop did by Deed inrolled grant to the Queen without the Conſent of the Dean and Chapter, it was held that this was not void againſt the Biſhop himſelf, *Warren's Caſe* v. *Smith, or Magdalen College Caſe*, *Paſch.* 13 *Jac. B. R.* 1 *Rolls Rep.* 151. So though this Statute of 13 *Eliz. cap.* 10. doth ſay, that all Leaſes, Gifts, Grants, *&c.* made by any Perſons or Corporations therein mentioned, contrary to the tenor of that Act ſhall be utterly void and of none effect to all intents, conſtructions and purpoſes; yet it hath been adjudged, that a Leaſe made againſt the ſaid Statute by a Dean and Chapter ſhall not be void, or voided by them, nor any Covenants therein contained during the Life and Continuance of the Dean that made the Leaſe; and if they have made a Leaſe for years of any of their Poſſeſſions, and before the Expiration thereof, do make a concurrent Leaſe alſo for years of the ſame Lands, and then make a third Leaſe for lives with an expreſs Covenant that the Grantee of the Leaſe for lives ſhall enjoy the Land againſt the ſecond or concurrent Leaſe; and the Grantee of the Leaſe for lives being in poſſeſſion is evicted, and brings Covenant againſt the Dean and Chapter; in this Caſe, although the laſt Leaſe for lives be void by the Statute of 13 *Eliz.* yet it was agreed by the Juſtices, that becauſe the Dean that made the Leaſe for three Lives, was living and continued Dean at the time of the Eviction, the Leaſe and Covenants were not void, *Paſch.* 10 *Jac. Walter* v. *the Dean and Chapter of Norwich*, *Moor* 875. *the ſame Caſe*, *Brownlow and Gouldsborough* 2 *part* 158.

So when the Caſe was, that a Maſter and Fellows of a College did by Deed inrolled make a Leaſe not warranted by the Statute, and did ſuffer a Fine and five years to paſs without Claim, though this was void againſt the ſucceeding Maſter, yet by Conſtruction the Leaſe and Fine ſhall be good againſt the College (though it be a Corporation that never dies) during the life of the Maſter that was Party to the Leaſe and made no Claim, becauſe he is the Head and principal part of the Corporation, *Paſch.* 17 *Jac. the Caſe of the Maſter and Fellows of Magdalen College in Cambrige*, 11 *Co.* 67. *the ſame Caſe*, 1 *Rolls Rep.* 151. *Mich.* 32 & 33 *Eliz. C. B. Carter and Claycoles Caſe*, 1 *Leonard* 306.

And the Law I ſuppoſe to be the ſame, if an Archdeacon, Dean, or Prebend, *&c.* make Leaſes or other Grants of any of their ſole Poſſeſſions, not warranted by the ſaid Statute, *viz.* That they ſhall be bound by their own Grants for their time; for ſo was it held in the Caſe of a Parſon, by *Popham*, *Clinch* and *Gawdy*, that is, if a Rent be reſerved by ſuch Leaſes, otherwiſe not, as was ſaid by *Popham*, *Hill.* 43 *Eliz. Revil* v. *Hart*, *Gouldſborough* 138. And the reaſon of all theſe Caſes is, becauſe that the intent of the Statutes of the *1ſt* and *13th* of *Eliz.* was only to provide for the Succeſſor, and not relieve the very perſons themſelves who make ſuch Leaſes or Grants not warranted by the Statutes, *Hetley* 24. But where there is a Chapter that hath no Dean, as the Chapter of the Collegiate Church of *Southwel*, there Grants, or Leaſes made by them contrary to the Statute of 13 *Eliz.* are void *ab initio*, for they muſt be either ſo, or good for ever, *Trin.* 27 *Car.* 2. *C. B. the Chapter of the Collegiate Church of Southwel* v. *the Biſhop of Lincoln and J. S.* 1 *Modern Rep.* 204. And in all Caſes where a Corporation aggregate makes a Leaſe not warranted by the Statute of 13 *Eliz.* ſuch Leaſe is void *ab initio* againſt themſelves, as hath often been adjudged; but where a ſole Corporation makes ſuch Leaſe, it ſhall bind him that makes it, but ſhall be void againſt his Succeſſor, *Paſch.* 15 *Car.* 2. *Scaccar. Morrice* v. *Antrobus*, *Hardres Rep.* 326. *Carter* v. *Claycoles*, 1 *Leonard* 308. As Leaſes and Grants not warranted by the Statutes are not void againſt the Leſſors and Grantors themſelves, ſo neither are Grants made without due Confirmation, where Confirmation is neceſſary, but only by the Grantee's death, *&c. Trin.* 7 *Eliz. C. B. Hoskins* v. *Tucker*, *Dyer* 239. But Grants made by Corporations in which the Corporation is miſnamed are void immediately againſt the ſame Grantors. Alſo a Biſhop having made a defective and voiable Leaſe or Grant, not only the Succeſſor, but alſo the King, when the Temporalities come into his Hands may take advantage thereof by avoiding them during the Vacancy of the Biſhoprick, in Privity and Right of the Biſhop. But though the King in Privity and Right of the Biſhoprick hath avoided the Leaſe during the time that the Temporalities were in his Hands, yet the Leaſe is not thereby ſo abſolutely avoided, but that the ſucceeding Biſhop may make the ſame either good, or void at his Election as to himſelf, *Mich.* 28 *&* 29 *Eliz. the Earl of Bedford's Caſe*, 7 *Co.* 8. And this may be done either expreſly, as when the Succeſſor doth actually agree to the Leaſe or Grant of his Predeceſſor, 5 *E.* 4. 105. or implicitely by ſome Act which amounts to an Agreement in Law, And in this, as in all Caſes of Conditions broken, whatſoever Act amounts to the affirming the Leaſe to have Continuance, is in Law an Agreement to the former Demiſe, and a Leaſe may be affirmed; firſt, by acceptance of Rent incurred after the death of the Predeceſſor, *Paſch.* 13 *Jac. B. R. Brook Abr. tit. Abbe & Prior* 26. *Magdalen College Caſe*, 1 *Rolls Rep.* 15. *Mich.* 3 *Car. C. B. Owen* v. *Thomas App Rees*, 1 *Cro.* 95. But here we muſt regard the difference betwixt Leaſes that are only voidable, and Leaſes that are actually void. For when Leaſes are abſolutely void, that is, without Entry or any other Ceremony, the Succeſſors Acceptance of Rent incurred will not affirm ſuch Leaſe; otherwiſe it is of Leaſes that are but voidable, *Brook Abr. tit. Acceptance* 7. Accordingly if a Biſhop doth let a Portion of Tithes for Lives, reſerving the ancient Rent, and the Succeſſor doth accept the Rent, this Acceptance of the Rent ſhall not bind the Succeſſor, becauſe the Leaſe was abſolutely void by the Biſhop's Death, *&c.* that made it without Entry or other Ceremony, the reaſon is, becauſe Tithes let alone are things that lie in *prender*, out of which a Rent cannot be reſerved, recoverable by the Succeſſors or next Incumbent when the Leaſe is for lives,

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Trin. 5 *Jac. B. R. Rickman* v. *Garth*, 2 *Cro.* 173. And therefore being that the Succeſſor's Acceptance of the Rent due at one day will not enable him to ſue for it, if afterwards denied he ſhall not be bound by ſuch Acceptance, and the Law is the ſame alſo to all other things not manurable. But if the Tithes had been let for years the Succeſſor's Acceptance of the Rent would have bound him during his time, becauſe then he may have an Action of Debt for the Rent; See the fifth Rule before in *Chap.* 41. And as to this Matter there is a difference alſo betwixt thoſe that have the Fee-ſimple abſolutely in themſelves, as Biſhops, Deans and Chapters, Maſters and Fellows of Colleges, *&c.* and thoſe that have but a qualified Fee-ſimple, as Parſons, Vicars, Prebends, and others that be Preſentative, or collative, not elective; for if any of the former ſort make voidable Leaſes for lives or years not warranted by the Statutes, if the Succeſſor doth accept the Rent before Entry to make ſuch Leaſes void be the Leaſe for lives or years he affirms it for his time. But if a Parſon, Vicar, Prebend, *&c.* doth make a Leaſe for one and twenty years rendring Rent, not warranted by the Statutes, and dies, the Leaſe is abſolutely void by the Death, 1 *Inſt.* 45. *b.* and no Acceptance of the Rent by the Succeſſor will affirm it, becauſe the ſame is void without Entry or other Ceremony, 32 *H.* 8. *Bro. tit. Dean* 20. *Bro. tit. Acceptance* 9, *&* 11. *Paſch.* 4 *Car. C. B. Johnſon's Caſe*, *Hetley* 88. 24 *H.* 8. *Brookes Novel Caſes f.* 10. *placito* 54. But if a Parſon, *&c.* doth make a Leaſe not warranted by the Statutes for life or lives, it is only voidable not void by Death, 1 *Inſt.* 45. *b.* and if the Succeſſor before Entry to avoid it doth accept the Rent, this Acceptance ſhall bind him for his time, becauſe this being an Eſtate of Freehold, which is very much regarded in Law, the Law allows it this Privilege amongſt ſeveral others not to be void before an Entry when the Eſtate is out of Lands, or the like, into which an Entry may be made, 32 *H.* 8. *Bro. Dean and Chapter* 20. *Hill.* 13 *Jac. Maund* v. *French*, *Bridgman* 94. *and by Dodderidge*, *Paſch.* 14 *Jac. in Maund and French's Caſe*, 1 *Rolls Rep.* 362. *Trin.* 7 *Eliz. Dyer* 239. *Paſch.* 39 *Eliz. Overton* v. *Sydal. Popham* 120. And this Difference concerning thoſe that have an abſolute Fee, as Biſhops, *&c.* and Parſons, *&c.* who have but a qualified Fee was obſerved at the Common Law before the Statutes were made, *Mich.* 33 *H.* 8. *Dyer* 46. *Plowden* 264. *a. Vide L.* 5 *E.* 4. 105.

And it is here to be obſerved, that ſo far as the Leſſor is bound by ſuch void or voidable Leaſe, ſo far alſo the Leſſee, his Executors or Aſſigns, which of them have the Intereſt are bound thereby, and no farther; therefore when the Leaſe is not void without Entry, if Rent be in arrear after the death of the Predeceſſor, the Succeſſor hath remedy to recover ſuch Arrears, if he doth chuſe to affirm the Leaſe; but if the Leaſe be abſolutely void, the Succeſſor hath no remedy at Law for any Rent incurred after the Death of his Predeceſſor, *Paſch.* 39 *Eliz. Overton* v. *Sydal*, *Popham* 121. and by *Anderſon*, *Mich.* 32 *&* 33 *Eliz. C. B. Carter and Claycoles Caſe*, 1 *Leonard.* 309. So in like manner the Leſſee of a voidable Leaſe after the Death of the Leſſor may maintain an Action of Treſpaſs againſt any Stranger who ſhall enter or do any other Treſpaſs upon the Land before the Leaſe be actually avoided, By *Periam in the ſaid Caſe of Carter and Claycoles.* 1 *Leonard.* 309. And what is ſaid with reſpect to Leaſes defective upon account of the Statutes holds good as to Leaſes defective for want of due Confirmation, *Trin.* 7 *Eliz. Dyer* 239. *and by Dodderidge*, *Paſch.* 14 *Jac. B. R. Maund* v. *French*, 1 *Rolls Rep.* 361.

Though, as hath been ſaid, a Leaſe may be affirmed by the acceptance of Rent, yet this is to be underſtood to hold true only, when the Rent is duly accepted, therefore, if a Biſhop doth accept of Rent before Reſtitution of the

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Temporalities, this Acceptance ſhall not conclude him or bar him of Entry, *Paſch.* 19 *Jac. B. R. the Biſhop of Oxford's Caſe*, *Palmer* 175. So when a Maſter of a College, or any Head of a Corporation aggregate doth accept Rent payable by a voidable Leaſe, this ſhall not affirm the Leaſe during ſuch Maſter or Head's life or continuance, that is, unleſs ſuch Maſter, *&c.* had an Authority from the Corporation to accept the ſame; for inaſmuch as ſuch Bodies Politick do conſiſt of many, the Maſter alone cannot deveſt any Right which is as much in the Fellows or other Members of the College, *&c.* as much as in himſelf, or conclude them of their Entry upon any voidable Leaſe, *Paſch.* 13 *Jac. the Caſe of the Maſter and Fellows of Magdalen College*, 11 *Co.* 79. *the ſame Caſe*, 1 *Rolls Rep. p.* 100.

If a Biſhop's Bailiff of his own Head, and without any Order from the Biſhop doth receive Rent (the Leaſe being voidable) this ſhall not bind the Biſhop, *Dorothy Owen and Owen Price's Caſe*, *Trin.* 3 *Car. C. B. Hetley* 24. But if a Biſhop doth leaſe for life certain Lands parcel of the Mannor of *H.* reſerving Rent (which Leaſe for ſome reaſon is voidable and ſhall not bind the Succeſſor) and dies, and another Biſhop is made, and the Bailiff of the ſaid Mannor doth come to him and ſhew him in general manner, that there be certain Rents in arrear of the ſaid Mannor; upon which the Biſhop doth command him to receive the ſaid Rents, and he receives them accordingly and entreth the Rent reſerved upon the voidable Leaſe to be received, and after doth pay all the Rents to the Biſhop without giving him notice of the ſaid voidable Leaſe, this is a good Confirmation thereof; for the Biſhop ought of himſelf to take notice what Leaſes were made by his Predeceſſor, *Per Curiam*, *Hill.* 5 *Jac. Wheeler and Danby's Caſe*, 1 *Rolls Abr. p.* 476. *D. Hetley* 24.

As by the Acceptance of Rent a voidable Leaſe may be affirmed, ſo may it be by diſtraining for a Rent due at a day after the Death of the Predeceſſor, or by bringing an Action of Waſte againſt the Leſſee. And in caſe the Leaſe be for life, by bringing an Aſſize for the Rent due aftnr the death of the Predeceſſor, but no Aſſize can be brought of a Rent reſerved upon a Leaſe for years. For an Aſſize cannot be brought but of ſuch things whereof a Man hath a Freehold that is an Eſtate for life at the leaſt, except an *Aſſize of Darrein Preſentment*, which as hath been ſaid *Chap.*22 may be brought by Tenant for years or at Will. Alſo if a Parſon doth accept of Fealty from the Leſſee for life of his Predeceſſor he thereby affirms his voidable Leaſe for his own time, *Trin.* 7 *Eliz. Dyer* 239. 42 11 *E.* 3. *Fitz. Abbot* 9. *Bro. tit. Acceptance n.* 15.

But on the other hand if a Succeſſor will make a voidable Leaſe actually void, this he may do either by Entry, *viz.* where the Leaſe is of things Corporeal, and manurable, and till then the Leaſe remains good, *Paſch.* 5 *Eliz. Ayer* v. *Ome*, *Dyer* 222 Or by Claim, when the Leaſe is of things incorporeal, as where a Leaſe for years is made rendring Rent upon Condition to be void for Non-payment, this Leaſe ſhall not be void without demand made of the Rent, for if it ſhould be otherwiſe, then were it in the power of the Leſſee to make the Leaſe void at any Rent day he pleaſeth, and by that means to add the wrong making the Leaſe void to that of Non-payment of the Rent, *Mich.* 31 *&* 32 *Car.* 2. *C. B. Young* v. *Wright*, 1 *Siderfin* 7. But when by theſe means a Leaſe is once made void, it can never be revived again, but remains void againſt all after Succeſſors, *Paſch.* 16 *Car. Oldfield* v. *Howden*, *Jones* 454.

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As to making an Entry, this may be done either by the Parties Bailiff that would enter, or by other perſons deputed for that purpoſe; but a Bailiff by virtue of his Office cannot make an Entry for his Maſter without ſpecial Warrant, becauſe his Office is to mannage his Maſter's Lands, and to take the Profits thereof to his Maſter's uſe, but to gain new Land which his Maſter had not, belongs not to the Office of a Bailiff. Beſides an Entry is a thing which the Maſter may or may not make, and his Bailiff ſhall not determine his Election, in *Eires Caſe*, *Moor* 52. *Paſch.* 5 *Eliz. C. B. Ayer* v. *Ome*, *Dyer* 222. Neither can a Corporation aggregate command their Bailiff to enter for a Condition broken, unleſs it be by Deed, for ſuch Command and Entry without Deed is void, *Paſch.* 43 *Eliz. B. R. Dumper and Sym's Caſe*, 1 *Rolls Abr.* 514. *k.* 18 *E* 4. 8. *Br. Corporation* 59. Yet *per Curiam* he that diſtrains as Bailiff of a Corporation, and is not Bailiff may make Conuſance, *&c.* and if the Corporation agree thereto it is good without Deed, for that the Command he had to diſtrain is not in ſuch Caſe traverſable, as was reſolved in a Caſe where one of the Members of the Corporation did diſtrain in the Name and Right of the Corporation without any Warrant in Writing, 25 *H.* 8. 8. *Br. Corporations*, *&c.* 2. But a Biſhop may by Word command his Servant to demand a Rent or to make an Entry, *Mich.* 15 *Eliz. B. R. Wood* v. *Chiver*, 4 *Leonard* 179.

And as to Corporations aggregate in the Caſe of Leaſes becoming void it hath been held, that where a Dean and Chapter made a Leaſe for years rendring Rent, and for default of payment the Leaſe to be void, the Rent was arrear and not paid, they make a new Leaſe to another perſon, ſealed in their Chapter Houſe before any Entry made upon the firſt Leſſee, and make a Letter of Attorny to one to enter and make Delivery of this Leaſe upon the Land, this was a good Leaſe, although it was in this Caſe objected that the Dean and Chapter being out of Poſſeſſion and the firſt Leſſee in Poſſeſſion, and they ſetting their Seal to the new Leaſe in their Chapter Houſe did perfect it as the Deed of the Corporation, ſo that there can be no other Delivery of it, and therefore the Leaſe was void for want of an Entry before the Leaſe made, and the after-delivery by the Attorny was void, by reaſon it was perfect before; but it was anſwered that there was no other means for a Corporation to make a Leaſe but this: And *Gawdy* ſaid, that it is not the Leaſe or Deed of the Corporation until Delivery as of another Perſon, *Hill.* 31 *Eliz. Willis* v. *Jermin*, 3 *Cro.* 167. *the ſame Caſe*, 2 *Leon.* 97. Yet its ſaid to be agreed, that if a Dean and Chapter put their Chapter Seal to a Deed this is a perfect Deed thereby, without any Delivery, *Davis Rep.* 44. *b. the Dean and Chapter of Fernes*, *Hill.* 32 *Eliz. B. R. Jermin* v. *Willis*, 2 *Rolls Abr.* 23. But this is to be underſtood when the Dean and Chapter are in Poſſeſſion as in the Caſe laſt put, *Mich.* 13 *Car. B. R. Flud* v. *Gregory*, 2 *Rolls Abr.* 24.

And note, that in the Caſe of a Corporation aggregate, if they make a Charter of Feoffment, and a Letter of Attorney to deliver Seiſin, the Livery of Seiſin is good after the death of him that is the Head of ſuch Corporations, but otherwiſe it is in the Caſe of the ſole Corporations; for albeit the Warrant of Attorney be indefinite, yet the Law preſcribeth that it muſt be executed in the Life time of him that made it, and the Death not only of the Feoffor, but alſo of the Feoffee is a Countermand in Law of the Letter of Attorney, and the Deed it ſelf is thereby become of none effect, 1 *Inſt.* 52. *b.*

And note, that if a Leaſe be made to two for their lives *& diutius eorum viventi*, and the Leſſees do make Partition, and then one of them doth dye, the Leſſor may enter into his part ſo dying, for there ſhall be no Occupancy

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of his Eſtate, the Words *& diutius eorum viventi* not being more than the Law doth ſay, and by the Partition the joint Tenancy is ſevered, 30 *Aſſ.* 8. 2 *Rolls Abr.* 150. So Entry may be made for Condition broke in the life of the Predeceſſor, or in the time of the Vacation, as the Heir may do for Condition broken in the life of his Father; but otherwiſe it is of Conditions in Law, as Waſte, Forfeiture and the like, *Eires's Caſe*, *Moor* 52.

If a Leaſe be made with a Clauſe, that it ſhall be void upon Non-payment of the Rent, yet before it ſhall be void the Leſſor ought to make demand of the Rent at the place where the Rent was made payable, *Trin.* 37 *Eliz. Tuskin* v. *Edmund*, *Moor* 408. And as to a Demand to be made of any Rent whereby to make a Re-entry or take advantage of the breach of a Condition in a Leaſe theſe things are to be obſerved. *Firſt*, That the Demand muſt be made upon the Land and at the moſt notorious place of it, if there be a Houſe upon the Land, the Demand muſt be made at the Houſe and at the Fore-dore of the Houſe. *Secondly*, If the Rent be made payable at any place from the Land, it muſt be demanded at the place where by Agreement of the Parties it is to be paid, obſerving that which hath been ſaid before of the moſt notorious place. *Thirdly*. The Demand is to be made ſuch a convenient time before the Sun-ſetting of the laſt day on which the Rent is payable, as the Mony may be numbred and received, 1 *Inſt.* 201, 202. *Fourthly*, The Demand muſt be certain in the Sum demanded, for if one Penny more or leſs Rent be demanded than is due, or if a certainty of the Rent be not ſhewed, and the day when it was due, is not a good Demand, *Moor* 207. *Mich.* 31 *&* 32 *Eliz. C. B. Fabian* v. *Windſor*, 1 *Leon.* 305. *Dalliſon* 35. So if there be ſeveral half years Rent in arrear the Demand muſt not be of the whole Sum ſo behind as of one entire Rent, but the half years Rent then due muſt be demanded, and ſo much in arrear before; for where a Leaſe for years was made rendring ſeven Pounds Rent *per annum*, and there being three Pounds behind, and at the next day of Payment the Leſſor demands ten Pound, this was held to be no good Demand, becauſe the Rent and Arrear were demanded as an entire Sum, By *Roll Mich.* 24 *Car. B. R. Allen* 95. And if the Leſſor doth come upon the Land at any time of the day when the Rent is due and payable, and demands the Rent, and doth continue upon the Land till the Sun be ſet without making any other Demand, yet the Demand is good enough, for his preſence there is a continuance of the Demand, (*Per Curiam.*) Or if the Leſſor after his Demand in the Morning doth depart off the Land, and before the Sun ſet returneth, and ſtays upon the Land till Sun ſetting, this is a Continuance of the Demand, and a further Demand is not neceſſary, by *Wray* and *Catlin*. But if the Leſſor doth come to the Land before the laſt Hour and demands the Rent and afterwards goes off the Land, and is not there at the laſt inſtant of the day, the ſame is not a ſufficient Demand, although that he return preſently after the Sun is ſet; So if the Leſſor's Attorny, *viz.* he whom he gives Authority to demand the Rent doth before Sun ſetting demand the Rent at the capital Meſſuage and then goeth his way, but leaves his Servant in the Houſe with Order, that if any Perſon did come to pay the Rent he ſhould ſignifie it to him, and returneth not again till after the Sun was ſet; this Continuance of the Servant is no Continuance of the Demand, for that the Attorney was but as a Servant himſelf in this Buſineſs and therefore could not appoint another in his ſtead, *Mich.* 15 *Eliz. B. R. Wood* v. *Chiver*, 4 *Leonard* 179.

If a concurrent Leaſe be made, and there be a Covenant therein, that if the Leſſee without the Licence of the Leſſor and his Succeſſors, ſhall grant over his Eſtate it ſhall be lawful for the Leſſor and his Succeſſors to re-enter, in this Caſe, although the Leſſee doth grant over his Eſtate without Licence, yet the Leſſor cannot enter during the firſt Leaſe, *Mich.* 1 *&* 2 *Ph. & Mar. Ernley* v. *Walron*, *Dyer*.

Though Entry is the means of making a voidable Leaſe void, as alſo of regaining an Eſtate that was aliened by the Predeceſſor, *&c.* yet at the Common Law in the Caſe of Alienation, Entry was not always lawful or of any Effect, that is, where there was a Diſcontinuance. For the Effect of Diſcontinuance is commonly thus, that it prevents a Man from entring upon the Land or Tenements alienated by his own Authority, but he muſt bring his Action and ſeek to recover his Poſſeſſion by Law. But at Common Law every Eccleſiaſtical perſon was not capable of making a Diſcontinuance, but only thoſe that had an abſolute Right or Fee in their Poſſeſſions, as Biſhops, *&c.* but not Parſons, Vicars, Prebends, nor any others that are preſentative, and have but a qualified Right; for the Succeſſors of ſuch might ever have entred, and were not driven to their real Action, by any Act of their Predeceſſors, *Paſch.* 4 *Car. C. B. Johnſon's Caſe*, *Hetley* 88. But at this day, neither a Biſhop, Dean, Maſter of an Hoſpital, *&c.* that have the Fee and Right in them, can diſcontinue any of their Poſſeſſions, or bar their Succeſſors of Entry, *&c.* by reaſon of the Statutes of 1 *&* 13 *Eliz.* 1 *Inſt.* 342. *a. Paſch.* 2 *Car. C. B. Water* v. *Jackſon*, 1 *Rolls Abr.* 633. And it is to be obſerved, that the remedy is ever agreeable to the Right, therefore a Biſhop, Dean, Maſter of an Hoſpital, or the like, that hath a College and Common Seal ſhall have a *Writ of Right*, which is the higheſt remedy the Law gives; for that they have the higheſt Eſtate, and they ſhall not have Aid in reſpect of their high and large Eſtate, albeit any of them be preſentable; but a Dean that is collative ſhall have Aid of the King, but a Parſon or Vicar cannot have a *Writ of Right*, the higheſt Writ that they can have is the *Writ of Juris Utrum*, 1 *Inſt. f.* 341. *b.* 342. *a.* and this lies for the Succeſſor of every Parſon or Vicar who have not the abſolute Right in them, and cannot maintain a *Writ of Right*, but not for the Succeſſor of a Prebend, or Provoſt in a Cathedral Church without the Conſent of the Chapter, eſpecially where the Body of the Prebend or Provoſtry is a Parſonage and not a Lay Fee. And many Books prove that they ſhall have Aid of the Biſhop, as Patron and Ordinary in any Action in which they ſhall be charged, and ſo all Clerks preſentative ſhall have Aid of their Patrons and Ordinaries, 1 *Rolls Abr.* 175. *Trin.* 7 *Eliz. C. B. Hodgskins* v. *Tucker*, *Dyer* 239. though the Patron be within Age, 1 *Rolls Abr.* 145. And if there be many Patrons, as Coparceners, tho' they make Compoſition to preſent by turns, they ſhall have Aid of them all, *Lancaſter* v. *Lucas*, *Mich.* 32 *&* 33 *Eliz. B. R.* 1 *Leonard* 234. *Harris's Caſe*, *Noy* 11. and ſo it is if a *Writ of Annuity* be brought againſt the Parſon, *ibid.* in theſe Caſes and the like, he muſt pray Aid of the Ordinary when he prays Aid of his Patron; for when an Annuity was brought againſt a Parſon who prayed Aid only of the King, it was agreed by the Court to be ill, becauſe he did not pray Aid alſo of the Ordinary, for it is all one in the Caſe of the King as of a common Patron, *Harris's Caſe*, *Noy* 11. But the Parſon who prays in Aid muſt be as well inducted as inſtituted, for when he prays in Aid of the Patron and Ordinary he ought to ſay, that he is Parſon *imparſone* of his Church, and found his Church diſcharged of this Annuity, *&c.* which he cannot ſay without Induction, *Hare* v. *Bickley*, *Trin.* 20 *Eliz. C. B. Plowden* 529.

If a Writ of Annuity be brought againſt a Parſon that prays in Aid of the Patron and Ordinary, who being ſummoned make default, and Judgment is given againſt the Defendant by Action tryed, or Confeſſion, or Default of the Parſon after Appearance, he himſelf in a *Scire Facias* after, ſhall not have Aid, neither ſhall the Succeſſor have it if the *Scire Facias* be afterwards brought againſt him upon this Judgment, *Br. tit. Aid* 29, & 76. *Jenkins Cent.* 1. *Caſe* 98. *p.* 51. *Cent.* 2. *Caſe* 15. *p.* 61. 29 *E.* 3. *tit. Scire Facias in Fitz.* 152. *contra Br. tit. Aid* 24, & 72. After Judgment in Annuity once had, a *Scire Facias* upon this Judgment ſhall be only brought for rhe Recovery of Arrearages incurred before, and the Arrearages incurred pendant the Writ ſhall be recovered by the *Scire Facias*; and if the Annuity be determined a *Scire Facias* doth not lie for the Arrears, but an Action of Debt, for a *Scire Facias* is in the place of a Writ of Annuity, *Jenkins Cent.* 1. *Caſe* 98. *p.* 51. If the Parſon in a Writ of Annuity hath Aid of the Metropolitan Guardian of the Spiritualities as Ordinary, he ſhall not have a new Aid of a new Biſhop when created, ſo if he hath Aid of the Ordinary, who dies, he ſhall not thereupon have Aid of the Metropolitan, Warden of the Spiritualities, nor of the ſucceeding Biſhop, 1 *Rolls Abr.* 188. A Defendant in a Writ of Annuity pleaded, that the Biſhop was Patron of the Benefice charged, and that his Temporalties were in the Hands of the King, therefore prayed Aid of the King, and of the Biſhop as Patron and Ordinary and of the Dean and Chapter, for that the Parſonage appertained to the Chauntor as one of the Chapter, and Aid was granted of them all, *Br. tit. Aid n.* 18.

And note, that ſuch Perſons as have not the meer Right in them, but a qualified Right, as Parſons, Prebends, *&c.* if they be barred in a Real Action without making them Parties who have Intereſt, yet this ſhall not bind the Succeſſor, but that he in a new Action of the ſame nature brought ſhall falſify the Recovery; neither is a Judgment given in ſuch Caſe any Diſcontinuance, but the Succeſſor may enter; otherwiſe it is of an Abbot, Biſhop, or the like, who have the entire Fee-ſimple in them, for their Succeſſor at the Common Law ſhall not falſify in a *Scire Facias* or new Action of the ſame nature. The ſame Law when Recovery is had againſt them, for it hath beeen adjudged that in a *Writ of Right* againſt a Parſon who after the Miſe joyned made Default, whereupon Judgment was given againſt him; yet the Succeſſor might have *Juris utrum*, becauſe he had not the meer Right, nor had prayed in Aid of the Patron and Ordinary. And if a Parſon, Vicar, or Prebend, *&c.* loſe by Default in a Real Action, he himſelf may have a *Juris utrum*, for that is his *Writ of Right*, as is ſaid, *Regiſt.* 32. *b.* And it would be againſt Reaſon that he ſhould have no remedy in ſuch Caſe, the ſame being the Right of the Church which is favoured in Law, *Mich.* 40 & 41 *Eliz. C. B. Ferrer's Caſe.* But ſee more concerning this Matter, 1 *Rolls Abr. tit. Aid & Br. tit. Aid, & Aid del Roy.*

CHAP.

CHAP. XLVI.

Tithes of what due. Tithes in London *how payable. Tithes of Houſes.*

HAving ſhewed what are the Effects of a legal Poſſeſſion of an Eccleſiaſtical Benefice or Promotion, and what Eſtates, Grants, and Leaſes may be made thereof; I am further to ſpeak of the Profits themſelves, and to ſhew what the Profits be that may belong to any Eccleſiaſtical Benefice or Promotion. Theſe (not to ſpeak of Lands of which nothing need to be ſaid in this place) do principally conſiſt of Tithes: As to which two things in general are only needful to be ſhewed. *Firſt*, for what, and of what things, Tithes ought, or ought not to be paid. *Secondly*, What remedy the Law hath given the Owner for the Recovery of them and other Church Duties being detained.

As to the firſt, it muſt be noted, that *de Jure communi* Tithes are to be paid for ſuch things only which do yield a yearly Increaſe by the Act of God, and therefore of common Right no Tithes are to be paid of Quarries of Stone or Slate, for that they are parcel of the Freehold, and the Parſon hath Tithes of the Graſs or Corn which grow upon the Surface of the Land in which the Quarry is, *Paſch.* 34 *Eliz. C. B. Lyſs* v. *Wats*, 3 *Cro.* 277. *ſame Caſe*, *Moor* 908. *Hill.* 11 *Jac. B. R. Per Curiam*, 1 *Rolls Abr.* 637. Nor for Coal, *Hill.* 14 *Jac. B. R. by Haughton*, 1 *Rolls Abr.* 637. *Paſch.* 34 *Eliz. Lib* v. *Watts*, *Moor* 908. Nor of Turf which is to burn, *Hill.* 14 *Jac. B. R. by Haughton, and Hill.* 11 *Jac. B. R. Per Curiam*, 1 *Rolls Abr.* 637. *Mich.* 28 & 29 *Eliz. B. R. Godbolt p.* 44. Nor for Lime, *Mich.* 13 *Jac. C. B. Thomas and Perries Caſe, Per Curiam* 1 *Rolls Abr.* 637. 2 *Inſt.* 651. *Hill.* 21 & 22 *Car.* 2. *Amiers* v. *Chambers*, 2 *Keb.* 596. *and Raymond* 425. Yet of a Lime Kiln by Cuſtom Tithes ſhall be paid, 1 *Rolls Abr.* 642. and ſo by Cuſtom Tithes ſhall be paid of white Salt, *Trin.* 16 *Jac. B. R. Jones and Gowards Caſe*, 1 *Rolls Abr.* 642. So a *Modus* may be of the Tithes of Iron Oar, *Mich.* 27 *Car.* 2. *Andrews* v. *Sympſon*, 3 *Keb.* 527. No Tithes ſhall be paid for Brick becauſe 'tis part of the Soil, and 'tis ſaid to have been often adjudged, *Paſch.* 28 *Car.* 2. *C. B. Stoutfils Caſe*, 2 *Mod. Rep.* 77. Nor for Houſes which be for Habitation, nor for other Buildings; nor for any Rent reſerved upon a Demiſe of any ſuch Houſe or Building being created meerly by the Act of the Party, *Mich.* 11 *Jac. C. B. Dr. Grant's Caſe*, 11 *Co.* 16. *Dr. Leyfield* v. *Tiſdal*, *Hobart p.* 11. If a Man purchaſe an Houſe for 300 *l.* and doth ſell it again within a ſhort time after for 500 *l.* yet no Tithes ſhall be paid of the gain thereof made, for this is againſt the Common Law, Reſolved *Mich.* 11 *Jac. B. R. Daires and Tollins Caſe*, 1 *Rolls Abr.* 657. but though not of Common Right, yet by Cuſtom; Tithes may be paid for Houſes by the Rent reſerved upon a Demiſe thereof; to which purpoſe is the Caſe of Dr. *Grant*, which is as followeth. *Gabriel Grant* Doctor in Divinity, Parſon of the Pariſh of St. *Leonard* in *Foſter-Lane infra Præcinctum Sancti Martini le Grand*, did libel in the Spiritual Court before Dr. *Maſters*, Official of the Dean and Chapter of *Weſtminſter*, againſt *Edward Taylor* Farmer of a great and ancient Houſe called *the Dean's Houſe* within the Precinct of St. *Martin le Grand*, late parcel of the Poſſeſſions of the Abbot of *Weſtminſter*, and alledged, that every Pariſhioner or Inhabitant having or occupying a Manſion Houſe, Shops, Warehouſes, Cellars or Stables within the ſaid Pariſh of St. *Leonard* within St.

Martins le Grand, hath paid yearly every quarter of the year at the Feasts of *Easter*, the Birth of Christ, St. *John* the Baptist, and St. *Michael*, time out of mind, *&c.* or at least from the Foundation, Donation and Erection of the said Rectory of St. *Leonard* by equal Portions to the Parsons of the said Rectory for the time being, *Nomine & loco decimarum suarum juxta ratam cujuslibet viginti solidor' readitus per annum ex qualibet hujusmodi Domo, Shopa, Sollar', Sellar', sive Stabulo sic tent' sive occupat' in prædicta Parochia duos solidos legalis Monetæ Angliæ, &c.* And that the said *Edward Taylor* and his Family did dwell in the said House three years, and had possessed the same for the same time *sub annuali reddita sexdecim librarum seu saltem duodecim librarum &c.* and so demanded two Shillings in the Pound, *&c.* the said *Edward Taylor* did exhibit an Information and Suggestion to the Court, that the late Abbot of *Westminster* and all his Predecessors till the dissolution of the said Monastery, which was *Anno* 30 *H.* 8. had held the said House discharged of Tithes, and alledged the Statute of 31 *H.* 8. concerning the discharge of the payment of Tithes, and conveyed to himself a Lease for years, and thereupon had a Prohibition to which the said Doctor *Grant* appeared, and *Taylor* declared against him to the Effect aforesaid, and Doctor *Grant* traversed the said Prescription of Discharge of Tithes, whereupon Issue was joyned, and tryed in *London* for Doctor *Grant*; But it was moved by *Taylor*'s Council, that upon the said Libel no Consultation ought to be granted, for of common Right no Tithes ought to be paid for Houses of Habitation, nor for any Rent reserved upon any Lease of them, for Tithes ought to be paid of things which grow and renew year by year by the Act of God, *Regist.* 54. *b. F. N. B.* 53. *tit. Dismes* 16. and not for Dwelling-Houses, or Rents issuing out of Lands reserved, and created only, and meerly by the Act of the Party, and therefore in the City of *London* the Parsons have two Shillings eight Pence in the Pound, *&c.* in the name of Tithes; but the same is by Decree made, *Anno* 1535. which is enacted and confirmed by Authority of Parliament *Anno* 37 *H.* 8. *cap.* 12. But St. *Martins le Grand* is not included within the said Decree and Act; for though the same is within *London* yet 'tis not of it, and therefore it remaineth at the Common Law. And in 30 *E.* 3. *fol.* 1. *a.* & 38 *E.* 3. *fol.* 13. By *Finchden* it is said, that the Profits of the Churches in *London* are the Oblations and Obventions. But it was resolved by the whole Court, that a Consultation should be granted, for it may have a lawful beginning, for it may be, that for all the Tithes of the Land upon which the Houses are built. This *Modus Decimandi* hath time out of mind been paid, and although the same be after built, that shall not take away the Right of the Parson in such Case; and because it might have a lawful beginning and the same hath been used time out of mind, *&c.* for this Cause it was resolved that a Consultation should be granted. It was also resolved, that for this Customary Payment of Monies he might sue in the Ecclesiastical Court, because it is in the nature of Tithes, *viz. Modus Decimandi*, and every ancient City and Borough hath for the most part such Custom *de modo Decimandi* for their Houses for the maintenance of their Parsons. And as to the Opinions in 30 *E.* 3. & 38 *E.* 3. it was said, that *Obventio dicitur ab obveniendo*, and includeth Oblations, Rents, and other Revenues, which may well agree with the resolution before, and a Consultation was granted, *Mich.* 11 *Jac. C. B. Dr. Grant's Case*, 11 *Co.* 16.

And afterwards Doctor *Lyefield*, Parson of St. *Clements* without *Temple-Bar*, which is also out of *London* and the Liberty thereof, sued for Tithes of certain Stables, and libelled, that by common Right, and by Prescription time out of mind, the Parsons there used to have a *Modus Decimandi* for the Houses,

Houſes, Stables and Buildings, that is to ſay, after the rate of the tenth part of the yearly Rent, or Value of the ſame, and upon this Surmiſe a Prohibition was granted; but the Caſe being after moved for the Defendant, and upon urging Dr. *Grant's* Caſe, it was ordered by the Court, that they ſhould declare upon the Prohibition and ſo bring the Matter to be determined judicially by the Court, *Dr. Leyfield* v. *Tiſdal*, *Hobart p.* 11. alſo the Proviſo in the Statute of 2 & 3 *E.* 6. *cap.* 13. doth ſuppoſe that ſuch *Modus* may be, which is this: **Provided always, and be it enacted by the authority aforeſaid, that this Act, or any thing therein contained, ſhall not extend in any wiſe to the Inhabitants of the City of** London **and** Canterbury, **and the Suburbs of the ſame, nor to any other Town or place that hath uſed to pay their Tithes by their Houſes, otherwiſe then they ought or ſhould have done before the making of this Act; any thing contained in this Act to the contrary in any wiſe notwithſtanding.** But it is ſaid to be ruled, *Trin.* 31 *Eliz. in the Lady Greſhams Caſe*, where one preſcribed to pay yearly by the Hands of two Perſons inhabiting in ſuch Houſes four Pence to the Vicar, in ſatisfaction of all Tithes, that the Preſcription was not good, for the Houſes may decay or none may live in them, ſo nothing ſhould be paid, *Trin.* 3 *Eliz. B. R. Perry* v. *Sean*, 3 *Cro.* 139. Yet if a Cuſtom be, that the Inhabitants of a Pariſh ſhall pay in full ſatisfaction of all Tithes after the rate of the tenth part of the yearly Rent or Value of their Land and Houſes whilſt any ſhall remain there, it is good; for in ſuch Caſe the Rent of the Houſe with the Land is but the meaſure of the Rate to be paid in Mony. But a Suggeſtion that all the Occupiers of Land within ſuch a Vill have uſed to pay 2 *s.* 6 *d.* in full of all the Tithes of the ſaid Vill, was held by the Court not to be good, there being no remedy to compel any that refuſe to contribute; but if it had been that *quilibet Occupator* had uſed to pay, it had been good, *Mich.* 19 *Car.* 2. 2 *Keb.* 280. So a Cuſtom that all Occupiers and Tenants that are Inhabitants in any place out of the Pariſh, ſhall pay to the Vicar 4 *d.* for every Acre, was held an unreaſonable Cuſtom, not being fixed to the Land, nor to any perſon certain, *Mich.* 15 *Car.* 2. 1 *Keb.* 602.

But the Tithes of Houſes in *London* are ſetled by Statute Law, for it hath been Enacted as followeth: **Where of late time contention, ſtrife and variance hath riſen and grown within the City of** London, **and the Liberties of the ſame, between the Parſons, Vicars and Curates of the ſaid City, and the Citizens and Inhabitants of the ſame, for and concerning the payment of Tithes, Oblations and other Duties within the ſaid City and Liberties; for appeaſing whereof a certain Order and Decree was made thereof by the moſt Reverend Father in God,** Thomas **Archbiſhop of** Canterbury, **Metropolitan, Chief Primate of all** England, Thomas Audley **Knight, Lord** Audley of Walden, **and then Lord Chancellor of** England, **now deceaſed, and other of the Kings Majeſty's moſt hononourable Privy Council, and alſo the King's Letters Patents and Proclamation was made thereof, and directed to the ſaid Citizens concerning the ſame; whereupon it was after enacted in the Parliament holden at** Weſtminſter **by Prorogation the fourth day of** February **in the xxvij year of the Kings Majeſty's moſt noble Reign, by authority of the ſame Parliament, that the Citizens and the Inhabitants of the ſame City ſhould at** Eaſter **then next coming, pay unto the Curates of the ſaid City and Suburbs, all ſuch and like Sums of Money for Tithes, Oblations and other Duties, as the ſaid Citizens and the Inhabitants by the order of the ſaid late Lord Chancellor, and other the King's moſt honourable Council, and the King's ſaid Proclamation, paid or ought to have paid by force and vertue of the ſaid Order at** Eaſter, **which was in the year of**

our

our Lord God, M. D. XXXV. and the same payments so to continue from time to time, until such time as any other Order or Law should be made, published, ratified and confirmed by the King's Highness, and the two and thirty persons by his Grace to be named, as well for the full establishment concerning the payment of all Tithes, Oblations and other duties of the Inhabitants within the said City, Suburbs and Liberties of the same, as for the making of other Ecclesiastical Laws of this Realm of England; and that every person denying to pay, as is aforesaid, should by the Commandment of the Mayor of London for the time being, be committed to Prison, there to remain until such time as he or they should have agreed with the Curate or Curates for their said Tithes, Oblations and other Duties, as is aforesaid, as in the said Act more plainly appeareth: Sithen which Act divers variances, contentions and strifes are newly risen and grown between the said Parsons, Vicars and Curates, and the said Citizens and Inhabitants touching the payment of the Tithes, Oblations and other duties, by reason of certain words and terms specified in the said Order, which are not so plainly and fully set forth, as is thought convenient and meet to be: for appeasing whereof, as well the said Parsons, Vicars and Curates, as the said Citizens and Inhabitants have compromitted and put themselves to stand to such Order and Decree touching the Premisses, as shall be made by the said Right Reverend Father in God, Thomas Archbishop of Canterbury, Metropolitan and Primate of England, the Right honourable Sir Thomas Wryothesly Knight, Lord Wryothesly, and Lord Chancellor of England, the Right honourable Thomas Duke of Norfolk, Lord Treasurer of England, the Right honourable Sir William Paulet Knight, Lord St. John, Lord President of the Council, and Lord great Master of the King's most honourable Houshold, the Right honourable Sir John Russel Knight, Lord Russel and Lord Privy Seal, the Right honourable Edward Earl of Hertford, Lord great Chamberlain of England, the Right honourable John Vicount Lisle, High Admiral of England, Sir Richard Lister Knight, Chief Justice of England, Sir Edward Montague Knight, Chief Justice of the Common Bench at Westminster, and Sir Roger Cholmely Knight, Chief Baron of the Exchequer, for a final end and conclusion to be had and made touching the Premisses for ever. And to the intent to have a full peace and perfect end between the said Parties, their Heirs and Successors touching the said Tithes, Oblations, and other Duties for ever, Be it enacted by authority of this present Parliament, that such end, order and direction, as shall be made, decreed and concluded by the fore-named Archbishops, Lords and Knights, or any six of them, before the first day of March next ensuing, of, for and concerning the payments of the Tithes, Oblations, and other duties within the said City, and the Liberties of the same, and enrolled in the King's High Court of Chancery of Record, shall stand, remain and be as an Act of Parliament, and shall bind as well all Citizens and Inhabitants of the said City and Liberties for the time being, as the said Parsons, Vicars, Curates and their Successors for ever, according to the effect, purport and intent of the said Order and Decree so to be made and enrolled; and that every person denying to pay any of his or their Tithes, Oblations or other duties contrary to the said Decree to be made, shall by the Commandment of the Mayor of London for the time being, and in his default or negligence, by the Lord Chancellor of England for the time being, be comitted to prison, there to remain till such time as he or they have agreed with the Curate and Curates for his or their said Tithes, Oblations and other duties, as is aforesaid.

The

The Decree.

As touching the payment of Tithes in the City of London and the Liberties of the ſame, It is fully ordered and decreed by the moſt Reverend Father in God, Thomas Archbiſhop of Canterbury, Primate and Metropolitan of England, Thomas Lord Wryotheſly, Lord Chancellor of England, William Lord St. John, Preſident of the Kings Majeſty's Council, and Lord great Maſter of his Highneſs's Houſhold, John Lord Ruſſel, Lord Privy Seal, Edward Earl of Hertfort, Lord great Chamberlain of England, John Viſcount Liſle, High Admiral of England, Richard Liſter Knight, Chief Juſtice of England, and Roger Cholmely Knight, Chief Baron of his Graces Exchequer, this preſent xxiv. day of February, Anno Domini, ſecundum curſum & computationem Eccleſiæ Anglicanæ, milleſimo quingenteſimo quadrageſimo quinto, according to the Statute in ſuch caſe lately provided. That the Citizens and Inhabitants of the ſaid City of London, and Liberties of the ſame, for the time being, ſhall yearly without fraud or covin for ever pay their Tithes to the Parſons, Vicars and Curates of the ſaid City, and their Succeſſors for the time being, after the rate hereafter following, that is to wit, of every ten ſhilling Rent by the year of all and every Houſe and Houſes, Shops, Ware-houſes, Cellars, Stables, and every of them within the ſaid City and Liberty of the ſame, ſixteen pence ob. And of every twenty ſhillings Rent by the year of all and every ſuch Houſe and Houſes, Shops, Ware-houſes, Cellars and Stables, and every of them within the ſaid City and Liberties, two ſhillings and nine pence. And ſo above the Rent of twenty ſhillings by the year, aſcending from ten ſhillings to ten ſhillings according to the rate aforeſaid.

Item, That where any Leaſe is, or ſhall be made of any Dwelling-Houſe or Houſes, Shops, Ware-houſes, Cellars, or Stables, or any of them, by fraud or covin, reſerving leſs Rent then hath been accuſtomed, or is, or that any ſuch Leaſe ſhall be made without any Rent reſerved upon the ſame, by reaſon of any fine or income paid beforehand, or by any other fraud or covin: that then in every ſuch caſe the Tenant or Fermor, Tenants or Fermors thereof ſhall pay for his or their Tithes of the ſame, after the rate aforeſaid, according to the quality of ſuch Rent or Rents, as the ſame Houſe or Houſes, Shops, Ware-Houſes, Cellars or Stables, or any of them were laſt letten for without fraud or covin, before the making of ſuch Leaſe.

Item, That every Owner or Owners, Inheritor or Inheritors of any Dwelling-Houſe or Houſes, Shops, Ware-houſes, Cellars or Stables, or any of them, within the ſaid City and Liberties, inhabiting, or occupying the ſame himſelf, or themſelves, ſhall pay after ſuch Rate or Tithes as is abovеſaid, after the quantity of ſuch yearly Rent as the ſame was laſt letten for, without fraud or covin.

Item, If any perſon or perſons have taken, or hereafter ſhall take any Meaſe or Manſion place by Leaſe, and the taker or takers thereof, his or their Executors or Aſſigns, doth or ſhall inhabit in any part thereof, and have or hath within eight years laſt paſt before this order, or hereafter will or ſhall let out the reſidue of the ſame; that then in ſuch caſe the principal fermor or fermors, or firſt taker or takers thereof, his or their Executors or Aſſigns, ſhall pay his or their Tithes after the rate aforeſaid, according to his or their quantity therein, and that his or their Executors, Aſſignee or Aſſignees, ſhall pay his or their Tithes after the rate abovеſaid, according to the quantity of their Rent by year.

And

And that if any person or persons have, or shall take divers Mansion Houses, Shops, Ware-houses, Cellars or Stables, in one Lease, and letteth, or shall let out one or more of the said Houses, and keepeth or shall keep one or more in his or their own hands, and inhabiteth or inhabit in the same; that then the said taker or takers, and his or their Executors or Assigns shall pay his or their Tithes after the rate abovesaid, according to the quantity of the yearly rent of such Mansion Houle or Houses, retained in his or their hands: And that his assignee or assignees, of the residue of the said Mansion Houle or Houses, shall pay his or their Tithes after the rate abovesaid, according to the quantity of their yearly Rents.

Item, If such fermor or fermors, or his or their assigns of any Mansion-House or Houses, Ware-houses, shops, cellars or stables, hath at any time within eight years last past, or shall hereafter let over all the said Mansion House or Houses contained in his or their Lease, to one person, or to divers persons: that then the inhabitants, lessees or occupiers of them, and every of them, shall pay their Tithes, after the Rate of such Rents as the inhabitants, lessees or occupiers, and their assignee or assignees have been or shall be charged withall, without fraud or covin.

Item, If any Dwelling House within eight years last past, was or hereafter shall be converted into a Ware-Houle, Store-house, or such like, or if a Ware-House, Store-house or such like, within the said eight years, was, or thereafter shall be converted into a Dwelling Houle: that then the occupiers thereof shall pay Tithes for the same, after the Rate above declared of Mansion Houle Rents.

Item, That where any person shall demise any Dye-Houle or Brew House, with implements convenient and necessary for Dying or Brewing, reserving a Rent upon the same, as well in respect of such implements, as in respect of such Dye-Houle or Brew Houle: that then the Tenant shall pay his Tithes after such Rate as is abovesaid, the third peny abated: And that every principal Houle or Houses, with Key or Wharf, having any Crane or Gibit belonging to the same, shall pay after the like rate of their Rents, as is aforesaid, the third peny abated; and that other Wharfs belonging to Houses having no Crane or Gibit, shall pay for his Tithes as shall be payed for Mansion Houses, in form aforesaid.

Item, That where any Mansion-house with a shop, stable, ware-house, wharf with crane, timber-yard, teinter-yard, or garden belonging to the same, or as parcel of the same, is or shall be occupied together, that if the same be hereafter severed or divided, or at any time within eight years last past were severed or divided: that then the fermor or fermors, occupier or occupiers thereof, shall pay such Tithes as is abovesaid, for such shops, stable, ware-Houses, wharf with crane, timber-yard, teinter-yard, or garden aforesaid, so severed or divided, after the Rate of their several Rents thereupon reserved.

Item, That the said citizens and inhabitants shall pay their Tithes quarterly, that is to say, at the Feast of Easter, the Nativity of St. John Baptist, the Feast of St. Michael the Archangel, and the Nativity of our Lord, by even portions.

Item, That every Housholder paying ten shillings Rent or above, shall for him or her self, be discharged of their four Offering days: But his wife, children, servant or others of their family, taking their Rights of the Church at Easter, shall pay two pence for their four Offering days yearly.

Provided always, and it is decreed, That if any House or Houses which hath been or hereafter shall be letten for ten shillings Rent by year, or more, be, or hath at any time within eight years last passed, or hereafter shall be divided

vided and leased into small parcels or members yielding less yearly Rents than ten shillings by year; that then the Owner or Owners, if he or they dwell in any part of such House, or else the principal Lessee and Lessees, if the Owner or Owners do not dwell in some part of the same, shall from henceforth pay for his or their Tithes after such rate of Rent as the same House was accustomed to be letten for, before such division or dividing into parts or members: And the Under-fermor and Fermors, Lessee and Lessees to be discharged of all Tithes for such small parcels, parts or members, rented at less yearly Rent than ten shillings by year without fraud or covin, paying two pence apiece yearly for four Offering-days.

Provided alway, and it is decreed, That for such Gardens as appertain not to any mansion house, and which any person or persons holdeth or shall hold in his or their hands, for pleasure, or to his own use: that the then person so holding the same, shall pay no Tithes for the same: But if any person or persons, which holdeth, or shall hold any such garden, containing half an acre or more, doth or shall make any yearly profit thereof by way of sale; that then he or they shall pay Tithes for the same, after such rate of his Rent, as is herein first above specified.

Provided also, That if any such gardens now being of the quantity of half an acre, or more, be hereafter by fraud or covin divided into less quantity or quantities, then to pay Tithe according to the Rate abovesaid.

Provided alway, That this Decree shall not extend to the houses of great men, or noble men, or noble women, kept in their own hands, and not letten for any Rent, which in times past hath paid no Tithes, so long as they shall so continue unletten: Nor to any Halls of Crafts or Companies, so long as they be kept unletten, so that the same Halls in times past have not used to pay any Tithes.

Provided always, and it is decreed, That this present Order and Decree shall not in any wise extend to bind or charge any sheds, stables, cellers, timber-yards, ne tinter-yards, which were never parcel of any dwelling-house, ne appertaining or belonging to any dwelling-house, ne have accustomed to pay any Tithes; but that the said Citizens and Inhabitants shall thereof be quit of payment of any Tithes, as it hath been used and accustomed.

Provided also, and it is decreed, That where less sum than after sixteen pence half peny in the ten shillings Rent, or less sum than two shillings nine pence in the twenty shillings Rent, hath been accustomed to be paid for Tithes; that then in such places the said Citizens and Inhabitants shall pay but only after such rate as hath been accustomed.

Item, It is also decreed, That if any variance, controversie or strife, do or shall hereafter arise in the said City for Non-payment of any Tithes; or if any variance or doubt arise upon the true knowledge or division of any Rent or Tithes, within the Liberties of the said City, or of any extent or assessment thereof, or if any doubt arise upon any other thing contained within this Decree; that then upon complaint made by the party grieved to the Mayor of the City of London for the time being, the said Mayor by the advice of Counsel, shall call the said parties before him, and make a final end in the same, with costs to be awarded by the discretion of the said Mayor and his Assistants, according to the intent and purport of this present Decree.

And if the said Mayor make not an end thereof within two months after complaint to him made, or if any of the said parties find themselves agrieved; that then the Lord Chancellor of England for the time being, upon complaint to him made within three months then next following, shall make an end in

the ſame, with ſuch coſts to be awarded as ſhall be thought convenient, according to the intent and purport of the ſaid Decree.

Provided always, That if any perſon or perſons take any tenement for a leſs Rent than it was accuſtomed to be letten for, by reaſon of great ruine or decay, brenning, or ſuch like occaſions or miſfortunes, that then ſuch perſon or perſons, his Executors or Aſſigns, ſhall pay Tithes only after the rate of the Rent reſerved in his or their Leaſe, and none otherwiſe, as long as the ſame Leaſe ſhall endure. Stat. 37 H. 8. cap. 12.

Upon motion for a Prohibition, the Caſe upon this Statute was this; that the yearly Rent of an Houſe in *London*, at the time of the Decree made, and after, was Five Pounds, and a new Leaſe was made of the ſaid Houſe, rendring the Rent of Five Pounds *per Annum*; and over that a great Income or Fine, which was Covenanted and Agreed to be paid yearly the ſame day that the Rent was paid, as a ſumm in groſs, but ſo much Rent might have been reſerved for the ſaid Houſe, as both the ſaid Five Pounds Rent reſerved, and the ſumm in groſs amounted unto, which Reſervation and Covenant, *&c.* were made to defraud the Parſon of the true Rent of the ſaid Houſe, which he ought to have had according to the true intent of the ſaid Decree. In this Caſe it was reſolved by the whole Court of *C. B.* If ſo much Rent be reſerved as was accuſtomed to be paid at the making of the Decree in 37 *H.* 8. (whatſoever Fine or Income be paid) that the Parſon can averr no fraud, in the reſervation of that Rent, for the words of the Decree are: **Where any Leaſe is or ſhall be made of any dwelling Houſe, &c. by fraud or covin, in reſerving leſs Rent than hath been accuſtomed or is paid, &c.** So as if the accuſtomed Rent be reſerved, no fraud can be alledged; for the fraud by the Decree is, when leſſer Rent than uſual is reſerved; or if no Rent at all be reſerved, that then Tyth ſhall be paid according to the Rent that then was laſt before reſerved, for ſo are the words of the Decree; which Decree conſiſteth of four parts, *viz. Firſt*, Where the accuſtomed Rent, *&c.* was reſerved; *Secondly*, Where the Rent was increaſed, there the Tythes ſhould be paid according to the whole Rent; *Thirdly*, Where leſs Rent was reſerved; *Fourthly*, Where no Rent was reſerved, but had been formerly reſerved; but in this Caſe the Parſon confeſſeth that the accuſtomed Rent was reſerved, and therefore had no cauſe of Suit.

Secondly, It was reſolved, That ſuch Houſes as were never letten to Farm, but inhabited by the Owner, is *Caſus Omiſſus*, and ſhall pay no Tythes by force of the Decree.

Thirdly, It was reſolved, That where the Decree ſaith, **Where no Rent is reſerved by reaſon of any Fine or Income paid before hand**; albeit, no Fine or Income be paid, yet if no Rent be reſerved, the Parſon ſhall have his Tythes according to the Decree, for that is put but for an Example, or Cauſe, why no Rent is reſerved, and whether any Fine or Income were paid or no, is not material as to the Parſon, and a Probibition was Awarded to the Court of the Chancellor of the Biſhop of *London* to ſtay the Plaintiff's Suit there, *Mich.* 5 *Jac. Skidmore and Eire* v. *Bell, Parſon of St. Michael Queenhith*, 2 *Inſt.* 659.

And Note, That it hath been held by the Juſtices, that a Houſe in *London* which was part of the poſſeſſions of a Priory, that was diſcharged of paying Tythes of their poſſeſſions, was by the aforeſaid Statute charged with Tythes, according to the Ordinance there; for before that Statute, no Dwelling-houſe was chargeable with Tythes, becauſe, no profit ariſeth of it, and only Noblemens Houſes are excepted, *Paſch.* 34 *Eliz. B. R. Green* v. *Piper*, 3 *Cro.* 276 *and Moor* 912.

Alſo

Alſo it hath been reſolved, that a Rent for half a year, and afterwards for another half year, is a yearly Rent within the meaning of the Decree; and that as the ſame was laſt let, is not intended laſt before the Decree, but before the demand of the Tythes; yet if Leſſee for life leaſeth for years to *A.* reſerving Rent, that Rent reſerved by the Leſſee ſhall not conclude and bind him in the Reverſion to pay Tythes according to that Rule, *Hill.* 5 *Jac. B. R. Doctor Mendhouſe* v. *Doctor Taylor*, *Noy* 130.

If a Suit be brought in the Spiritual Court for the Tythes of the Rent of Houſes in *London*, a Prohibition lies, for by the *Statute* 37 *H.* 8. *cap.* 12. the Suit ought to be before the Mayor of *London*, by complaint in Writing, and not by word of Mouth only, in nature of a *Monſtrans de Droit*, declaring all the Title; and if the Suit be in the Spiritual Court for Tythes in *London*, the Court of *King's-Bench* may grant a Prohibition, and yet that Court hath not power to meddle with Tythes in *London*, *Hill* 5 *Jac. B. R. Doctor Mendhouſe* v. *Doctor Taylor*, *Noy* 130 *Skidmore and Eire* v. *Bell*, 2 *Inſt.* 659.

Notwithſtanding this Settlement, divers Preſcriptions for the payment of leſſer Rates than the Parſons might require by the ſaid Settlement (as to pay Ten Shillings for the Tyth of an Houſe, although that the Rent thereof was Fourty Pounds *per Annum* or more) have been gained, and allowed. But upon the occaſion of the late dreadful Fire, as to the Churches thereby conſumed, another Statute was made to make the maintainance of the Miniſters thereof more certain, which is as followeth.

Whereas the Tithes in the City of London **were levied and paid with great Inequality, and are ſince the late dreadful Fire there, in the Rebuilding of the ſame, by taking away of ſome Houſes, altering the Foundations of many, and the new erecting of others, ſo diſordered, that in caſe they ſhould not for the time to come be reduced to a certainty, many Controverſies and Suits of Law might thence ariſe; Be it enacted by the King's moſt Excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, that the annual certain Tithes of all and every Pariſh and Pariſhes within the ſaid City of** London **and the Liberties thereof, whoſe Churches have been demoliſhed, or in part conſumed by the late Fire, and which ſaid Pariſhes by vertue of an Act of this preſent Parliament, Entituled,** An Additional Act for the Rebuilding of the City of *London*, Uniting of Pariſhes, and Rebuilding of the Cathedral and Parochial Churches within the ſaid City, **remain and continue ſingle, as heretofore they were, or are by the ſaid Act annexed or united into one Pariſh reſpectively, ſhall be as followeth; that is to ſay, the annual certain Tithes, or ſum of Mony in lieu of Tithes.**

	l.	s.	d.
Of the Pariſh of Alhallows Lumbard-Street	110	00	00
Of Saint Bartholomew-Exchange	100	00	00
Of St. Bridget *alias* Brides	120	00	00
Of St. Bennet Finck	100	00	00
Of St. Michaels Crooked-Lane	100	00	00
Of St. Chriſtopher	120	00	00
Of St. Dyonis Back-Church	120	00	00
Of St. Dunſtan in the Eaſt	200	00	00
Of St. James Garlick-hith	100	00	00
Of St. Michael Cornhil	140	00	00
Of St. Michael Baſſiſhaw	132	11	00
Of St. Margaret Lothbury	100	00	00

	l.	s.	d.
Of St. Mary Aldermanbury	150	00	00
Of St. Martin Ludgate	160	00	00
Of St. Peter Cornhil	110	00	00
Of St. Stephen Coleman-Street	110	00	00
Of St. Sepulchre	200	00	00
Of Alhallows Bread-ſtreet, and St. John Evangeliſt	140	00	00
Of Alhallows the Great, and Alhallows the Leſs	200	00	00
Of St. Alban Wood-ſtreet, and St. Olaves Silverſtreet	170	00	00
Of St. Anne and Agnes, and St. John Zachary	140	00	00
Of St. Auguſtine, and St. Faith	172	00	00
Of St. Andrew Wardrobe, and St. Anne Black-Friars	140	00	00
Of St. Antholin, and St. John Baptiſt	120	00	00
Of St. Bennet Grace Church, and St. Leonard Eaſtcheap	140	00	00
Of St. Bennet Pauls-Wharf, and St. Peters Pauls Wharf	100	00	00
Of Chriſt Church, and St. Leonard Foſter Lane	200	00	00
Of St. Edmond the King, and St. Nicholas Acons	180	00	00
Of St. George Butolph-Lane, and St. Butolph Billinſgate	180	00	00
Of St. Lawrence Jury, and St. Magdalen Milk-Street	120	00	00
Of St. Magnus, and St. Margaret New Fiſh-ſtreet	170	00	00
Of St. Michael Royal, and St. Martin Vintry	140	00	00
Of St. Matthew Fryday-ſtreet, and St. Peter Cheap	150	00	00
Of St. Margaret Pattons, and St. Gabriel Fenchurch	120	00	00
Of St. Mary at Hill, and St. Andrew Hubbard	200	00	00
Of St. Mary Woolnoth, and St. Mary Woolchurch	160	00	00
Of St. Clement Eaſtcheap, and St. Martin Orgars	140	00	00
Of St. Mary Abchurch, and St. Lawrence Pountny	120	00	00
Of St. Mary Aldermary, and St. Thomas Apoſtles	150	00	00
Of St. Mary le Bow, St. Pancras Soper-Lane, and Alhallows Hony-Lane	200	00	00
Of St. Mildred Poultry, and St. Mary Cole-Church	170	00	00
Of St. Michael Woodſtreet, and St. Mary Staining	100	00	00
Of St. Mildred Bredſtreet, and St. Margaret Moſes	130	00	00
Of St. Michael Queenhith, and Trinity	160	00	00
Of St. Magdalen Old Fiſhſtreet, and St. Gregory	120	00	00
Of St. Mary Sommerſet, and St. Mary Mounthaw	110	00	00
Of St. Nicholas Coleabby, and St. Nicholas Olives	130	00	00
Of St. Olive Jewry, and St. Martin Ironmonger-Lane	120	00	00
Of St. Stephen Walbrook, and St. Bennet Sherehogg	100	00	00
Of St. Swythin, and St. Mary Bothow	140	00	00
Of St. Vedaſt *alias* Foſters, and St. Michael Quern	160	00	00

Which reſpective Sums of Mony to be paid in lieu of Tithes within the ſaid reſpective Pariſhes, and aſſeſſed as herein after is directed, ſhall be, and continue to be eſteemed, deemed and taken to all intents and purpoſes, to be the reſpective certain annual maintenance (over and above Glebes and Perquiſites, Gifts and Bequeſts to the reſpective Parſon, Vicar and Curate of any Pariſh for the time being, or to his or their reſpective Succeſſors, or to other perſons for his or their uſe) of the ſaid reſpective Parſons, Vicars and Curates who ſhall be legally inſtituted, induced and admitted into the reſpective Pariſhes aforeſaid.

And

And that the ſaid ſeveral Sums of Mony for Tithes, may be more equally aſſeſſed upon the ſeveral Houſes, Buildings, and other Hereditaments whatſoever, within all the ſaid reſpective Pariſhes; Be it enacted by the authority aforeſaid, That the Alderman of ſuch reſpective Ward or Wards within the ſaid City, wherein any of the ſaid Pariſhes reſpectively lie, and his or their Deputy or Deputies, and the Common-council-men of ſuch reſpective Ward or Wards, with the Churchwardens, and one or more of the Pariſhioners of ſuch reſpective Pariſh, wherein the Maintenance aforeſaid is reſpectively to be aſſeſſed, to be nominated by ſuch reſpective Alderman, Deputy, Common-council-men, and Churchwardens, or any five of them, whereof the Alderman or his Deputy to be one, ſhall at ſome convenient and ſeaſonable time before the twentieth day of May, in the year of our Lord God, One thouſand ſix hundred and ſeventy one, aſſemble and meet together in ſome convenient place within every of the reſpective Pariſhes, in ſuch reſpective Ward wherein the Maintenance aforeſaid is to be aſſeſſed; And they or the major part of them ſo aſſembled, ſhall proportionably aſſeſs upon all Houſes, Shops, Ware-houſes, and Cellars, Wharfs, Keys, Cranes, Water-houſes, (which Water-houſes ſhall pay in their reſpective Pariſhes where they ſtand, and not elſewhere) and Tofts of Ground (remaining unbuilt) and all othe Hereditaments whatſoever (except Parſonage and Vicarage Houſes) the whole reſpective Sum by this Act appointed, or ſo much of it as more than what each Impropriator is by this Act enjoyned reſpectively to allow, in the moſt equal way that the ſaid Aſſeſſors according to the beſt of their Judgments can make it; which ſaid Aſſeſſments ſhall be made and finiſhed before the four and twentieth day of July then next enſuing.

And be it farther enacted by the authority aforeſaid, That if any variance or doubt ſhall happen or ariſe about any Sum ſo aſſeſſed, as aforeſaid, or that any Pariſhioner or Pariſhioners, or Owner or Owners of any Houſe, Shop, Ware-houſe or Cellar, Wharf, Key, Crane, Water-houſe, Toft of Ground, or other Hereditament within any the ſaid Pariſhes, ſhall find himſelf or themſelves agrieved by the aſſeſſing of any Sum or Sums of Mony, in manner and form aforeſaid, that then upon Complaint made by the party or parties agrieved, to the Lord Mayor and Court of Aldermen of the ſaid City, within fourteen days after notice given to the party or parties aſſeſſed, of ſuch Aſſeſſments made, the ſaid Lord Mayor and Court of Aldermen ſummoning as well the party or parties agrieved, as the Alderman and ſuch others as made the Aſſeſſement, ſhall hear and determine the ſame in a ſummary way, and the Judgment by them given ſhall be final, and without Appeal.

Provided always, and be it enacted, That any Aſſeſſment or Rate to be made or laid by virtue of this Act, ſhall or may in all or any the Pariſhes aforeſaid, in like manner be reviewed, or altered, or laid again within three Months after the twenty fourth day of June, One thouſand ſix hundred and ſeventy four, according to the aforeſaid Rules, and any ſuch Aſſeſſment or Rate, ſhall or may be again reviewed, or re-aſſeſſed within three Months after the twenty fourth day of June, in the year of our Lord, One thouſand ſix hundred eighty one; and that all and every ſuch new Aſſeſſment and Rate ſhall be liable to the like Appeals, as aforeſaid, and ſhall be collected, levied and paid as any other Aſſeſſment or Rate mentioned in this Act, may or ought to be.

And if the ſaid Alderman, Deputy, Common-council-men, and Pariſhioner or Pariſhioners appointed, as aforeſaid, ſhall after Summons and Requeſt made in that behalf unto them, by the Lord Mayor and Court of Aldermen, or the Incumbent or Incumbents of any of the ſaid reſpective Pariſh

riſh or Pariſhes, refuſe and neglect to meet and make ſuch Aſſeſſments, as aforeſaid, then it ſhall and may be lawful to, and for ſuch perſon or perſons as ſhall be thereunto authorized and required by the ſaid Lord Mayor and Court of Aldermen, to make ſuch Aſſeſſment, as by the ſaid Aldermen, Deputy, Common-council-men, Churchwardens, Pariſhioner or Pariſhioners aforeſaid, ſhould or ought to have been made.

And be it farther enacted by the authority aforeſaid, That the ſaid Aſſeſſors within ten days after ſuch Aſſeſſments made, and the reſpective Appeals (if any be) determined, ſhall make three Tranſcripts thereof in Parchment, containing the reſpective Sums to be payable, or appointed to be paid out of all and every the Premiſſes within ſuch reſpective Pariſh, and ſubſcribe the ſame under their Hands, and within twenty days after ſuch Subſcription as aforeſaid, one of the ſaid Tranſcripts ſhall be returned to the Lord Mayor of the City of London, to be kept and preſerved by the ſaid Lord Mayor, in and among the Records of the ſaid City, for a perpetual memorial thereof; and another of the ſaid Tranſcripts ſhall be returned into the Regiſtry of the Lord Biſhop of London, to be kept and preſerved, as aforeſaid; and the other of the ſaid Tranſcripts ſhall remain and be kept in the Veſtry of ſuch reſpective Pariſh, for a perpetual memorial, as aforeſaid.

And for the ſurer and better payment of the ſaid reſpective Sums of Mony ſo to be aſſeſſed and taxed towards the raiſing of the ſaid Maintenance of the reſpective Parſons, Vicars and Curates of the ſaid reſpective Pariſhes, as aforeſaid; Be it farther enacted by the authority aforeſaid, That all and every ſuch reſpective Sum and Sums of Mony ſo to be aſſeſſed and taxed, as aforeſaid, towards the raiſing of the ſaid Maintenance of the ſaid reſpective Parſons, Vicars and Curates, of the ſaid reſpective Pariſhes, ſhall be paid to the ſaid reſpective Parſons, Vicars and Curates, and their Succeſſors reſpectively, at the four moſt uſual Feaſts, (that is to ſay, at the Annunciation of the Bleſſed Virgin Mary; the Nativity of St. John Baptiſt, the Feaſt of St. Michael the Archangel, and the Nativity of our Bleſſed Saviour, or within fourteen days after each of the Feaſts aforeſaid, by equal payments; the reſpective payments thereof to begin and commence only from ſuch time and times as the Incumbent or Incumbents of ſuch reſpective Pariſh ſhall begin to officiate or preach as Incumbent or Parſon in the reſpective Church belonging to the reſpective Pariſh, or in ſome other convenient place or places in ſuch reſpective Pariſh or Pariſhes, to be nominated or appointed by the Lord Biſhop of London for the time being, or by the Archbiſhop of Canterbury, in any place within his peculiars.

And in any Pariſh or Pariſhes where any Impropriations be, be it enacted by the authority aforeſaid, That all and every the Impropriator or Impropriators of any of the ſaid ſaid Pariſhes, ſhall pay and allow what really, and bona fide, they have uſed, and ought to pay and ſatisfie to the reſpective Incumbent of ſuch reſpective Pariſh, at any time before the ſaid late Fire, and the ſame ſhall be eſteemed and computed as part of the Maintenance of ſuch Incumbent; notwithſtanding this Act, or any Clauſe or Matter, or thing therein contained.

And be it farther enacted by the authority aforeſaid, That if any the Inhabitants in any reſpective Pariſh or Pariſhes as aforeſaid, ſhall, or do refuſe or neglect to pay to the reſpective Incumbents aforeſaid, of any of the ſaid reſpective Pariſhes, any Sum or Sums of Mony to him reſpectively payable, or appointed to be paid by this Act, or any part thereof, contrary to the true intent and meaning of this Act, (being lawfully demanded at the Houſe or Houſes, Wharf, Key, Crane, Cellar or other Premiſſes whereout the ſame is payable) that

that then it shall and may be lawful to and for the Lord Mayor of the City of London for the time being, upon Oath to be made before him of such refusal or neglect, to give and grant out Warrants for the Officer or person appointed to collect the same, with the assistance of a Constable in the day time, to levy the same Tithes or Sums of Mony so due, and in arrear and unpaid, by Distress and Sale of the Goods of the party or parties so refusing or neglecting to pay, restoring to the Owner or Owners, the Overplus of such Goods over and above the said Arrears of the said Monies so due and unpaid, and the reasonable Charges of making such Distress, which he is to deduct out of the Monies raised by Sale of such Goods.

Provided always, and be it enacted, That in case the Lord Mayor, or Court of Aldermen shall refuse or neglect to execute any of the respective powers to them by this Act granted, or to perform all and every such thing relating either to the assessing or levying of the respective Sums aforesaid, as they are by this Act authorized and required to perform, That then it shall and may be lawful for the Lord Chancellor, or Lord Keeper of the Great Seal of England for the time being, or any two or more of the Barons of his Majesty's Court of Exchequer, by Warrant or Warrants under his or their respective Hands and Seals, to do and perform what the said Lord Mayor and Court of Aldermen, according to the true intent or meaning of this present Act, might or ought to have done, and by such Warrant either to impower any person or persons to make their respective Assessments, as aforesaid, or to authorize the respective Officers or persons appointed to collect the Sums aforesaid, to levy the same by Distress and Sale of the Goods of any person or persons that shall refuse or neglect to pay the same in manner and form aforesaid.

Provided always, and be it enacted, That where any of the Parishes within the said City, have since the late Fire, by death or otherwise, become vacant, the surviving or remaining Incumbent of the other Parish thereto united, or therewith consolidated, shall have and enjoy, and have like remedy to recover the Tithes hereby setled to be paid, as if he had been actually presented, admitted, instituted and inducted into both the said Parishes, since the Union and Consolidation thereof.

Provided always, That no Court or Judge Ecclesiastical or Temporal shall hold Plea of, or for any Sum or Sums of Mony due and owing, or to be paid by vertue of this Act, or any part thereof, other than the persons hereby authorized to have Cognizance thereof: Nor shall it be lawful to or for any Parson, Vicar or Incumbent, to convent or sue any person or persons assessed as aforesaid, and refusing or neglecting to pay the same in any Court or Courts, or before any Judge or Judges, other than what are authorized and appointed by this Act, for the hearing and determining of the same, in manner aforesaid.

Provided always, That it shall and may be lawful to and for the Warden and Minor Canons of St. Paul's Church London, Parson and Proprietors of the Rectory of the Parish of St. Gregory, aforesaid, to receive and enjoy all Tithes, Oblations and Duties arising or growing due within the said Parish, in as large and beneficial manner as formerly they have, or lawfully might have done; any thing herein to the contrary notwithstanding. Stat. 22 & 23 Car. 2. cap. 15.

CHAP.

CHAP. XLVII.

The ſeveral ways and means Lands may be diſcharged of Tithes at Common Law. Of Real Compoſitions. Modus Decimandi, Non Decimandi, &c. *and if Glebe Lands ſhall pay Tithes.*

BY what hath been ſaid it appears, that Tithes *de Jure Communi* are not to be paid of the Earth or Land it ſelf, nor Houſes of Habitations, *&c.* erected upon Lands, but only of the Fruits of the Earth; and yet the Rule at this day is not general, that the tenth of the Fruits of all Lands here in *England* are to pay Tithes. For by the Law there are divers ways by which Lands ſtand diſcharged from the Payment of Tithes to any Perſon, as by real Compoſition, Preſcription, and Acts of Parliament. But where Lands are thus diſcharged from the Payment of Tithes, and the Parſon notwithſtanding ſuch diſcharge ſues for Tithes in kind, yet no Action of the Caſe lies againſt the Parſon for bringing ſuch Suit, for where ſuch Action was brought the Court conceived it would not lie, though *falſo*, *malitioſe* & *ſcienter* were put into the Declaration, the Suit being brought by the Parſon in a proper Court, *Mich.* 26 *Car.* 2. *B. R. Biſhop* v. - - - - 3 *Keble* 383. See *Hob.* 205, 206. 3 *Cro.* 836. 8 *E.* 4. 13. 1 *Rolls Abr.* 34. But if a Suit be brought in the Eccleſiaſtical Court to recover the Advowſon of a Church and alſo the Tithes, in ſuch Caſe the Patron may have an Action of the Caſe for ſuch unjuſt vexation, 1 *Rolls Abr.* 109. But if one ſue for Tithes in the Eccleſiaſtical Court, and the Defendant pleads payment, and hath two Witneſſes to prove it, upon which the Plaintiff diſcontinues his Suit, then one of the Witneſſes dies; then the Plaintiff knowing that the Defendant hath but one Witneſs to prove the ſaid Payment, and that one Witneſs is not ſufficient in the Eccleſiaſtical Court, brings a new Action for the ſame Tithes, ſuppoſing now that the Defendant cannot prove Payment of them, yet no Action lies againſt the Plaintiff for this Vexation, *Trin.* 43 *Eliz. Bray* v. *Pratridge*, 1 *Rolls Abr.* 101, 102.

Firſt, Lands may be diſchargrd from the Payment of Tithes by real Compoſition, *Regiſt. fol.* 38. *F. N. B. f.* 44. this is when an Agreement is made with the Parſon or Vicar, together with the aſſent of the Patron or Patrons and Ordinary, that certain Lands ſhall for the future be diſcharged from the Payment of Tythes in *Specie*, by reaſon of a Recompence agreed upon to be paid, or made to the Parſon, *&c.* in reſpect thereof in Mony, either as an entire Sum, or as a yearly Payment, or by Settlement of Lands upon the Incumbent and his Succeſſors for ever, or by doing ſome other thing that ſhall be of advantage to the Parſon or Vicar to whom the Right of Tithes doth otherwiſe belong, *Doctor and Student lib.* 2. *cap.* 55. *Mich.* 11 *Car. B. R. Sydown* v. *Holm*, *Jones p.* 368. *Paſch.* 17 *Car. B. R. Hitchcock* v. *Hitchcock*, *Marſh* 87. But then this Compoſition to make it binding as to the Succeſſors, is to be made either by Deed under Hand and Seal, or by Fine in the King's Courts, *Hobart* 176. and alſo it ought to be made by apt Words; for if the Words of the Contract be, *Inter ſe convenerunt*, this is not ſufficient to make it a real Compoſition to bind the Succeſſors, although that the Biſhop call it *Realis compoſitio*, for his calling of it ſo will not alter the Nature of it, but that it ſhall remain as a perſonal Agreement binding and obliging the Parties to it only

only, and ſhall not be extended to the Succeſſors, *Paſch.* 17 *Car. B. R. Hitchcock* v. *Hitchcock*, *Marſh p.* 87.

It was found by ſpecial Verdict, that the Abbey of *Fountain* of the Order of the *Ceſtercians* was before the Council of *Lateran* ſeiſed of the *Grange* of *S.* within the Prebend of *R.* and that betwixt the years of 1216 and 1261. a Compoſition was made between the Abbot and Convent and the Prebend of the ſaid Prebendary, that the Abbot and Convent ſhould for ever be free from the payment of any Tithes for their Lands, which they tilled at their own charge within their ſaid *Grange*, *Anno Domini*, 1216. and that they ſhould pay Tithes for all other Lands there and elſewhere, and that the ſaid Abbot, *&c.* ſhould pay annually to the ſaid Prebend and his Succeſſors the Sum of five Marks; the Verdict further found that *Anno Domini* 1359. another Compoſition was made betwixt them, reciting the former (but they do not find, that it was confirmed by the Patron and Ordinary) and by this later Compoſition the Prebend and his Succeſſors were to have their Election for all times to come yearly, either to receive Tithes in kind of Corn or Grain ariſing within the places aforeſaid, as well of Lands in the hands of the Abbot, as in the hands of the Tenants, or elſe five Marks to be paid in lieu thereof, ſo as ſuch Election was notified to the Abbot or any of the Monks, *&c.* in the preſence of a Procter, or of two good Men, and when no notice was given the Prebend to be content with the five Marks, *&c.* In this Caſe the Court were of Opinion, that the ſecond Compoſition did not affect the Succeſſors of the Prebend, and therefore the Abbot was not bound by it. (The Reaſon ſeems to be, becauſe by the firſt Compoſition, the Prebend was bound only *quamdiu propriis manibus*, *&c.* and by the ſecond Compoſition the five Marks go in Recompence of all, whether *in propriis manibus* or in the Hands of Tenants;) *Secondly*, The Court held that the power of Election is gone, becauſe it cannot be made according to the Compoſition, and that therefore the firſt Compoſition ſhould ſtand *quoad terras in propriis manibus*, and for the others, Tithes in kind may be taken as before, and Judgment was given accordingly, *Mich.* 16 *Car.* 2. *in Scaccar. Sir William Ingolsby Bar.* v. *Robert Wivel and John Ullithorn*, *Hardres* 381. After the Compoſition is duly and firmly made, if the Lands be transferred, or granted to another, the Feoffee or Grantee ſhall have the benefit thereof, *Mich.* 11 *Car. B. R. Sydown* v. *Holm*, *Jones* 268. But if any Real Compoſition hath been made with any Archbiſhop or Biſhop ſince the 1*ſt* of *Eliz.* or with any Dean and Chapter, College, Archdeacon, Prebend, Parſon, Vicar, *&c.* ſince the 13*th* of *Eliz.* the ſame is void, or at leaſt voidable by the Statutes as to all Succeſſors whatſoever; for by the Statute of 1 *Eliz.* Archbiſhops and Biſhops, and by the Statute of 13 *Eliz. cap.* 10. all Collegiate and other Eccleſiaſtical Corporations aggregate and ſole, are reſtrained from making any Grants, other than for one and twenty years, or for three lives, and without other qualifications, which will be mentioned hereafter in their proper place. And if any Parſon or Vicar doth make ſuch Compoſition for the binding of himſelf only during his time, he ſhall not be bound thereby, but only whilſt he is reſident, and ſerving the Cure, without abſence by eighty days, as will be hereafter alſo ſhewed.

A ſecond means by which Lands are diſcharged of Tithes, is by Cuſtom or Preſcription. Cuſtom and Preſcription differ in this; that Cuſtom is that which gives a Right to a Province, County, Hundred, City or Town, and then it muſt be common to all within, the Limits where it is pretended to be: But Preſcription is that which gives a Right to ſome particular Perſon with reſpect to ſome particular Houſe, Farm or other thing. Both Cuſtom

and Preſcription may be either *De Non Decimando*, or *de Modo Decimandi*. As for Cuſtom and Preſcription whether they may be *de Modo Decimandi* none at this day diſpute; and it ſeems that a Cuſtom may be good *de Non Decimando* in reſpect of this or that particular Tithe; ſo that a County or part of a County ſhall not pay any ſuch ſort of Tithes; Provided that there be beſides ſufficient Maintenance for the Parſons, *Hill.* 14 *Jac. per Curiam, Burham and Gooſes Caſe, and Mich.* 17 *Jac. B. R. Dr. Andrews and* ---- 1 *Rolls Abr.* 653, 654.

Upon this account a Man (being ſued in the Eccleſiaſtical Court for the Tithes of the Milk of Ewes) did ſuggeſt that by the Cuſtom of the Country no Tithes of the Milk of Ewes had been paid within the Memory of Man, and a Prohibition was granted, *Mich.* 14 *Car. B. R. Sewell and Bickwel's Caſe, Per Curiam*, 1 *Rolls Abr.* 654. So it is ſaid to have been adjudged that no Tithes of Underwoods ſhall be paid in forty Pariſhes of the *Wild of Suſſex*, nor in the *Wild of Kent*, *Mich.* 13 *Jac. Porter* v. *Tike*, *Rolls* 1 *Abr.* 653. *Trin.* 15 *Jac. B. R. Bell* v. *Tard*, *and Mich.* 21 *Jac. Loane* v. *Dixon and Trin.* 17 *Jac. B. R. Fawkner and Andrews, per Curiam, Rolls* 1 *Abr.* 654.

And upon the ſame account it was adjudged, that a cuſtom for Bakers within two Hundreds in two Counties, not to pay any thing of Tithes for new erected Mills for the uſe of their Trade was good, *Paſch.* 15. *Car. B. R. Kidden and Edward's Caſe, Rolls* 1 *Abr.* 654. But ſuch cuſtom is ſaid not to be good for a ſingle Pariſh, *Hill.* 14 *Jac. B. R. Barham and Gooſe, per Curiam, Rolls* 1 *Abr.* 653. much leſs is a cuſtom good *De Non Decimando*, abſolutely for a Pariſh, or places of greater Limits, to have their Lands free from the payment of Tithes, without paying any thing in lieu thereof, for that this would be to the deſtruction of Divine Worſhip, and of ſuch Cuſtom no inſtance hath been given; but generally ſpeaking, a Cuſtom *De Non Decimando* for a Hundred, *&c.* is good againſt ſuch Tithes as are due by Cuſtom only, and not of common Right, as of Wood, *&c.* for as ſuch Tithes are due by cuſtom only, ſo by the like Cuſtom within a certain Hundred, *&c.* they may be diſcharged from the payment of ſuch Tithes.

When 'tis ſaid that Preſcription *De Non Decimando* is good, this is to be underſtood chiefly as to Spiritual Perſons, or Corporations; for theſe being capable of Tithes at Common Law in *pernancy*, may preſcribe to be diſcharged generally, ſo that no Tithes ſhall be paid of their own Lands, nor any recompence for them, *Paſch.* 38. *Eliz. the Biſhop of Wincheſter's Caſe*, 2 *Coke* 44. *Hill.* 33. *Eliz. B. R. the Biſhop of Lincoln* v. *Cowper*, 3 *Croke* 216. *Mich.* 13. *Jac. B. R. the Biſhop of Hereford's Caſe, Rolls* 1 *Rep.* 264. *Mich.* 11. *Car. B. R. Sydown* v. *Holme Jones* p. 368. *Bowles* v. *Atkins*, 2 *Keble* 28. 60. 162. 175. And if Lands ſo diſcharged by Preſcription, be aliened to a Lay-man, and during the Alienation doth pay Tythes, *viz.* for divers Years, and then be regranted to a Spiritual Corporation, in this Caſe, the Lands ſhall be diſcharged as formerly, for Tithe is not a thing iſſuing out of Land, therefore unity of Poſſeſſion, or a releaſe of all Right in and to the Land doth not extinguiſh them, *Hill.* 33 *Eliz. B. R. Biſhop of Lincoln* v. *Cowper*, 3 *Croke* 216. *and Mich.* 33 *Eliz. ſame Caſe*, 1 *Leonard* 248. and ſuch Lands as a Spiritual Perſon may hold Tithe-free by Preſcription, the Preſcription holds good, not only for diſcharging of the Lands in the hands of Spiritual Perſons, but alſo of their Tenants and Farmers at Will, for Years, or Life, *Paſch.* 38 *Eliz. the Biſhop of Wincheſter's Caſe*, 2 *Coke* 44 *Mich.* 38 *Eliz. B. R. Wright* v. *Wright*, 3 *Croke* 511. *ſame Caſe Moor* 425 *Mich.* 42 *Eliz. B. R. Crouch* v. *Fryer*, 3 *Croke* 785 *ſame Caſe, Moor* 618. alſo their Copyhold Tenants, that is, if no

no Tythes have been paid of the Lands of a Spiritual Perſon's Copyholders time whereof, *&c.* And it ſhall be intended, that this Preſcription had its commencement at ſuch time, when all was in the hands of the Spiritual Perſon, by *Gawdy*, *Fenner* and *Yelverton* againſt *Popham*, *Mich.* 22 *Eliz. Crouch* v. *Fryer*, 3 *Croke* 785. *Paſch.* 1 *Jac. Crouch* v. *Fryer*, *Yelverton* 2. *ſame Caſe*, *Moor* 618. but then the Copyholder muſt preſcribe in the Name of the Lord, *Noy* 132. but in theſe Caſes, although the Preſcription may bar the Parſon of the Pariſh, in which the Lands be, from demanding Tythes, yet the doubt remains, whether the Tythes of the Lands occupied by the Spiritual Perſons Fermers, and if his Copyholders Lands, ſhall belong to the Spiritual Perſon, or that his Tenants, by Leaſe or Copy ſhall have the advantage of ſuch Preſcription; and it ſeems that the Tythes ſhall be to the Spiritual Perſon, in both Caſes, for this is granted in the Caſe of the Farmer, *Mich.* 38 *&* 39. *B. R. Wright* v. *Wright*, 3 *Croke* 511. and 'tis ſaid by *Popham* and *Fenner*, that a Biſhop may preſcribe to have the Tythe of his Copyholders, and that it ſhall be good againſt a Rector, *&c.* of the Pariſh, *Mich.* 42 *Eliz. B. R. Crouch* v. *Fryer*, 3 *Croke* 785. but that is to be underſtood where Tythes have been uſually ſo paid to the Biſhop, in which Caſe, it may be good againſt the Parſon of the Pariſh; but whether the Copyholders of a Spiritual Perſon, not having paid Tythes to any, ſhall be bound to pay them to the Lord of the Mannor is the doubt, which I ſuppoſe, they ſhall not. *Quere.*

But from this that hath been ſaid, That Spiritual Perſons may preſcribe in *Non Decimando*, we may not collect, that in all Caſes, where no Tythes have been paid by Spiritual Perſons occupying their own Lands time whereof, *&c.* that no Tythes ſhall upon any account be paid of ſuch Lands, for no Tythes can be paid of Lands where there is an unity of Poſſeſſion, that is, where the Land and Tythes, or Rectory are in one hand, in that a man cannot pay Tythes to himſelf, and yet the Lands may remain Tythable in themſelves; therefore, although a Parſon, or Vicar, whilſt his Glebe is in his own hands, hath not paid Tythes, nor have his Predeceſſors paid time whereof, yet Glebe Land, becauſe it is Glebe, is not therefore free from the payment of Tythe in whoſe hands ſoever it ſhall come, and in all Caſes; for if a Parſon doth Demiſe his Glebe Land rendering Rent, and free from all other Exactions and Demands, his Leſſee ſhall pay Tythes to him of the Glebe ſo Demiſed, notwithſtanding the words, free from all Exactions and Demands, for that the Tythes are an Eccleſiaſtical Inheritance collateral to the Land, *Trin.* 31. 32. *Eliz. B. R. Parkins* v. *Hind*, 3 *Croke* 161 *Paſch.* 27 *Eliz. C. B. Stye* v. *Miles*, *Mich.* 31 *&* 32 *Eliz. Parkins* v. *Wild*, *Noy* 35. *Trin.* 31 *Eliz. B. R. Style and Miller's Caſe*, 1 *Leonard* 300.

If a Parſon doth ſow his Glebe, and afterwards doth leaſe over the Land, and the Leſſee doth ſever the Corn, he ſhall pay Tythes thereof to the Parſon, or if a Parſon having ſown his Glebe doth afterwards ſell the Corn reſerving the Land, the Parſon when the Vendee doth ſever the Corn, ſhall have Tythe thereof notwithſtanding his own grant, *Paſch.* 40 *Eliz. B. R. Humphrys Caſe*, *Dubitatur*, *Hil.* 11 *Jac. B. R. Moyle and Ewer's Caſe*, *per Curiam*, *and affirmed upon Error*, *Rolls Abr.* 1. 655. So if a Parſon doth ſow his Glebe, and dies before Severance, and another is inducted, and then his Executor, or his Vendee doth ſever the Corn, the Succeſſor ſhall have Tythes thereof; for though the Executor doth repreſent the Perſon of the Teſtator, yet he cannot repreſent him as Parſon, for that another is inducted, *contra Paſch* 40 *Eliz. B. R. Humphrey's Caſe*, *Rolls Abr.* 1. 655. But if the Corn be ſevered, and the Parſon dies before the ſame be carried off from the Ground, there I ſuppoſe the Succeſſor ſhall not have Tythes of ſuch Corn ſo ſevered, though ſtanding

in Rucks or Shocks upon the Ground, for in the like Caſe I take it to be, that the Executors of the dying Parſon, and not the Succeſſor, ſhall have the Tithes of all Corn within the Pariſh ſevered from the Ground, at the time of the Parſon's death and not carried away, although the Tithes were not then actually ſet out, for a right to the Tithes was veſted in the dying Parſon by the ſeverance of the Corn from the Ground, and this I take to be warranted, by the Opinion, *in the Office of Executor, Chap.* 5. *fol.* 94 *Orphans Legacy* 81. *See alſo* 2 *Bulſtrode* 184. 1 *Rolls Abr.* 656.

If a Spiritual Perſon hath a Parſonage appropriate, and doth enfeoff another of part of the Glebe, yet he ſhall have Tithes againſt his own Feoffment, 42 *Ed.* 3. 13. *a.* and if he Demiſeth his Glebe, he ſhall have Tithes of his Leſſee, *Dyer* 43. But it is ſaid to be otherwiſe, if the Parſonage be impropriated and in Lay-hands, becauſe of the Statute 32 *H.* 8. *of Diſſolutions*, *Brewers and Verſy's Caſe, vouched by Hutton in Noy* 132. (but of this I much doubt) and when it was urged for Law, the Court denied it, and ſaid, that the Caſe of *Perkins* and *Hind* was adjudged to the contrary in that very point, *Booth and Franklin's Caſe, Mich.* 3 *Car. B. R. Hetley* 31. if a Parſon doth let his Rectory, reſerving to himſelf his Glebe, he in this Caſe ſhall pay Tithes to his Grantee, 37 *H.* 8. *fol.* 35.

Though Glebe-land in it ſelf conſidered, be all Tithable as any other Lands be, yet no Tithes ſhall be paid of the Glebe by the Parſon of a Church, to the Vicar of the ſame Church, whilſt they are in the hands of the Parſon himſelf, although that the Vicar be endowed of the Tithes of all Lands within the Pariſh; for that *Eccleſia Decimas Solvere Eccleſiæ non Debet*, and *Tanfield* ſaid, that then lately this matter was in queſtion betwixt *Young and the Parſon of Boxly in the County of Wilts*, and adjudged, that no Tithes ſhall be paid of Glebe-lands: But by *Popham*, if the Vicar by Endowment be to have all the ſmall Tithes within the Pariſh, and then the Parſon doth make a Leaſe of his Glebe-land, the Leſſee ſhall pay the Tithes ariſing there from to the Vicar, and the groſs Tithes thereof to the Leſſor; to which the Court agreed, *Trin.* 38 *Eliz. B. R. Blinco* v. *Marſton*, 3 *Croke* 479. *ſame Caſe Moor* 457. or if the Vicar had been ſpecially endowed of the Minute Tithes of the Glebe-lands of the Parſonage, the Vicar ſhould have had them, although they were in the hands of the Appropriator: Note alſo, that it ought to be ancient Glebe at the time of the Endowment, *Mich.* 39 & 40 *Eliz. B. R. Blincoe* v. *Barksdale*, 3 *Croke* 578. *ſame Caſe*, *Moor* 910.

And what is before ſaid of the Parſon's Glebe with reſpect to the Vicar, holds as to the Vicar's Glebe with reſpect to the Parſon; for whilſt the Vicar doth retain his Glebe in his own hands, he ſhall not pay Tithes thereof, but if he Demiſe it to another, the Leſſee ſhall pay the groſs Tithes to the Parſon, and the Vicar's Tithes to the Vicar; and when the Caſe was, that the Vicar had ſowed his Glebe, and died, the Tithes thereof ought to be paid by the Executors of the Vicar, *Harris* v. *Cotton*, *Brownlow and Gouldsborough*, 69 *Rolls* 1 *Abr.* 655. *contra Paſch.* 40 *Eliz. B. R. Humphrey's Caſe.* But it ſeems, if the Parſons, or Vicar's Glebe be in another Pariſh than where the Church is to which it belongs, that Tithes of ſuch Glebe ſhall be paid to the Incumbent of the Church where the Glebe is, unleſs the Parſon, or Vicar to whom the Glebe belongs can preſcribe in *Non Decimando*, *Benton and Troff's Caſe*, *Mich.* 40 & 41 *Eliz.* *Moor* 528. *Mich.* 13 *Car. B. R. Doctor Ward and Taylor*, *per Curiam*, *Rolls* 1 *Abr.* 653. *Selden Hiſtory of Tithes*, *cap.* 6. *fo.* 75, 76. So if a Parſon, or Vicar of a Church doth purchaſe a Mannor or Lands within their Pariſh, though by this purchaſe, and unity of poſſeſſion, the Lands which were Tithable before are become Tith-free, becauſe a Man cannot pay Tithes

to

to himſelf; yet if the Parſon leaſe his Rectory, the Parſon himſelf ſhall pay Tithes of his Lands to his Leſſee, and if the Parſon makes a Feoffment of his Mannor, or Lands, the Feoffee ſhall pay Tithes to the Feoffor, being Parſon, becauſe, Tithes cannot be extinguiſhed by any unity of Poſſeſſion, *Mich.* 30 *H.* 8. *C. B. Dyer fol.* 43. *vide* 32 *H.* 8. *Brook* 7 *Ed.* 6. *Tit. Diſmes*, 17 *Mich.* 3 *Car. C. B. Booth* v. *Frankling Hetley* 31. much more, if a man being poſſeſt of Lands ſown with Corn, doth ſell the Corn to an other, and afterwards doth become proprietor of the Tithes of the ſaid Land, he ſhall have the Tithes of the Corn by him ſold, for though the Parſon may ſell the Tithes before ſeverance, and before ſeverance hath ſuch an Intereſt and Right in them as he may diſpoſe of, ſo that the propriety of them doth not grow unto him only by the ſeverance, the ſeverance giving unto him only the Lay intereſt in them, yet they ſhall not before ſeverance paſs without expreſs words, *Hill.* 11. *Jac. B. R. Moyle* v. *Ewer* 2 *Bulſtrode* 183.

Although generally ſpeaking, the Tithes within every Pariſh do belong to the Rector, Vicar or Impropriator of ſuch Pariſh, and ſhall be ſo intended, if the contrary be not ſhewed, *Stile's Reg.* 532. yet may a portion of Tithes within one Pariſh belong to the Rector, *&c.* of another Pariſh: By a portion of Tithes is to be underſtood, where a Parſon, Rector, or other hath ſome part of the Tithes of a Pariſh in groſs, ſeparated and divided from the Rectory of the Pariſh wherein they ariſe; it is ſaid, that the original of theſe Portions of Tithes is to be referred to time, before the Counſel of *Lateran*, when it was lawful to every one to diſpoſe of his Tithes to any Church at his pleaſure, and was not reſtrained to pay them to any one Pariſh in certain; ſee for theſe matters *Paſch.* 7 *E.* 6. *Dyer* 84. *b. Selden Hiſtory of Tithes. cap.* 6. *and cap.* 10. *Mich.* 26, 27. *Eliz. Bozoun's Caſe*, 4 *Coke* 35. *Godolf.* 35. *Biſhop of Winchester's Caſe*, 2 *Coke* 44. 14 *H.* 4. 17. *a.* 44 *Aſs.* 25. 20 *H.* 6. 17. *Linw. tit. de locat' & conduct c Licet* v. *Portiones*, though it may as probably be ſuppoſed that many of theſe Portions of Tithes have had their commencement by grants of Parſon, Patron and Ordinary, ſince the ſaid Counſel of *Lateran*; however that be, a portion of Tithes is in the notion of Law ſo diſtinguiſhed from Tithes belonging to a Rectory, that if a portion of Tithes in ſuch a Pariſh be granted (eſpecially in Caſe of the King's Grants) Tithes belonging to the Rectory will not paſs thereby, *Bozoun's Caſe*, 4 *Coke* 35. *Clayton's Rep. Caſe* 25. ſo in pleading to demand Tithes generally, a portion of Tithes ſhall not be recovered, which I collect from the Caſe 14 *H.* 4. 17. *a.*

As perſons meerly Spiritual, becauſe capable of Tithes, may preſcribe *De Non Decimando*, ſo the King who is ſaid to be *Perſona Mixta* being alſo capable of Tithes, may in like manner preſcribe to be abſolutely diſcharged from the payment thereof, *Comes Hertford* v. *Leech*, *Jones* p. 387. 22 *Aſs.* 75. 33 *Ed.* 3. *Fitz. Aid del Roy* 103. 10 *H.* 7. 18. *Mich.* 39 *&* 40. *Eliz. Pyſot* v. *Heron Moor* 483. for the Rule is, that he that may have Tithes, may be diſcharged from the payment of them, *Brownlow* and *Gouldsborough*, 1 p. 31. Therefore it is, that Lands lying within a Forreſt, and in the hands of the King, do not pay any Tithes, although they be within a Pariſh, *Mich.* 24. *Car. B. R. Banniſter* v. *Wright*, *Stiles* 137. *Stiles Regiſt.* 532. *Mich.* 3 *Car. C. B. Comins his Caſe*, *Hetley* 60. and this is a priviledge which extends to the Leſſee of the King, but not to his Feoffee, by *Henden*, *Davenport* and *Athow Serjeants*, *Mich.* 3 *Car. C. B. Comin's Caſe*, *Hetley* 60. *and per Curiam*, *Mich.* 24. *Car. B. R. Banniſter* v. *Wright*, *Stiles* 137. *Paſch.* 12 *Car. B. R. Comes Hertford* v. *Leech*, *Jones* 387. And it is ſaid to be ruled by advice of all the Juſtices upon a Caſe depending in the Exchequer, 29 *Eliz.* that although the Queen ſhall not pay Tithe for her own poſſeſſions, becauſe ſhe is *Perſona Mixta*, and might well

well return them, yet if ſhe grants them by Patent in Fee, her Patentee ſhall pay Tithes, and ſo ſhall her Copyholder of inheritance, for that they cannot participate of the Queens Prerogative therein, *Crouch* and *Fryer's Caſe*, *Mich.* 42 *Eliz. B. R.* 3 *Croke* 785. and 'tis alſo admitted, that Lands held of the King in Capite ſhall pay Tithes, *Paſch.* 37. *Eliz. C. B. Vaughan* v. *Beal*, 3 *Croke* 393. 14 *Car.* 2. *in Scaccar Compoſt* v - - - *Hardres* p. 315. *a.* But in *Foſſet* and *Franklin*'s Caſe, it was agreed, that the King's Farmer is diſcharged though the diſcharge be only in *propriis manibus*; and Sir *William Jones* ſaid it had been ſo adjudged, but the Court remembred it not, and held, the King's Fee Farm is not diſcharged, no more is his Leſſee coming under the priviledge of the Monaſtery, but agreed that the King, as a Spiritual Perſon, may preſcribe in diſcharge of himſelf and Fermers, but by a general preſcription, the King's Fermer is not diſcharged, much leſs on a diſcharge by priviledge of Order, *&c.* and the Court conceived, the preſcription muſt be found for the King, his Fermers and Tenants, and that Non-payment by the undertenants of the King's Fermer, is ſufficient Evidence to prove ſuch preſcription, *Mich.* 25. *Car.* 2. *B. R. Foſſet* v. *Franklin* 3 *Keble* 217.

Though Perſons meerly Spiritual, or mixt as the King, may preſcribe *De Non Decimando* by the Common Law, that is, without the aid of an Act of Parliament; yet no Lay Perſon can ſo preſcribe, therefore, when one being ſued in the Eccleſiaſtical Court for the Tithes of rough Hay growing in the Marſhes, and for to have a Prohibition did ſurmiſe, that the Pariſhioners paid Tithe Hay and Grain growing upon their other Lands, and certain cuſtomary Rates for the Tithe of Cow and Calf, and that becauſe they had not ſufficient Graſs within the Pariſh to ſuſtain their Beaſts in Winter, they uſed to gather this Hay called Fenny Fodder for the ſuſtenance of their Beaſts for the better increaſe of their Husbandry, and for this cauſe had been always freed from the payment of Tithes, *&c.* it was adjudged, that this Preſcription was not good, becauſe, it was but a Preſcription *De Non Decimando*, and it was held to be a Preſcription *De Non Decimando*; for that the beſtowing the Hay upon their Cattle there, was no good cauſe, or conſideration of a diſcharge, in that they might as well preſcribe to be free from the payment of Tithe-Corn, becauſe they ſpend Corn in their Family, or give it for Provender to their Cattle, *Mich.* 2 *Jac. Webb* v. *Sir Henry Warner*, 2 *Croke* 47. *Paſch.* 44. *Eliz. Moor* 685.

So admitting that Church-wardens of a Pariſh may have Land by Preſcription, for the reparation of their Church, yet they cannot preſcribe generally in *Non Decimando*, for that they be not Spiritual Perſons, though their Office be a kind of an Eccleſiaſtical Office, *Paſch.* 37. *Eliz. B. R. Longley and Meredine's Caſe*, *Rolls* 1 *Abr.* 653. *and Rolls* 2 *Rep.* 107. And the reaſon why a Preſcription *De Non Decimando* is not good for a meer Lay-man, is, becauſe that none by the Common Law had capacity to take Tithes, but only Spiritual Perſons, or a mixt perſon, as the King; and regularly, no meer Lay-man was capable of them, if not in ſpecial Caſes; for at the Common Law he could not (ſave in ſome particular inſtances) ſue for the ſubſtraction of them in the Spiritual Court, 7 *Ed.* 3. 5. 11 *Aſs* 9. 44 *Ed.* 3. 10 *H.* 7. 18. *Dyer* 84 but it is ſaid 43 *Ed.* 3. 34. 44 *Ed.* 3. 39. that the Farmer of a Parſon might ſue for Tithes; but it appeareth that ſuch Farmer was a Spiritual Man, as Vicar, *&c.* and ſo it is ſaid are all the other Books to be intended, as 31 *H.* 6. 11. 35 *H.* 6. 39. 2 *Ed.* 4 15. 6 *Ed.* 4. 3. 12 *H.* 7. 24. (in which in truth, there are but opinions) and therefore was remedy given to lay Perſons by Statute, 32 *H.* 8. *cap.* 7. But if they had been capable of Tithes before, the Common Law would have given them remedy, from which 'tis concluded, that they cannot preſcribe in *Non Decimando*, *Paſch.* 30. *the Biſhop of Winchester's Caſe*, 2 *Coke* 44.

Mich.

Mich. 6. Jac. C. B. the Caſe of Modus Decimandi, 13 *Coke* 13. *Hill.* 38 *Eliz. Wrights's Caſe*, *Moor* 425. *Bowls* v. *Atkins*, 2 *Keb.* 28, 60, 162, 175. *Selden's Hiſtory of Tithes*, 288. and upon his reaſon that a Lay-man cannot preſcribe in *Non Decimando*; if a Lay-man hath a Grant from Parſon, Patron and Ordinary to be diſcharged of Tithes (which is good of it ſelf without any recompence or Conſideration) yet when it runs out to Preſcription it dies, and periſheth, and although Preſcription and Antiquity of time fortifies all other Tithes, and ſuppoſeth the beſt beginning the Law can give them, in this Caſe it works clean contrary, and that in favour of the Church, leſt by degrees it ſhould be ſpoiled by the Laity; ſo that though the Law will allow of a Lay-man's diſcharge by Grant, when it appears, yet when it appears not, it is preſumed, that it never was, becauſe of the dangerous conſquence of preſuming the contrary, *Mich.* 15 *Jac. Slade* v. *Drake*, *Hobart* 297. *See the Caſe of Bowls and Atkins before cited.* And the Law, ſaith *Coke*, had great Policy therein, for that Lay-men (to the trial of whom all Preſcriptions are to be put) will rather ſtrain their Conſciences for their private benefit, than yield to the Church the Duties that belong thereto, and the decay of the Revenues of Men of Holy Church, in the end will be the overthrow of the Service of God and of his Religion; for it is recorded in Hiſtory that there were (amongſt others) two grievous Perſecutions, one under *Dioclesian*, the other under *Julian* called the *Apoſtate*; one of them intending to have rooted out all the Profeſſors and Preachers of the Word of God, *Occidit omnes Preſbiteros*, but notwithſtanding that Religion flouriſhed; for *Sanguis Martyrum eſt Semen Eccleſiæ*, and yet the ſame was a fearful and grievous Perſecution; but the Perſecution under the other was more grievous and dangerous, becauſe (as the Hiſtory ſaith) *Ipſe occidit Presbyterium*, for he robbed the Church and ſpoiled Spiritual Perſons of their Revenues, and took all from them whereon they might live, thereupon in ſhort time did follow great Ignorance of the true Religion and Service of God, and thereby great decay of the Chriſtian Profeſſion, for none will apply themſelves or their Sons or any other, who he hath in charge, to the Study of Divinity, when they ſhall have after long and painful ſtudy, nothing to live upon, *Paſch.* 38 *Eliz. the Biſhop of Winchester's Caſe*, 2 *Co.* 44.

And the ſame Reaſons are of equal force againſt allowing Preſcriptions *De Modo Decimandi*, which oftentimes for a Tithe Gooſe do leave but a Feather to the Parſon or Vicar; yet becauſe Lay-men though not capable of Tithes in Pernancy were capable of a diſcharge of Tithes at the Common Law in their own Hands, with the Conſent of the Incumbent, Patron and Ordinary, *viz.* by Grant or Compoſition, 8 *E.* 4. 14. *& Regiſt.* 38. the Law hath allowed Preſcriptions *de Modo Decimandi*, *Paſch.* 38 *Eliz. the Biſhop of Wincheſter's Caſe*, 2 *Co.* 44. *Mich.* 6 *Jac. C. B. the Caſe of Modus Decimandi*, 13 *Co.* 13.

A *Modus Decimandi* is when Lands, Tenements or Hereditaments, or an annual certain Sum, or other Profit, time out of mind have been given to the Parſon and his Succeſſors in full ſatisfaction and diſcharge of all the Tithes in kind in ſuch a place. So that a Lay-man may preſcribe, that he and all thoſe whoſe Eſtate he hath in the Mannor of *B.* time whereof the memory, *&c.* have paid to the Parſon for the time being a certain Penſion yearly for maintenance of Divine Service there, in ſatisfaction of all Tithes renewing or ariſing within the ſaid Mannor; and further may preſcribe, that he and all thoſe whoſe Eſtate he hath in the ſaid Mannor, time out of mind, *&c.* have uſed in reſpect of the ſaid Penſion ſo paid to the Parſon, to have the tenth part of all the Corn within the ſaid Mannor, or any other part thereof, or of

all

all Lands holden of the ſaid Mannor, and ſuch Preſcription is good; for it ſhall be intended, that at the beginning the Lord had all in his Hands, and afterwards gave the Tenancies to hold of him, retaining the Tithes, ſo that now he takes but the Tithes which he had before by Retainer, *Trin.* 42 *Eliz. B. R. Pigot* v. *Sympſon*, 3 *Cro.* 763. And of this later Preſcription for the Lord to have the tenth Shock of his Tenants, there is this reaſon alſo given becauſe he hath it as parcel of, or as a thing appurtenant to his Mannor, and not as Tithes; for though a Lay-man cannot have Tithes by Preſcription, yet he may have the tenth Shock as a Temporal Profit apprender, and it may well be parcel of a Mannor, but otherwiſe of Tithes, for they cannot be parcel of, nor appendant to a Mannor, as was adjudged in *Winſcomb's Caſe*, *Hill.* 35 *Eliz.* 3 *Cro.* 293. 10 *E.* 3. 5. and therefore a man cannot preſcribe generally in himſelf and all thoſe whoſe Eſtate he hath in the Mannor to have any Tithes appertaining to the ſame, without ſome ſpecial matter ſhewed, nor may he preſcribe to have *Decimas Garbarum*, but *Decimam Garbam*, *Hill.* 40 *Eliz. B. R. Pigot* v. *Hern*, 3 *Cro.* 599. *vouched alſo in the Biſhop of Winche-ſter's Caſe*, 2 *Co.* 45. *ſame Caſe*, *Moor* 483. *and* 3 *Cro.* 599. *See Sherwood and Winchcomb's Caſe*, *Hill.* 37 *Eliz. B. R.* 3 *Cro.* 293. But where the Preſcription is to have *decimam Garbam*, which is to be underſtood a Lay Fee to be taken aft er the Parſons Tithes, and not the Tithes, there the Land notwithſtanding ſuch Preſcription ſhall be liable to pay Tithes to the Parſon or other Proprietor of Tithes of that Pariſh wherein ſuch Lands lie; See 44 *Aſſ.* 25. But a Lay-man at this day may have a Portion of Tithes within a Pariſh by Grant from the Crown, laying a Preſcription, *&c.* in ſome of the diſſolved Religious Houſes who were ſeized of ſuch Portion of Tithes, and which by the Diſſolution of Monaſteries, *&c.* came to the Crown, and was granted by the King to ſuch Lay-man who claims by or under the Grant, *Paſch.* 7 *E.* 6. *Dyer* 83. *Mich.* 26 *&* 27 *Eliz. Bozoun's Caſe*, 4 *Co.* 35. 1 *Rolls Abr.* 657.

If a Man grants parcel of his Mannor to a Parſon in Fee, and the Parſon with the Aſſent of the Ordinary (without the Patron) in conſideration of that Grant, grants to him that he ſhall be quit of Tithes of the reſidue of the Mannor, and afterwards he or his Aſſignee be ſued in the Spiritual Court for Tithes of this Mannor, they ſhall have a Prohibition though the Grant was made before time of Memory, if he hath always ſince continued to be quit of Tithes, See 8 *Ed.* 4. 14. *F. N. B.* 41. *g.* 3 *E.* 3. 17. 16 *E.* 3. *tit. Annuity* 24. So if the Lord of a Mannor hath always holden his Mannor diſcharged of Tithes in conſideration that the Parſon's Predeceſſors before time of Memory, or in ancient times had divers Lands in the ſame Pariſh of the Gift of the Anceſtors of the ſaid Lord, of which the Parſon is ſeized at this day in Fee. If the Parſon ſueth for Tithes of the Mannor, the Lord of the Mannor may ſhew this ſpecial Matter, how that the Parſon and his Succeſſors time out of mind have holden thoſe Lands, *&c.* of the Gift of one and his Anceſtors, or whoſe Eſtate he hath in the ſaid Mannor in full ſatisfaction of the ſaid Tithes; and the Proof that the Lord of the Mannor gave the Lands that Tithes ſhould never be paid, at this day is good Evidence to prove the Surmiſe of the Prohibition, *Mich.* 6 *Jac. C. B. in the Caſe of Modus Decimandi*, 13 *Co.* 15. Yet when a Prohibition was granted upon this Suggeſtion, that one being a Lay-man was ſeized of the Mannor of *D.* and that he and all thoſe whoſe Eſtate he had time whereof the Memory of Man is not to the contrary, have uſed to have the Tithes within the ſaid Mannor, and that therefore he and all thoſe whoſe Eſtate he had have uſed to maintain a Chaplain in the Church of *A.* a Conſultation was prayed. *Firſt*, Becauſe it was not alledged that the Church of *A.* was within

in the ſame Pariſh where the Mannor was, and ſo no conſideration to the Parſon that was the Plaintiff. *Secondly*, Becauſe it doth not extend to the Maintenance of the Chaplain ſo long as he claims the Tithes whereof the Memory, *&c.* *Thirdly*, Becauſe the Defendant had not proved the Maintenance of the Chaplain within the ſix Months, but only the Reſidue of his Suggeſtion, this being the principal matter to make his Preſcription good, and a Conſultation was awarded upon this laſt Exception, *Per Curiam*, and *Coke* ſaid, it ſhall be granted for other Exceptions alſo, *Paſch.* 12 *Jac. B. R. Boothers* v. *Rogers*, 1 *Rolls Rep. p.* 2.

And as a Mannor may be diſcharged of Tithes againſt the Parſon upon the account of a Penſion paid by the Lord, or Land given; ſo may a whole Pariſh, or Hamlet, be diſcharged of this or that ſort of Tithe, as of Wood, Hay, *&c.* upon a Cuſtom, that all the Parſons of the Church of *D.* time whereof, *&c.* have had ſuch Lands parcel of the Mannor of *H.* in recompence of this or that ſort of Tithe within the ſaid Pariſh or Hamlet, although all the Lands within the ſaid Pariſh, *&c.* at this day do not belong to the ſaid Mannor, *Mich.* 39 *&* 40 *Eliz. B. R. Somerton* v. *Dr. Cotton*, 3 *Cro.* 587. *Mich.* 16 *Jac. B. R. Moor* v. *Bullock*, 2 *Cro.* 501. *Hill.* 42 *Eliz. B. R. Auſten* v. *Piggot*, 3 *Cro.* 736. And it is ſaid to be ſufficient for the Pariſhioners to alledge, that the Parſon's have had ſuch Lands in recompence of ſuch Tithes not paid within Memory, and that it is not neceſſary that they ſhew how, or by what Title the Parſons had the Land, but if they had it in another manner than in ſatisfaction of the Tithes, the Parſon himſelf ought to ſhew that, *Hill.* 42 *Eliz. Auſten* v. *Piggot*, *Moor* 911. But where there is a Preſcription to be diſcharged of all Tithes of Hay-ground, *viz.* of all the Meadow in the Pariſh in conſideration that the Parſon hath certain Acres of Meadow; if any arable Land be converted into Meadow, the Preſcription extends not to diſcharge that, as was ſaid to be adjudged, 14 *Jac. in Conier's Caſe vouched in Pool and Reynol's Caſe*, *Hutton* 58.

As a Pariſh, ſo any private perſon may pay a *Modus* for his Lands, or ſome part thereof, *viz.* a certain Rate or Sum of Mony, or other Conſideration, and by that means be diſcharged from the payment of Tithes ariſing on ſuch Lands. But this Rule ever holds, that as a Lay-man cannot preſcribe in *Non decimando*, ſo to maintain his Preſcription *de Modo decimandi*, he muſt preſcribe to the paying, or doing ſomething time whereof, *&c.* to the benefit of the Parſon to whom the Tithes in kind were otherwiſe due; therefore when one preſcribed, that he ought to be diſcharged of Tithes in conſideration that he hath uſed time out of Memory, *&c.* to imploy all the Profits of the Land in the Reparation of the Body of the Church, and to find all neceſſaries for the Church; it was adjudged, that his *Modus* was not good, becauſe that the Parſon thereby hath no recompence for the Tithe; but otherwiſe it would have been, if he had uſed with the Profits to repair the Parſon's Chancel, for that the Parſon being charged with the Repair thereof, hath benefit thereby, *Paſch.* 37 *Eliz. B. R. Longley* v. *Meridine*, 1 *Rolls Abr.* 649, 650. So when one preſcribed to reap Corn, and to make it into Sheafs, and to ſet forth the tenth Sheaf at his Charges, and to cut his Hay, and to ſever it from the nine parts at his Charges in full ſatisfaction of the Tithes of the Corn, Hay and Wool, it was adjudged inſufficient for the Wool, for the other two were due of common Right, and ſo the Parſon had nothing for the Wool, and by conſequence the Preſcription is a *De non decimando* as to that, therefore bad, *Trin.* 7 *Jac.* 13 *Co.* 45. And upon the ſame reaſon the Court held, that a Preſcription to pay a Rate to the Rector will not be to the diſcharging of the payment of Tithes to the Vicar, *Mich.* 14 *Jac. Wintel* v. *Child*, 3 *Bulſtr.*

220. and that the payment of five Shillings yearly to the Pariſh Clark is no conſideration of a Preſcription to be diſcharged of the Tithe due to the Parſon, *Mich.* 29 & 30 *Eliz. Savil* v. *Wood*, 3 *Cro.* 11. But where the Plaintiff in a Prohibition did ſuggeſt, that the Prior of *N.* was ſeized of a Mannor, and of the Tithes *ſimul & ſemel*, as of a Portion of Tithes, and in the 25*th* of *H.* 1. granted the ſaid Mannor and Tithes to one *F.* and his Heirs rendring Rent, and that the Heirs of the ſaid *F.* afterwards granted parcel of this Mannor with the Tithes to *S.* rendring five Shillings Rent, and brings down a Title from the ſaid *S.* to the Plaintiff in the Prohibition, and concludes that the ſaid *F.* and all thoſe whoſe Eſtate, *&c.* did pay the ſaid Rent to the ſaid Prior, and ſince the Diſſolution to the King and his Aſſigns, in diſcharge of all Tithes. It was objected, that the Plaintiff here would infer a *Modus* by the Payment of the Rent to the Prior, *&c.* which will not do, for unleſs the *Modus* doth go to the perſon who by Law ought to have the Tithes, or for his benefit, 'tis not good: But it was anſwered, and agreed to by the Court, that in this Caſe it doth appear, that there was a *Modus* in the Prior, which being received till it came to the Crown, 'tis good, though now paid to others; for if a *Modus* be payable to him who hath the Right of the Tithes, though it be not to the Parſon of the Pariſh, 'tis well enough eſpecially as here, being alledged to be a portion of Tithes belonging to the Prior, ſo that it cannot be ſaid that the Parſon hath not *Quid pro Quo*, for he had nothing at firſt, and the Compoſition being made with the Prior the Plaintiff is only to ſhew payment to him, and to thoſe who have his Right, *Trin.* 34 *Car.* 2. *B. R. James* v. *Trollop*, 2 *Mod. Rep.* 320. But when to have a Prohibition it was ſuggeſted, that the Dean and Chapter of *Carliſle* were ſeized of a Mannor whereof the place out of which Tithes are demanded is parcel, and that the Defendant againſt whom Tithes are demanded is Copy-holder in Fee of thoſe Lands; and that all the Tenants of that Manor had been diſcharged of the fourth part of their Tithes of all their Lands in what place ſoever they did lie, paying ſo much to the Lords of the ſaid Mannor for Quit-Rent; a Prohibition was denied, for *per Curiam* it cannot be, that Lands held of other Lords can be diſcharged of Tithes by the payment of this Rent, and it doth not appear that the payment to the Lord was in any other manner, but as his Rent, *Trin.* 17 *Car.* 2. *B. R. Wilkinſon* v. *Richardſon*, 1 *Sid.* 258. *the ſame Caſe*, 1 *Keb.* 906. And it is ſaid if a Man preſcribe to pay one Peny or thereabouts for the Tithes of every Acre of arable Land, this is no good Preſcription by reaſon of the uncertainty, *Mich.* 7 *Jac. B. R. Allen's Caſe*, *per Curiam*, 2 *Rolls Abr.* 265. So a *Modus* to pay four Shillings for every days plowing of Wheat, and two Shillings for every days plowing of Barley was held not to be good for the Incertainty, it not being averred how much every days plowing did contain, 1 *Keb.* 612.

After a Cuſtom or Preſcription to be diſcharged of Tithes upon a *Modus* is created by continuance of time it may afterwards be loſt, and the Parſon ſhall have his Tithes in kind, of which one inſtance may be given, by not making payment of the Conſideration of the diſcharge, or by paying the Tithes themſelves; for Cuſtom and Preſcription may be loſt as well as gotten by time, but an Interruption of the Uſage for ſuch time only, as ſhall not deſtroy the Poſſibility of making Proof that ſuch Cuſtom or Preſcription was ſhall not be to the deſtruction of it, by *Coke in Price and Maſcal's Caſe*, *Trin.* 12 *Jac. B. R.* 2 *Bulſtrode* 240. for otherwiſe a Leſſee might pay Tithes in kind where a *Modus* is, and ſo bar the Leſſor of the benefit of the *Modus* in after time, which ought not to be, *Maſcal and Price's Caſe*, *Paſch.* 13 *Jac. B. R.* 1 *Rolls Rep.* 176. Alſo a *Modus* may be loſt by the alteration or deſtruction of

of the thing for which the *Modus* was paid, as if there be a *Modus* to pay a certain Rate for the Tithe of a Mill, this *Modus* may be loſt; as if two Fulling Mills be under one Roof for which a Rate Tithe hath been paid time whereof, *&c.* and after theſe Mills are altered and made into one Corn Mill, the *Modus* is gone, and Tithe for the Corn Mill muſt be paid in kind; or if there be but one Pair of Stones in a Mill, and a *Modus* is to pay a certain Rate for them, and then another Pair of Stones is put into the ſame Mill, 'tis ſaid that Tithes muſt be paid in kind, *Brownlow & Gouldsborough p.* 32. So if one be diſcharged from the payment of Tithes for two ancient Corn Mills driven by Water, for a *Modus* of ſix Shilling and eight Pence annually paid to the Parſon, and the Water-courſe that was wont to run to the Mills is diverted by the Owner of the Mills, and runs in another place a little diſtance from theſe Mills, and then the Owner doth pull down one of theſe Mills and re-edifies it upon the Stream in the new Courſe, he ſhall pay Tithes thereof as for a new Mill, and the ſaid ancient *Modus* ſhall not diſcharge it; but if by the Continuance of time by the Act of God the Water-Courſe that was wont to run to the Mills is altered, and the Mills therefore be pulled down, and built where ſuch new Stream is, the *Modus* ſhall continue and he ſhall be diſcharged of Tithes for theſe new Mills paying the ſaid ſix Shillings and eight Pence, *Per Curiam, Mich.* 11 *Car. B. R. Johnſon* v. *Dandridge*, 1 *Rolls Abr.* 652. So if a Man preſcribe in *Modo Decimandi* for Hay and Graſs in forty Acres of Land, and the Tenant doth convert it into Hop-garden, or into Tillage, the *Modus* is gone; for when the *Modus* is ſpecial, as for Hay and Graſs, *&c.* only, there it will be deſtroyed by the Converſion of the Land, *&c.* to other uſes, *Hill. 6 Jac. B. R. Sharp and Coult's Caſe, Per Cur.* 1 *Rolls Abr.* 651.

In like manner if a *Modus* hath been paid for a Park, time whereof, *&c.* and afterwards the Park is diſ-parked, and the Lands converted to Tillage, *&c.* if the *Modus* were general for a Park, it is gone, if the Park be diſparked; but otherwiſe it is, if the *Modus* be for ſo many Acres of Land contayned in the Park, *Spardam's Caſe*, 1 *Rolls Abr.* 651. *and Shibden's Caſe cited Noy* 148. So if a Preſcription be to pay a Buck or a Doe out of the ſame Park, when 'tis diſparked the Preſcription is gone, in *Pool and Reynold's Caſe*, *Mich.* 10 *Jac. Hutton* 57. And 'tis ſaid, the Court doubted whether one that had a Park and was uſed to pay the Shoulder of a Deer for all manner of Tithes, and the Park is diſparked, ſhall pay Tithes in kind or not? *Paſch.* 10 *Jac. Brownl. & Gouldsb.* 1. *p.* 31. And *Popham* ſaid, that where the Preſcription is to pay a Shoulder of every Buck or a Doe at *Chriſtmas*, if the Park be diſparked, the Tithes in kind ſhall be paid, *Bedingfield and Feaks Caſe*, *Paſch.* 30 *Eliz. B. R.* 3 *Cro.* 467. *ſame Caſe*, *Moor* 909. *and in the Dean and Chapter of Norwiches Caſe*, *Paſch.* 38 *Eliz. B. R. Owen* 74. So if the Preſcription be to pay ten Shillings for the Deer and Herbage of the Park, and not for all the Park, and the Park is diſparked and ſown with Corn, Tithes in kind ſhall be paid; or if the Preſcription be to pay ten Shillings and a Shoulder of every Deer, when the Park is diſparked Tithes ſhall be paid in kind, and not the ten ſhillings, as hath been adjudged, *Mich.* 21 *&* 22 *Eliz. in C. B. Rot.* 404. *as is ſaid in Bedingfield and Feak's Caſe*, *Moor* 909. And when a Preſcription was to pay two Shillings yearly and the Shoulder of every third Deer killed within the Park, *Winch* and *Warburton* held that by the diſparking of the Park the Preſcription as to the Shoulders was determined, and by conſequence all the *Modus Decimandi*, and then that the Parſon ſhall have Tithes in kind, and that if the Park be revived the Preſcription and *Modus Decimandi* ſhall alſo be revived; but *Nichols* and *Hobart* held, that in ſuch caſe the Preſcription ſhould endure, ſaying, that the two Shillings is clearly a *Modus Decimandi*, which is certain, and the diſparking doth

not hinder the payment of it, and the Shoulders are but caſual, and upon the diſparking the Parſon ſhall loſe them, and recover in the *Court Chriſtian* a Recompence for them in Mony; as if a Man will not ſet forth his Tithes, the Tithes themſelves ſhall not be recovered, but a Recompence for them; and in this Caſe, though he was to have the Shoulders according to the number of the Deer killed, which makes the value uncertain, yet the Spiritual Court ſhall ſet the Value according to what was uſually paid whilſt it was a Park, *Hill.* 12 *Jac. B. R. Cowper* v. *Andrews*, 1 *Rolls Rep.* 120. *and Hobart* 39. *Godbolt* 237. But according to the former Caſes the Preſcription is gone and Tithes are to be paid in kind; however it is clear that if a *Modus* hath been to pay a certain Rate in Mony for all the Tithes of ſuch a Park, ſuch *Modus* ſhall hold notwithſtanding the Park ſhall be diſparked *Bedingfield and Feaks Caſe*, 3 *Cro.* 467. *ſame Caſe*, *Moor* 909. *the Dean and Chapter of Norwich's Caſe*, *Owen* 74. *and Price and Maſcal's Caſe*, 2 *Bulſtrode* 240. *ſame Caſe.* 1 *Rolls Rep.* 176. Or if the *Modus* be to pay a Buck and a Doe for all Tithes of ſuch a Park this *Modus* ſhall continue though the Park be diſparked; for though they be *feræ naturæ* and ſo not tithable in themſelves, yet they may be given for Tithes by Compoſition, and may be the Conſideration of a *Modus*, *Sharp* v. *Sharp*, *Noy* 148. *Pool* v. *Reynolds*, *Hutton* 57. *and by Carus and Catlin Owen* 34. And ſo though Partridges and Pheaſants in a Garden be not tithable, yet they may be by Compoſition paid in lieu of Tithes, and the Parſon ſhall not take them, but they ſhall be brought dead to him, and though in the Caſe of the Park the Park be diſparked, yet if the payment of the Buck, *&c.* be not fixed to be had out of that particular Park, the Owner may give a Buck, *&c.* out of another Park, and the *Modus* will continue; But where the *Modus* of the Buck, *&c.* is to be had out of that Park only then according to the Caſes before mentioned, the Park being diſparked the *Modus* is gone, and the Tithes in kind will revive, therefore in a Suit for Tithes of Corn growing in a Park diſparked the Defendant pleaded a Cuſtom to pay a Buck in ſatisfaction of all Tithes; and the Witneſſes proved a Buck paid yearly but could not tell whether it was taken out of this Park or not. And the Jury was charged to enquire particularly of this, for if it were fixed to a Deer out of this Park only then by diſparking the Park the Cuſtom is gone: But if it had been often and moſt what paid out of this Park, yet this will not alter the Cuſtom, but it may be paid out of any other Park, if the Cuſtom were to pay a Buck generally, *Clayton's Rep.*

CHAP.

CHAP. XLVIII.

Lands how diſcharged of Tithes by ſeveral Acts of Parliament. What Abbies were diſcharged of Tithes. A Catalogue of Abbies above 200 l. per Annum *value diſſolved by Statute* 31 H. 8. *Unity of Poſſeſſion, and Barren Land.*

THE third and laſt means by which Lands are diſcharged from the payment of Tithes, is by ſeveral Acts of Parliament, and by this means all Abby Lands that are free from the payment of Tithes receive their diſcharge. 'Tis true, in ancient times divers religious Corporations, eſpecially, were diſcharged of the payment of Tithes by Special priviledge, and this priviledg was acquired by two means. *Firſt*, by the Pope's Bull, for the Pope was wont to exempt what Abbies he pleaſed from the payment of Tithes for their own Lands, as the Præmonſtrantes, *&c.* *Secondly*, by general Councils, for ſo ſome Orders were alſo diſcharged, as the Ciſtertians, Hoſpitalers, and Templers; but this priviledg as to ſuch Orders was limited to the time that the Lands remained in their own hands, and were manured by them, *Slade and Drake's Caſe*, *Mich.* 15 *Jac. Hobart* 297. and was but a perſonal priviledge, by whom, or to whomſoever it was granted, *Mich.* 11. *Car. B. R. Sydown* v. *Holm*, *Jones* 368. ſo that if all the members of a Corporation had died, the Lands muſt have paid Tithes that were before free in their own hands, *Mich.* 11 *Jac. C. B. the Dean and Chapter of Windſor* v. *Webb*, *Godbolt*, therefore the Abbeys being now diſſolved, this priviledg of Exemption had fallen with them, unleſs upheld, and continued, by thoſe Acts of Parliament that did diſſolve them, ſo that the diſcharge at this day by which Abby Lands are free from the payment of Tithes, is not by other Law, or Authority, but by Act of Parliament.

The Acts of Parliament by which Monaſteries, Chauntries, Colledges, or free Chappels, *&c.* were diſſolved, and their Lands given to the Crown were, *Statute* 27 *H.* 8. *cap.* 28. 31 *H.* 8. *cap.* 13. 32 *H.* 8. *cap.* 24. 37. *H.* 8. *cap.* 74. *and* 1 *Ed.* 6 *cap.* 14. therefore we are to ſee, what Lands given by the ſaid Statutes or any of them are diſcharged from the payment of Tithes; as for *Stat.* 27 *H.* 8. the Lands thereby given to the Crown, were ſuch Monaſteries, Priories, or other Religious Houſes, as were not above the clear yearly value of two Hundred Pounds, and theſe are not thereby made free from the payment of Tithes; although they were by the ſame Statute given in as large and ample manner as the Abbots, *&c.* had the ſame in the right of their Houſes; alſo all ſuch Lands, *&c.* were by this Statute given, or confirmed to the Crown, which did belong to any Monaſtery, Abby, or Priory, as at any time within one year next before the making of the ſaid Act, had been given or granted to the King by the Governour thereof under their Covent Seal, or that otherwiſe had then been ſuppreſſed or diſſolved; and this Statute, nor any other, not containing any clauſe, or words of diſcharge, the Lands thereby given have been ſince the ſaid Statute ſubject to the payment of Tithes, although they might be free from that duty whilſt in the hands of the Religious Poſſeſſors, or their right to them did continue; therefore in this caſe, if a Prior, *&c.* had been diſcharged by priviledge only, that is by Bull, or Canon, by *Brampſton* Chief Juſtice, *Jones* and *Berkley* againſt *Croke*, the Statute of 27 *H.* 8. doth not preſerve this priviledg, becauſe, that there be not any words that the Lands given

given thereby ſhall be diſcharged, as the Abbots, *&c.* held them, and general Words will not preſerve Privileges which were determined, unleſs ſpecially revived; and they ſaid, that Statute 31 *H.* 8. doth not extend to Free Land given by the former Statutes, for all the Scope of the ſaid Statute, is only to extend to Abbies which came to the King after the Fourth of *February* 27 *H.* 8. and all Abbies which came to the King by the Statute of 27 *H.* 8. came unto him upon, or before the Fourth of *February* 27 *H.* 8. and to thoſe the Statute of 31 *H* 8. doth not intend to extend. For in every branch, are mentioned only the Abbies, *&c.* which came to the King after 27 *H.* 8. And although this Clauſe to be diſcharged of Tythes in the body of the ſaid Clauſe, is any Monaſteries, *&c.* yet it is after the ſaid late Abbots, *&c.* and Abbots be not mentioned before in that Clauſe therefore, it ought to be expounded, and coupled with the Clauſes before, which mention and intend only, what came to the King after the Fourth of *February* 27 *H.* 8. and doth not extend to Abbies which came to the King the Fourth of *February* 27 *H.* 8. and *Jone*'s ſaid, although, it is no Statute until the end of the Seſſions where the King's Aſſent is given, yet when there hath been a Seſſion, it ſhall have ſuch relation to the firſt day of the Seſſion, that they veſt actually in the King the ſaid Fourth day of *February* 27 *H.* 8. that the King ſhall have the Rents incurred after the Firſt day and before the laſt day of the Seſſion, and if they be paid in the interim to the Abbot, *&c.* they ſhall be paid again to the King. And *Jones* and *Brampſton* relyed upon a Judgment 18 *Jac.* in the Common Bench, betwixt *Gerrard* and *Wright*, where it was held upon ſolemn Argument, by *Hobart*, *Winch* and *Hutton* Juſtices, that the Statute of 31 *H.* 8. doth not extend to Abbies which came to the King by the Statute of 27 *H.* 8. and that in this Court in the Caſe of *Whitton* and *Weſton* for the Poſſeſſions of the Abby of Saint *John*'s of *Jeruſalem* 4 *Caroli*, where the queſtion being whether the ſaid Abby came to the King by the ſpecial Act of 32 *H.* 8. all the Four Juſtices agreed, that the Caſe of *Gerrard* and *Wright* was good Law, That the Abbies which came to the King by the 27 *H.* 8. were not within the privilege of 31 *H.* 8. nor to have the Benefit of the ſaid Statute of 31 *H.* 8. And *Berkley* Juſtice inſiſted much, that this privilege to be diſcharged of Tithes, being a meer Spiritual privilege, was determined by the Diſſolution of the Abbies, and tied only to their Bodies and Perſons; nor can be revived without eſpecial Words, which are not in the Statutes of 27 *H.* 8 or 31 *H.* 8. and that although the Statute of 31 *H.* 8. extend to the ſaid Abbies Suppreſſed by the Statute of 27 *H.* 8. yet there is a ſaving in the ſaid Statute of 31 *H.* 8. of all Rights and Intereſts, except to the Donors, Abbots, *&c.* ſo that the perſons which have right to Tithes, are preſerved by this Saving; but this point all the Juſtices in their Arguments denyed, and held, that the ſaving any right, *&c.* doth not extend to Perſons, to ſave their right againſt ſuch privileges, being againſt the Words, and intent of the Statute, wherefore for the Reaſons before, but principally, for that the Abby diſolved, appeared to be Suppreſſed by the Statute of 27 *H.* 8. By the opinion of the ſaid three Juſtices, it was adjudged for the Defendant, and that Conſultation ſhould be awarded [*Mich.* 11 *Car. B. R. Sydown* v. *Holme* 1 *Croke* 422. *ſame Caſe Jones* 368. *Hill.* 15 *Jac. Wright ver. Gerrard*, *&c. Hobart* 306. *Jones* 368. *Hill.* 18 *Jac. Gerrard* v. *Wright* 2 *Croke* 607 *Jones* 2.

As Diſcharges by Privilege only, are not now good by the Aid of the ſaid Statutes, ſo not by preſcription, or real Compoſition; for when upon a Prohibition, a Surmiſe was made, that a Prior of a Priory, by this Statute 27 *H.* 8. diſſolved, held the Lands for which Tithse were demanded by

by Suit in the Spiritual Court, diſcharged time whereof, *&c.* from the payment of Tithes for his Farmer and Tenants for Life, or Years of the ſaid Lands; Two points were moved and reſolved, *Firſt*, whether the Prior having a preſcription *De non Decimando*, this preſcription ſhall be determined by the diſſolution of the Priory, or ſtill remain to the King, and ſo to his Patentee, without the Aid of the Statute 27 *H.* 8 *and* 31 *H.* 8. *c.* 13. as to which it was argued, that in regard the Land had been diſcharged in the hand of Spiritual perſons time whereof, *&c.* who were capable of being diſcharged of Tithes, it may by intendment be Originally by Compoſition real, and then it ſhall go with the Land 8 *Ed.* 4 14. *Fits N. B.* 41. where 'tis ſaid, that a Lay Perſon may have a Compoſition, and thereupon a Prohibition, much more a Spiritual perſon, and then it ſhall go with the Land; and 'twas alſo ſaid, that ſuch preſcription *De non Decimando*, being fixed in a Spiritual perſon, by the Diſſolution comes to the King, being *Perſona Mixta*, and capable thereof, and ſo to his Patentee. But *Bramſton*, *Jones* and *Barkley* Juſtices, held the contrary, and *Firſt* agreed, that ſuch Compoſition real in the Caſe of a Lay man, if it may appear, ſhall be good, and the diſcharge ſhall go with the Land; but becauſe a Spiritual perſon may be diſcharged by grant, and that in divers manners, as well as by Compoſition real, it ſhall be intended in favour of the Church, to be by the moſt general Courſe, as by grant of Privilege, which is a perſonal diſcharge, and determins with the Corporation, and not by any real Compoſition, unleſs it could be ſhewed, *Mich.* 11 *Car. B. R. Sydown* v. *Holm.* 1. *Croke* 422. *ſame Caſe Jones* 368. *Paſch.* 17 *Car. in Scaccario, Clark* v. *Ward and Hill* 11 *Car. Cock* v. *Thorp adjudged Croke Contra* 1 *Rolls Abr.* 654. But in the like Caſe *Dodderidg* ſaid, that if it be alledged, that the Abby was founded before the time of Memory, and that from the Foundation until the Diſſolution, the Land had been diſcharged, this had been good, to which *Coke* agreed, *Trin.* 12 *Jac. B. R. Prowſe* v. *Doctor Leyfield Rolls* 1 *Rep.* 54 *and by Hobert*, who grants that diſcharge by Compoſition, Bull, Canon and Order, were but perſonal, and doth die with the Body, without the aid of a Statute to ſupport them, but holds, that diſcharge by preſcription is of another nature, for having been always (as preſcription preſumes) in Spiritual hands, the Law judgeth that it was never charged with Tithes, as the pleading is, that the Lands were *Immunes a Solutione Decimarum*, *negative*, *non privative*, *Scilicet* uncharged, not diſcharged, as if they had been once Chargeable; the reaſon whereof was, that being Spiritual Perſons, they were able to Miniſter to themſelves Spiritual Rights, and therefore performing *Officium*, they might retain *Beneficium*, and this noncharge ſtanding upon preſcription, was inherent to the Land, not as a thing given, but as a *Non ens*: Lands that never yielded Tithes, and Land of the little Monaſteries ſo free of Tithes, the King by the Statute, 27 *H.* 8. and his Patentees were to hold free not by reaſon of any Privilege, which did need to be preſerved by Statute, but even by the grant of the Land, by any kind of conveyance. And therefore, though diſcharge by Bull, or Compoſition, was to die with the Corporation, yet if it were once run out time whereof mind of man, *&c.* it was then to be pleaded, and uſed as a noncharge by preſcription, which was a Title of Diſcharge by the Temporal Law, and if it were impugned, it was to be drawn by Prohibition to a Trial at the Common Law, and this without the help of any Statute. But after he ſaith, that he is of Opinion, that the Defendant may avoid the Plea of Preſcription, by ſhewing the Abby to which the Lands belonged, had other ways of diſcharge, *Wright* v. *Gerrard and Hilderſham*, *Hill.*

Hill. 15. *Jac. Hobart* 309. but the before mentioned Judgments are more to be regarded, which are, that preſcription is no diſcharge for Lands given by the Statute, 27 *H.* 8. for the reaſons given in thoſe Judgments, and accordingly was it adjudged after ſeveral Arguments, *Hill.* 18 *and* 19 *Car.* 2. *B. R. in the Caſe of Bowles* v. *Atkins* 1 *Siderfin* 320. *the ſame Caſe* 2 *Keble* 28, 175 *where it is ſaid by Twiſden Juſt. that the Caſe of Sydnam and Holmes* 1 *Cro.* 422. hath been agreed for Law in all the Courts of *Weſtminſter*, and by (*Keeling Ch. Juſt.*) the ſame point hath been adjudged by all the Courts, the like opinion the Court was of, *Hill.* 20 *and* 21 *Car.* 2. *B. R.* 2. *Keble* 472.

And as Lands are not diſcharged by this Statute upon the account of Preſcription, ſo much leſs upon a preſcription of Unity of Poſſeſſion of the Parſonage, and the Lands of which Tithes are demanded, *Hill.* 15 *Jac. Wright* v. *Gerrard, &c. Hobart* 311. *ſame Caſe, Jones p.* 2 *Hill and* 2 *Croke* 607.

The next Statute by which Religious Houſes, *&c.* were diſolved, and the Lands given to the Crown is 31 *H.* 8. *c.* 13. and in this Statute for the freeing of Lands given thereby from the payment of Tithes, there is this Clauſe, **And where divers and ſundry Abbots, Priors Abbeſſes, Prioreſſes, and other Eccleſiaſtical Governors, and Governeſſes of the ſaid Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, houſes of Friers, and other Religious and Eccleſiaſtical houſes and places, have had, poſſeſſed and enjoyed divers and ſundry parſonages appropriated, Tithes, Penſions and Portions, and alſo were acquitted and diſcharged of and for the paiment or paiments of Tithes, to be paid out of for their ſaid Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, houſes of Friers, and other Religious and Eccleſiaſtical houſes and places, Manors, Meſſuages, Lands, Tenements and Hereditaments: Be it therefore enacted by the authority abovеſaid, That as well the King our ſovereign Lord, his heirs and ſucceſſors, as all and every ſuch perſon and perſons, their heirs and aſſigns, which have, or hereafter ſhall have any Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, houſes of Friers, or other Eccleſiaſtical houſes or places, ſites, circuits, precincts of the ſame, or any of them, or any manors, meſſuages, parſonages appropriate, tithes, penſions, portions, or other hereditaments, whatſoever they be, which belonged or appertained, or which now belong or appertain unto the ſaid Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, houſes of Friers, or other Religious and Eccleſiaſtical houſes or places, or unto any of them, ſhall have, hold, retain, keep and enjoy, as well the ſaid parſonages appropriate Tithes, Penſions, and portions, as the ſaid Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, houſes of Friers, and other Religious and Eccleſiaſtical houſes and places, ſites, circuits, precincts, manors, meaſes, lands, tenements and other hereditaments whatſoever they be, and every of them, according to their eſtates and titles, diſcharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the ſaid late Abbots, Priors, Abbeſſes, Prioreſſes, and other Eccleſiaſtical Governors and Governeſſes, or any of them had, held, occupied, poſſeſſed, uſed, retained, or enjoyed the ſame, or any parcel thereof, at the days of their diſſolution, ſuppreſſion, renouncing, relinquiſhing, forfeiting, giving up, or coming to the Kings Highneſs, of ſuch Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, houſes of Friers, or other Religious or Eccleſiaſtical houſes or places, or at the day of the diſſolution, ſuppreſſion, renouncing, relinquiſhing, giving up, or coming to the Kings**

Highneſs

highneſs of any of them, this act, or any thing therein contained to the contrary notwithſtanding. Stat. 31 *H.* 8. *chap.* 13. *Sect.* 21.

And here I ſhall ſet down the Catalogue of the ſeveral Monaſteries, that upon the general ſurvey taken the 26 *H.* 8. were returned to be of the Annual value of two Hundred Pounds *per Ann.* and upwards, within *England* and *Wales*, and by conſequence diſſolved by the Statute of 31 *H.* 8 *c.* 13. and by that means are capable of being diſcharged of the payment of Tithes, *viz.*

Berks.

	l.	*s.*	*d.*
Reading Benedictines, Founded in the time of *H.* 1.	1938	14	03
Buſleſham Abby Canons of St. *Auſten*, Founded in the 13 *Ed.* 3	0285	00	00
Abington Abby Benedictines, Founded in the year 720	1876	10	09

Bedford.

Newnham Priory Canon St. *Auſtin*, Founded in the time of *H.* 1.	0293	05	11
Elmeſton Abby Benedictines Founded in the time of *Will.* the *Conq.*	0284	12	11
Wardon Abby Ciſtertians, Founded in the 4 of *Stephen* in the Year 1139.	0389	16	06
Chickſand Priory, White Canons *Gilbertines*, Founded in the time of *W. Ruf.*	0212	03	05
Dunſtable Abby Canons of St. *Auſtin*, Founded in the time of *H.* 1.	0344	13	03
Wooburn Abby Ciſtertians, Founded in the time of King *John.*	0391	18	02

Bucks.

Aſhrugg College Canons of St. *Auſtin*, Founded in the time *Ed.* 1.	0416	16	04
Noteley Abby Canons of St. *Auſtin*, Founded in the time of *H.* 1. in 1112.	0437	06	08
Miſſenden Abby Benedictines, Founded in the Year 1293.	0261	14	06

Cantabr.

Thorney Abby Benedictines, Founded in the Year 972.	0411	12	11
Barnwell Priory Canons of St. *Auſtin*, Founded in the time of *H.* 1. in the Year 1092	0256	11	10

Ceſtr.

St. *Werburge Abby Benedictines*, Founded in the Year 1095	1003	05	11
Combermeere Abby Ciſtertians, Founded in the Year 1134	0225	09	07

Cornub.

Bodnim Priory Canons of St. *Auſtin*, Founded in the Year 936.	0270	00	11
Launceſton Abby Canons of St. *Auſtin*, Founded in the time of *Will.* the *Conq.*	0354	00	11
St. *Germans Abby* Canons of St. *Auſtin*, Founded in the time of King *Ethelſtone*	0243	08	00

Cumbr.

Carliſle Priory Canons of St. *Auſtin*, Founded in the time of *Will. Rufus.*	0418	03	04
Holmcoltrom Abby Ciſtertians, Founded in the Year 1135	0427	19	03

Derb.

Darley Abby Canons of St. *Auſtin*, Founded in the time of *H.* 2.	0258	14	05

Devon.

Ford Abby Ciſtertians, Founded in the Year 1133	0374	10	06
Newnham Abby Ciſtertians, Founded about the Year 1246	0227	07	08
Dinkeſwell Abby Ciſtertians, Founded in the Year 1201	0294	18	06
Hertland Abby Canons of St. *Auſtin*, Founded in the time of *H.* 2.	0306	03	02
Torre Abby Præmonſtratenſes, Founded in the time of *R.* 1.	0396	00	11
Buckfaſt Abby Ciſtertians, Founded in the time of *H.* 2	0466	11	02
Plimpton Abby Ciſtertians, Founded in the time of *E.* 1.	0241	17	09
Taveſtock Abby Benedictines, Founded in the Year 961	0902	05	07
Exon Priory Clun. Founded in the time of *H.* 1.	0502	12	09

Dorſet.

Abbotsbury Benedictines, Founded about the Year 1016	0390	19	02
Midleton Abby Benedictines, Founded by King *Ethelſton*	0538	13	11
Tarrent Abby Ciſtertians, Founded by *H.* 3	0214	07	09
Shaſton Abby Benedictines, Founded in the Year 941	1166	08	09
Cerne Abby Benedictines, Founded in the time of King *Edgar.*	0515	17	10
Sherburn Abby Benedictines, Founded about the Year 370	0682	14	07

Dunelm.

St. *Cuthbert Abby Benedictines*, Founded about the Year 842	1366	10	09
Tinmouth Priory Benedictines, Founded	0397	11	05

Eſſex.

Berking Abby Benedictines, Founded in the Year 680	0862	12	05
Stratford Langthorn Abby Ciſtertians, Founded in 1135	0511	16	03
Waltham Abby Canons of St. *Auſtin*, about 1060	0900	04	03
Walden Abby Benedictines, Founded in the Year 1136	0372	18	01
St. *Oſwith Abby* Canons of St. *Auſtin*, Founded in 1120	0677	01	02
Colcheſter Abby Canons of St. *Auſtin*, in the time of *H.* 1.	0523	17	00

Glouceſter.

Briſtol Abby Canons of St. *Auſtin*, Founded about the time of *Hen.* 1.	0670	13	11
Hayles Abby Ciſtertians, Founded in the Year 1246	0357	07	08
Winchcomb Abby Benedictines, Founded in the Year 787	0759	11	09
Tewksbury Abby Benedictines, Founded in the Year 715	1598	01	05

Ciren-

Cirenceſter Abby Canons of St. *Auſtin*, Founded in the time of *H.* 1.	1051	07	01
Kingſwood Abby Ciſtertians, Founded in the Year 1139	0244	11	02
Glouceſter Abby Benedictines, Founded in the Year 680	1946	05	09
Lanthony Priory Juxta Glouceſter, Canons of St. *Auſtin*, Founded in the Year 1136	0648	19	11

Hants.

St. *Swithins Wintin Abby Benedictines*, Founded in the Year 634.	1507	17	02
Hide Abby Benedictines, Founded by King *Alfrid*	0865	18	00
Wherwell Abby Benedictines, Founded in the time of King *Edgar*	0339	08	07
Romſey Moniales Benedictines, Founded in the Year 907	0393	10	10
Twinham Priory Canons of St. *Auſtin*, Founded *Ante* 1042	0312	07	00
Belloloco *Abby Ciſtertians*, Founded in the Year 1024	0326	13	02
Southwick Priory Canons of St. *Auſtin*, Founded in the time of *H.* 1.	0257	04	04
Tichfield Abby Præmonſtratenſes, Founded in the time of *H.* 3.	0249	16	01

Hertford.

St. *Albanes Abby* Benedictines, Founded in the Year 755	2102	07	01

Hunts.

St. *Neots Abby* Benedictines, Founded about the time of *H.* 1.	0241	11	04
Ramſey Abby Benedictines, Founded in the Year 969	1716	12	04

Kanc.

St. *Auſtin's prop. Cant. Abby* Benedictines, Founded in 605	1413	04	11
Ledis Priory Canons of St. *Auſtin*, Founded in the Year 1119.	0362	07	07
Feverſham Abby Clun. Founded in the Year 1147 by K. *Stephen*	0286	12	06
Boxley Abby Ciſtertians, Founded in the Year 1144	0204	04	11
Roffen Abby Benedictines, Founded in the Year 600	0486	11	05
Malling Abby Benedictines, Founded by K. Edmund	0218	04	02
Dertford Abby Canons of St. *Auſtin*, founded 46 *Ed.* 3. *per. ipſ. R.*	0380	00	00

Lanc.

Whalley Abby Ciſtertians, Founded in the Year 1172	0321	09	01

Leic.

Leiceſter Abby Canons of St. *Auſtin*, Founded in 1143	0951	14	05
Croxden Abby Præmonſtratenſes, Founded about the time of *R.* 1.	0385	00	10
Launda Abby Canons of St. *Auſtin*, Found in the time of *W. Ruf.*	0399	03	03

Lincoln.

Lincoln St. *Gath. Priory Gilbert*, Founded in the time of *H.* 2.	0202	05	00
Kirkſteed Abby Ciſtertians, Founded in the Year 1139	0286	02	07
Reveſley Abby Ciſtertians, Founded in the Year 1142	0287	02	04
Thornton Abby Canons of St. *Auſtin*, Founded in the Year 1139.	0594	17	10
Barney Abby Benedictines, Founded in the Year 712	0366	06	01

Croyland Abby Benedictines, Founded in the time of K. *Ethelred* 716	1803	15	10
Spalding Abby Benedictines, Founded in the Year 1052	0761	08	11
Sempringham Abby Gilbert, Founded in the Year 1148 K. *Stephen*	0317	04	01
Epworth Moniales Carthusians, 10 *R.* 2. *Fundat*	0237	15	02

Lond. and *Midd.*

St. *John Jerusal. Priory*, Founded in the time of *H.* 1. 1100	2385	12	08
St. *Bartlol. Smithfield* Canons of St. *Austin*, Founded in the Year 1102	0653	15	00
St. *Mary Bishops-gate Priory*, Founded in the Year 1187 9 *R.* 1.	0478	06	06
Clerkenwell Priory Benedictines, Founded in the time of K. *Stephen*	0262	19	00
London Minors Benedictines, Founded in the time of *Ed.* 1.	0318	08	05
Westminster Abby Benedictines, Founded in the time of K. *Edgar*.	3471	00	02
Sion Abby Canons of St. *Austin*, Founded by *H.* 5.	1731	08	04
London a House. of *Carthusians*, Founded in the time of *Ed.* 3	0642	00	04
St. *Clare* without *Algate Monial*, Founded in the Year 1292	0418	08	05
St. *Mary Charter-house Carthusians*, Founded in the Year 1379	0736	02	07
St. *John Holiwell Monial Nigr.* Founded in the Year 1318	0347	01	03
St. *Mary East-Smithfield Abby Cistertians*, Founded 34 *Ed.* 3.	0602	11	10

Northfol.

Thetford Abby Clun. Founded in the Year 1103	0312	14	04
Wymundham Abby Benedictines, Founded in the Year 1139	0211	16	06
Hulmo Abby Benedictines, Founded by K. *Canutus*	0583	17	00
Westdreham Abby Præmonstratenses, Founded in the time of *H.* 2.	0228	00	00
Walsingham Abby Canons of St. *Austin*, Founded about the time of K. *Stephen*	0391	11	06
Castle Acre Abby Clun. Founded in the Year 1090	0306	11	04
Westacre Abby Clun. Founded in the time of *Will. Rufus*	0260	13	07

Northon.

Burgi St. *Petri Abby Benedictines*, Founded *per. Rofere R. Mer.*	1721	14	00
Pipewell Abby Cistertians, Founded in the Year 1143	0286	11	08
St. *Andrews Priory Clun.* Founded in the Year 1067	0263	07	01
Sulby Abby Præmonstratenses, Founded in the time of K. *Stephen*	0258	08	05

Notts.

Lenton Priory Clun. Founded in the time of *H.* 1.	0329	05	10
Thurgarton Priory Canons, of St. *Austin*, Founded in the time of *H.* 1.	0259	09	04
Welbeck Abby Canons of St. *Austin*, Founded in the time of K. *Stephen*	0249	06	03
Warsop Priory Canons of St. *Austin*, *Fundat.*	0239	10	05
Bella Valla Pri. Carth. F. Circa 16 *Ed.* 3.	0227	08	00
Newsteed Priory Canons of St. *Austin*, Founded in the time of *Ed.* 3.	0219	18	08

These two last are under value in Mr. *Dugdale*, but thus *per Speed.*

Nor.

Northumbr.

Tinmouth a Cell to St. *Albans*, a Nunnery ——— 0511 04 01

Oxon.

Godſtow Abby Benedictines, Founded in the time of K. *Stephen.* 0274 05 10
Eyneſham Abby Benedictines, Founded by K. *Etheldred* ——— 0441 12 02
Oſney Abby Canons of St. *Auſtin*, Founded in the time of *Hen.* 1. 0654 10 02
Thama Abby Ciſtertians, Founded in the time of *H.* 1. ——— 0256 13 11
Oxford Priory per Speed fund. ante Conqu. ——— 0224 04 08
Dorcheſter per eundem Abby Canons of St. *Auſtin*, Founded 635. 0219 12 00

Salop.

Haghmond Abby Canons of St. *Auſtin*, Founded in the Year 1100. 0259 13 07
Lilleſhull Abby Canons of St. *Auſtin*, *F. per A. d'Elſtreda*, *R. Merciæ* ——— 0229 03 01
Wigmore Abby Canons of St. *Auſtin*, Founded in the Year 1172 *per Speed* ——— 0267 02 10
Wenlock Priory, *Clun.* Founded in the Year 1181 *vel antea* ——— 0401 00 07
Salop Abby Canons of St. *Auſtin*, Founded in the Year 1081 *per Speed* ——— 0615 04 03
Hales Owen Abby Præmonſtratenſes, Founded in the time of K. *John* 0337 15 06

Somerſet.

Glaſſenbury, *Abby* Benedictines, Founded about the Year 300 — 3311 07 04
Brewton Abby Canons of St. *Auſtin*, Founded about the time of the Conquerour ——— 0439 06 08
Henton Priory Carthuſians, Founded in the time of *H.* 3. ——— 0248 19 02
Witham Priory Carthuſians, Founded by *H.* 2. ——— 0215 15 00
Taunton Priory Canons of St. *Auſtin*, Founded in the time of *H.* 1. ——— 0286 08 10
Bathon Abby Benedictines, Founded in the time of *H.* 3 ——— 0617 02 03
Keyneſham Abby Canons of St. *Auſtin*, Founded in the time of *H.* 1 ——— 0419 14 03
Michelney Abby Benedictines, Founded in the Year 740 ——— 0447 04 11
Buckland Priory Ciſtertians, Founded in the time of *E.* 1. — 0223 07 04

Staff.

Dela Cres Abby Ciſtertians, Founded in the Year 1153 ——— 0227 05 00
Burton ſup. Trent Abby Benedictines, Founded in the time of *Eadred* ——— 0267 14 03
Croxden Abby Ciſtertians, *Cont. Fundat.* ———

Suffolk.

St. *Edmondsbury Abby* Benedictines, Founded in the Year 1020. 1659 13 11
Butley Abby Canons of St. *Auſtin*, Founded in the Year 1171 — 0318 17 02
Sibeton Abby Ciſtertians, Founded in the Year 1150 ——— 0250 15 07

Ixworth Priory Canons of *St. Auſtin*, Founded in the time of the Conqueſt	0280	09	05

Surry.

Merton Priory Canons of St. *Auſtin*, Founded in the Year 1414 in the time of *H.* 1	0957	19	05
Skene Priory Carthuſians, Founded in the Year 1414	0777	12	00
Chertſey Abby Benedictines, Founded in the Year 666	0659	15	08
Newark Priory	0258	11	11
St. *Mary's Overs*, *Abby* Canons of St. *Auſtin*, Founded 7 *H.* 1.	0624	06	06
Bermundſey Abby Canons of St. *Auſtin*, Founded 7 *H.* 1.	0474	14	04

Suſſex.

Lewis, Founded in the time of *W. Rufus*	0920	04	06
Roberts-bridge Abby Ciſtertians, Founded in the time of *H.* 2.	0248	10	06
Battaile Abby Black Monks, Founded 1066	0987	00	11

Warw.

Combe Abby Ciſtertians, Founded in the time of K. *Stephen*	0311	15	01
Kenelworth Abby Canons of St. *Auſtin*, Founded in the time *Hen.* 1	0538	19	00
Merivall Abby Ciſtertians, Founded in the Year 1148	0254	01	08
Nunenton Monial Benedictines, Founded in the time *H.* 2.	0253	14	05

Wilts.

Malmsbury Abby Benedictines, Founded about the Year 670	0803	17	07
Bradenſtock Priory Canons of St. *Auſtin*, Founded in the time of the Conqueror	0212	19	03
Edington Priory Canons of St. *Auſtin*, Founded in 1352	0442	09	07
Ambresbury Abby Benedictines, Founded in 1177	0494	15	02
Wilton Abby Benedictines, Founded in the time of K. *Etholwolph*	0601	01	01
Faireley a Cell to *Lewis per Speed*, Founded in the Year 1125 *Clun.*	0217	00	04
Laycock Abby Canons of St. *Auſtin*, Founded in the Year 1232 *per Speed*	0203	12	03

Wigorn.

Malverne Abby Benedictines, Founded in the Year 1083	0308	01	03
Eveſham Abby Benedictines, in the time of *Offec*	1183	12	09
Perſhore Abby Ciſtertians, Founded in the Year	0643	04	05
Hales Owen Abby Præmonſtratenſes, Founded in the time of K. *John*	0282	13	04
Bordesly Abby Ciſtertians, Founded in the Year 1138	0388	01	10

Eborum.

St. *Mary Eborum Abby Benedictines*, Founded in the Second Year of *Will. Rufus*,	1550	07	00

Selby

Selby Abby Benedictines, Founded in the time of the Conqueror	0729	12	10
Kirkſtal Abby Ciſtertians, Founded in the Year 1147	0329	02	11
De Rupe Abby Ciſtertians, Founded in the Year 1147	0224	02	05
Monks Burton Abby Clun. Founded about the Year 1186	0239	03	06
Noſtel Abby Canons of St. *Auſtin*, Founded in the time of *H.* 1.	0492	18	02
Pomfrait Abby Clun. Founded in the time of the Conquerour.	0337	14	08
Gisbourne Abby Canons of St. *Auſtin*, Founded in the time of K. *Stephen*	0628	03	04
Whitby Abby Benedictines, Founded in the time of the Conqueror	0437	02	09
Montegratiæ Abby Carthuſians, Founded about the Year 1396	0323	02	10
Newburge Priory Canons of St. *Auſtin*, Founded in the Year 1145	0367	08	03
Belland Abby Ciſtertians, Founded in the Year 1134	0238	09	04
Kirkham Abby Canons of St. *Auſtin*, Founded in the time of *H.* 1.	0269	05	09
Melſa Abby Ciſtertians, Founded in the Year 1136	0299	06	04
Brilington Canons of St. *Auſtin*, Founded in the time of *H.* 1	0547	06	11
Walton Abby Gilbertines, Founded in the time of K. *Stephen*	0360	16	10
Bolton in *Craven Priory* Canons of St. *Auſtin*, Founded in *H.* 1.	0212	03	04
Rival Abby Ciſtertians, Founded in the Year 1132	0278	10	02
Jerval Abby Ciſtertians, Founded in the time of K. *Stephen*	0234	18	05
Furnes Abby Ciſtertians, Founded in the Year 1127	0805	16	05
De Fontibus Ciſtertians, Founded in the Year 1132	0998	06	08
Warter Priory, Canons of St. *Auſtin*, Founded in *H.* 1.	0221	03	10
Richal per Speed	0351	14	06
Old Maulton Abby Founded in the time of K. *Stephen per Speed*	0257	07	00
St. *Michael* near *Hull Carthuſians*, Founded in the Year 1377	0231	17	03

Wallia.

Valle De Sancta Cruce com Denbigh Ciſtertians, Founded in the time of *Ed.* 1	0214	03	05
Strata Florida Cardiganſhire Ciſtertians or *Clun.* Founded in the time of the Conqueror	1226	06	00

Note that in the Valuations aforeſaid, all Halfpence and Farthings are rejected.

And here we are alſo to take Notice, that not all the Monaſteries, Priories, and other Religious Houſes, which were not above the clear yearly value of two Hundred Pounds *per Annum*, were diſſolved by the Statute of 27 *H.* 8. *c.* 28. although they might have been, but ſome of them by this Statute 31 *H.* 8. and the reaſon is, becauſe, there was a *Proviſo* in Statute 27 *H.* 8. (which is left out of the Statute in the Book of the Statutes at large) that notwithſtanding that Act, the King might by his Letters Patents under the Great Seal of *England*, continue any of the ſaid Monaſteries. Therefore ſuch of them as were continued by the King's Letters Patents, are not to be looked upon as diſſolved by Statute, 27 *H.* 8. but by Statute 31 *H.* 8. and the Lands belonging to them that were held Tythe-free before their Diſſolution, remain ſo by force of the aforeſaid Clauſe in the Statute of 31 *H.* 8. So was it adjudged in the *Exchequer Chamber* betwixt *Walklute* Farmer of the Rectory of *Uttoxater* in the County of *Stafford* and *Wilſhaw* owner of a Farm there, formerly belonging to the Abby of *Croxden*, a ſmall Abby of the *Ciſtertian* Order, which *Wilſhaw* ſhewed

ſhewed to be continued by Letters Patents, and not diſſolved but by Statute 31 *H.* 8. *Parſons Counſellor part* 2. *cap.* 21. *fol.* 335.

But we are not from hence to Collect, that ſuch Land which did belong to the leſſer Monaſteries diſſolved by Statute 27 *H.* 8. and thereby then held Tythe-free, being after the diſſolution thereof given to ſome other greater Monaſteries that were not diſſolved, but by Statute 31 *H.* 8. ſhall be now held free from paying Tythe, by force of the diſcharging Clauſe in Statute 31 *H.* 8. for upon the Diſſolution of the Corporations to which firſt they belonged, they immediately became Tytheable, and ſo could not be held by the greater Abbies more free than the King their Donor had them; and by conſequence though they came the ſecond time to the King by 31 *H.* 8. yet they came to him as the Abby held them, *viz.* ſubject to Tythes, and the clauſe of diſcharge therein doth not extend to them, *Hill.* 15 *Jac. Wright* v. *Gerrard*, &c. *Hobart* 307. *ſame Caſe, Jones* p. 2. *and* 2 *Croke* 607.

Nor muſt we underſtand, that all the other Lands that did belong unto the greater Monaſteries diſſolved by the 31 *H.* 8. or of the leſſer Monaſteries continued by the King's Letters Patents, and ſo alſo diſſolved by the ſame Statute, are diſcharged from the payment of Tythes, but only ſuch of them as were held diſchaged by the Religious Perſons that did enjoy them before the diſſolution; and of theſe, ſome were held abſolutely diſcharged, others diſcharged only whilſt they did remain in the actual Occupation and Manurance of the Owners thereof.

Thoſe that were held abſolutely diſcharged, were ſuch as were diſcharged originally, either by Compoſition real, or by Bulls, or Grants of the Pope for this or that Mannor or parcell of Land, or for this or that ſort of Tythe only; therefore when a Parſon ſued for the Tythe of Hay and Grain of the Demeans of a Mannor within a Pariſh, of which the Dean and Chapter of *P.* after the Diſſolution of the Monaſteries were Owners; in regard that within the time whereof the memory of man was not to the contrary, before the Diſſolution, and at the time of the Diſſolution of the Abby to which the Mannor, *&c.* formerly did belong, no ſuch Tythes, but only other Tythes as Wool, Lamb, *&c.* were paid by the Farmers by Leaſe or at Will, being Lay-perſons: It was ſaid by the Juſtices and Clerks of the Court, that Prohibitions in this Caſe upon the Statute 31 *H.* 8. by vertue of the word Diſcharged were very ordinary, *Paſch.* 18 *Eliz. Dyer* 349.

And thoſe Lands that were Free in either reſpect, that is, ſo that no Tythes ſhall be paid of the Lands, or that none ſhall be paid of this, or that ſort of Tythe, are ſaid to be abſolutely freed; for that the freedom extends not only to the Owner, but alſo to his Farmers, Tenants, and Occupiers under him; yet not all that receive any Profits from the Lands belonging to a Mannor freed as aforeſaid, ſhall be underſtood to be Farmers, Tenants, or Occupiers, for if one, or more perſons have *Libertatem falcandi*, to make Hay only, or alſo to put their Cattel on Lands, that belong to ſuch Mannor, as appendant to their Houſes, *&c.* they are but Commoners, and not Farmers, or Occupiers, becauſe, what is taken, is taken as a profit apprender, therefore, if a Preſcription was, that the Abbot his Farmers, Tenants, and Occupiers ſhould be diſcharged of Tithes of the Lands where ſuch Commoners had ſuch Privileges, it ſhall not be extended to them, *Trin.* 12 *Jac. Suckerman and Coates* v. *Sir Henry Warner* 2. *Bulſtrode* 248. *ſame Caſe Rolls* 1 *Rep.* 53. Theſe Titles of diſcharge were indeed by time for the moſt part loſt, and ran out into Preſcriptions, and from hence, all other Preſcriptions *De non Decimando* are ſuppoſed to have their beginning, ſo that it is needleſs when a diſcharge is to be ſhewed, to ſet forth other Original thereof, than that they

they were discharged by Prescription, or that they were held by such Monasteries dissolved by 31 *H.* 8. time whereof, *&c.* free from the payment of Tithes, for it shall be presumed that it was by Lawful means, *Mich.* 32 *and* 33. *Eliz. B. R. Nash.* v. *Mollins* 1 *Leonard* 241. yet in a Declaration upon a Prohibition, the Plantiff ought to shew, not only that the Abbot held the Land discharged, at the time of the Dissolution; but also how he held it discharged, for the Statute of 31 *H* 8. saith, in as large and ample manner as the Abbot held, *&c.* and the Statute pincheth upon that, besides, such a Claim of discharge of Tithes is contrary to common Right, therefore shall be taken strict, by *Hobart Hutton* and *Winch*, *Contra Warburton*; yet to say that the Lands were held Tithe-free time whereof, *&c.* may be sufficient, *Hill.* 15 *Jac. C. B. Slade* v. *Drake*, *Noy* 97. *Mich.* 18 *Jac. same Case*, *Jones p.* 6. *and Hob.* 295. and a discharge by Composition, Bull, or Grant cannot otherwise be made to appear, but by Prescription, and appearing by Prescription as to Lands given by 31 *H.* 8. it shall be allowed at this day, *Mich.* 11 *Car. B. R. Sydown* v. *Holm. Jones* 368. and it is said, that if an Abbot, or Prior were seised of Land discharged of Tithe, he that now is Farmer of such Land, shall be admitted to prescribe in *Non Decimando* by the Statute of 2 *Ed.* 6. which wills, that none Pay Tithes otherways than they were paid Forty Years before, but in no other Case shall a Man prescribe in *Non Decimando*, but only in *Modo Decimandi*, *Mich.* 27 *and* 28 *Eliz. Branch's Case Moor* 219.

But it is to be Noted, that no Abbot, or Prior, could make any such Prescription that was not founded before the time of Memory, that is, before the first Year of *R.* 1. or the Year 1120 which is the time of limitation of all Prescriptions at the Common Law, 2 *Rolls Abr.* 269. *and Pasch.* 18 *Car.* 2 *B. R. Allen* v. *Pory* 3 *Keble* 45. *Mich.* 25 *Car.* 2 *Fosset* v. *Franklin.* 3 *Keble* 217 *and Raymond* 225.

Note also that it hath been Enacted as followeth, Item, **For as much as our Lord the King, upon grievous complaint to him made in this Parliament, hath perceived that the religious men of the Order of** Cisteaux **in the Realm of** England, **have purchaced certain Bulls, to be quit and discharged to pay the Tithes of their Lands, Tenements and Possessions, let to Farm, or Manured, or Occupied by other persons than by themselves, in great prejudice and derogation of the Liberty of holy Church, and of many liege people of the Realm: Our Lord the King willing thereupon to ordain remedy, by the advice and assent of the Lords Spiritual and Temporal, and at the instance and request of the said Commons, hath ordained and stablished, That the Religious persons of the Order of** Cisteaux **shall stand in the estate that they were before the time of such Bulls purchased. And that as well they of the said Order, as all other religious and seculars, of what estate or condition they be, which do put the said Bulls in execution, or from henceforth do purchace other such Bulls of new, or by colour of the same Bulls purchased or to be purchased, do take advantage in any manner: that process shall be made against them, and every of them by garnishment of two months by Writ of** Præmunire facias. **And if they make default, or be attained, then they shall incur the pains and forfeitures contained in the Statute of Provisors, made the thirteenth year of the said King** Richard, 2 *H.* 4. *Cap.* 4. It hath also been enacted, **That no person religious nor secular, of what estate or condition that he be, by colour of any Bulls containing such privileges, to be discharged of** Dismes **pertaining to Parish-Churches, Prebends, Hospitals, or Vicarages, purchased before the first year of King** Richard **the second after the Conquest, or sithence not exe-**

cuted, ſhall put in execution any ſuch Bulls ſo purchaſed, or any ſuch Bulls to be purchaſed in time to come. And if any ſuch religious or ſecular perſon, of what eſtate or condition he be, from henceforth by colour of ſuch Bulls do trouble any perſon of holy Church, Prebendaries, Wardens of Hoſpitals, or Vicars, ſo that they cannot take or enjoy the Diſmes due or pertaining to them of their ſaid Benefices, that then ſuch diſturbers ſhall incur like proceſs and pain as is ordained by the Statute made againſt them of the Order of Ciſteaux, in the ſecond year of the Reign of our ſaid Lord the King that nowis. 7 *H.* 4. *cap.* 6. By which Statute it appears, that as the Lands of Churches Founded ſince the time of the Firſt of *R.* 1. as aforeſaid, cannot plead Preſcription for an abſolute diſcharge of Tithes, ſo neither by reaſon of this Statute can any Popes Bull purchaſed before the making thereof, or after, be pleaded as a ground of an abſolute diſcharge, *viz.* not only for the Owners whilſt occupied by themſelves, but alſo for their Farmers, Tenants, or Occupiers, whether the Eſtate was belonging to any Religious perſons, or did, or at this day doth belong to any of the Secular Clergy, yet I ſuppoſe that a real Compoſition if it can be ſhewed, may be a ſufficient diſcharge, that is, if it was made ſince this Statute, or ſince the time of limitation of preſcriptions, provided that it was alſo made before Statute 1 *Eliz.* where the Tithes did belong to a Biſhop, or before Statute 13 *Eliz.* where they did belong to any College, Dean, Dean and Chapter, Archdeacon, Prebend, Parſon, Vicar, *&c.*

Though Preſcription *De non Decimando* without the aid of an Act of Parliament Periſheth when a Corporation is diſſolved, and the Lands come to a Lay hand, yet by reaſon of the aforeſaid Clauſe in the 31 *H.* 8. and the favourable interpretation thereof, Preſcription is of that force, that where any of the Lands belonging to the Monaſteries diſſolved by the 31 *H.* 8. were in the Pariſhes whoſe Churches were appropriated to any of the ſaid Monaſteries, ſo that the ſaid Monaſtery was ſeiſed both of the ſaid Lands and Rectory *Simul & Semel*, time out of mind, and paid no Tithes within the memory of man for the Lands, ſuch Lands ſhall be diſcharged from the payment of Tithes by ſuch perpetual Unity of poſſeſſion, as was adjudged, *Mich.* 34 *and* 35 *Eliz. Knightly* v. *Spencer, and Hill.* 24 *Eliz. Roſe* v. *Gurling both vouched Trin* 38 *Eliz. B. R. in the Arch Biſhop of Canterbury's Caſe* 2 *Coke* 47, 48. *Mich.* 40 *and* 41. *Eliz Benton* v. *Trot. Moor* 528. where alſo 'tis ſaid, to be ſo adjudged in *Green* and *Boſkins* Caſe. However, if in this Caſe of Unity, the Farmers of the Demeſnes had paid Tithes, *&c.* to the Abbot, *&c* when uſed by their Farmers at will, for Years, or life, then the intendment of the Law by reaſon of the ſaid Unity of Poſſeſſion (which ought to be time out of mind, *&c.*) that the land was diſcharged of the payment of Tithes, will not hold place, *Mich.* 4 *Car. B. R. Brondhead* v. *Lewis Jones*, 412. therefore, if an Abbot had made a Leaſe for Years, a year before the Diſſolution, although that the Leaſe was made void by the Statute, yet this Leaſe ſhall deſtroy the Unity of Poſſeſſion, ſo that it may not be pleaded in diſcharge of the Tithes, but otherwiſe it would have been, if there had been an abſolute nullity of the Leaſe *ab initio* without a conſequent Statute to make it void, *Hill.* 11 *Jac. B. R. Arnold* v. *Bidgood, per Cur.* 2 *Bulſtrode* 67. And ſo *Popham* ſaid that Unity in Eſtate, and not in occupation of the Land and Rectory at the day of the Diſſolution by the Abbot, is not a diſcharge of the Tithes within the Statute, no not though the Land was in Leaſe but for one year at the time of the Diſſolution, and though there had been an Unity of Poſſeſſion time whereof, *&c.* until the laſt year, or other ſhort time before the Diſſolution, *Mich.* 40 *and* 41 *Eliz. Benton* v. *Trot. Moor* 528. *Mich.* 39 *and*

40

40 *Eliz. Button* v. *Long* 3 *Croke* 584. And accordingly when the Caſe was, that an Abbot and his Predeceſſors had been ſeiſed of a Rectory, and of Land within the ſame Pariſh time whereof, *&c.* until the twenty ſixth year of *H.* 8. at which time the Abbot made a Leaſe of the Land for Sixty years, and by that Leaſe Demiſed all Tithes renewing, *&c.* upon the ſaid Lands, *viz.* Hay, Corn, *&c. reddendo perinde* certain Corn Rent, and by the ſame Indenture it was Covenanted, that the Leſſee ſhall not ſet forth the Tithes of the Hay, and Corn to the Leſſor and his Succeſſors, but that the Leſſee his Ex-Executors, and Aſſigns, ſhall ſet forth Tithe of Wool and Lamb. to the Leſſor, *&c.* and ſmall Tithe to the Vicar, *&c.* And after, *viz.* the 31 *H.* 8 the Abby was diſſolved, and in the ſame year was the Statute made, **which Enacts, that the purchaſer ſhall hold it diſcharged in the ſame manner as it was in the hands of the Abbots,** &c. in this Caſe it was adjudged, when the Lands and the Tithes had ſeveral Proprietors, that this Unity of Poſſeſſion with the other circumſtances, ſhall not diſcharge the Land from the Payment of Tithes, for there is a *Demiſe* of the Land, and of the Tithes alſo, which argues that they were due and payable in themſelves; *Secondly*, here is a Proviſion for the payment of other Tithes; *Thirdly*, here is a Covenant, that the Tithes Leaſed ſhall not be ſet forth; *Fourthly*, it is found that Lamb and Wool were paid in kind, and a payment of part of the Tithes is a ſeiſin of all; from which it follows, that the Land had never been diſcharged by real Compoſition, and ſo that though the Tithes of Corn and Hay were not paid during the Unity, yet becauſe they were paid ſome time before the Diſſolution, by right they were payable, *Mich.* 5 *Jac. B. R. Dobitoft* v. *Curteen* 2 *Croke* 452.

So if Tithes were not paid in time of memory by a Houſe of Religion, and they Leaſe the Land for years, and receive Tithes, of their Leſſee, the Leaſe expires two years before the Diſſolution of the ſame Houſe, the King ſhall not be diſcharged of the payment of Tithes by the Statute of 31 *H.* 8, by *Coke* and *Walmſley* againſt *Warburton* and *Foſter, Trin* 9 *Jac. Priddle* v. *Napper* 2 *Brownlow and Gouldsborough* 26. And if the Farmers have paid Tithes before the Statute, the ſame may be pleaded, and Iſſue thereupon may be taken, but if the Lands were always occupied by the Abbots, or Demiſed over, and no Tithes paid before the ſaid Statute, the Land is diſcharged of the payment of Tithes; *Grevil* and *Trotts* Caſe touched in the Arch Biſhop of *Canterbury*'s Caſe, 2 *Coke* 48. *Priddle* v. *Napper*, 11 *Coke* 14. *Slade* v. *Drake*, *Hobart* 298. And if Land that was diſcharged by Unity of Poſſeſſion, came to the King by 31 *H.* 8, then by force of the ſaid Branch of diſcharge of the paymen of Tithes, a general allegation that ſuch Prior, *&c.* held the Land at the time of the Diſſolution of the ſaid Priory, diſcharged of the payment of Tithes without ſhewing how, is ſufficient. The Arch Biſhop of *Canterbury*'s Caſe 2 *Coke* 48 *ſame Caſe*, *Moor* 420. Yet it hath been held, that if an Unity of Poſſeſſion by way of diſcharge be alledged generally, without ſhewing how, or adding, that it was perpetual, it is not ſufficient, *Mich.* 15 *Jac. Slade* v. *Drake Hobard* 298. *Mich.* 10 *Jac. Priddle and Napper's Caſe.* 11 *Coke* 14 *and by Gaudy againſt Popham and Fenner, Mich.* 37 *and* 38 *Eliz. Green* v. *Boſkin*, *Moor* 420. *but in Priddle and Napper's Caſe* 11 *Coke* 14 it was aſked what if an Appropriation was made in the time of *Ed.*4. *H.* 6. *H.* 4. *R.* 2. *Ed.* 3, *&c.* and yet in Law within time of Memory, and unity had continued from the time of the Appropriation, until the Diſſolution, and Tithes were never paid, by the Abbots, *&c.* or their Farmers, ſhould not the Statute extend to theſe Caſes? And it was anſwered no, upon the point of Unity, for if he will have aid of the Act of 31 *H.* 8. the Unity as hath been ſaid, ought to be perpetual,

But in ſuch Caſe there may be alledged the Branch of the Act of 31 *H.* 8. concerning the diſcharge of the payment of Tithes, *&c.* that the Abbots, *&c.* time out of mind, *&c.* until the Diſſolution, have held the Land diſcharged of Tithes, (as he may well preſcribe by the Common Law) and give ſuch Evidence, that may prove it; and ſo if in Truth, the Land be diſcharged, he hath ſufficient remedy to relieve himſelf; But if the Abby, or Priory, *&c.* were Founded within time of Memory, there he cannot preſcribe at all *Mich.* 10 *Jac. Priddle and Napper's Caſe* 11 *Coke* 14. *ſee Engliſh and Jone's Caſe*, 2 *Keeble* 459.

So when Unity of poſſeſſion time whereof, *&c.* was ſuggeſted, in order to obtain a Prohibition to ſtay a Suit for Tithes, the Defendant pleaded that the Abby to which *&c.* was Founded 5 *Ed.* 1. (which is within the time of memory,) and confeſſed the Unity from the Foundation, *per Cur.* this Plea in Barr was good to avoid the Unity, and that it was not neederful to traverſe the Preſcription; for the ſhewing the Foundation of the Abby to be after the time of memory, is a ſufficient confeſſing and avoiding. But if the Defendant encounter the ſuggeſtion of perpetual Unity, and will ſhew how that the Demeſnes before the Statute, and in the time of the Abby were in the hands of Farmers, *&c.* there he ought to traverſe the Preſcription. For although the Poſſeſſion was chargeable in other hands, yet as to the *Fee Simple* which remains in the Abbot, it is a diſcharge in right, *Hill.* 45 *Eliz. B. R. Gibſon* v. *Holcraft*, *Yelverton* 31. And accordingly in this Caſe, the Defendant traverſed the Unity at the time of the Diſſolution, and thereupon the Plaintiff Demurring, *Fenner* and *Clinch* (the other Juſtices being abſent) held, the Traverſe to be good; But if the diſcharge had been pleaded generally, by preſcription, and not by reaſon of Unity, then the preſcription ought to have been anſwered, and not the Unity, and it was ſaid, that, *Trin.* 34 *Eliz. betwixt Calmady and Wyther* it was ſo ruled, wherefore it was adjourned, *Mich.* 39 *and* 40 *Eliz. B. R. Button* v. *Long*, 3 *Croke* 584.

Neither will preſcription *De non Solvendo* in the Caſe of Unity avail any thing, if the Union was not Juſt, for if the Abbots, *&c.* have held by abuſe and wrong, time out of mind, *&c.* the ſame is no Unity within the Statute, *Mich.* 10 *Jac. Priddle and Napper's Caſe*, 11 *Co.* 14 *b. Paſch.* 5 *Eliz. Moor* 46. So if the Abbot did hold the Lands and Tithes in ſeveral rights; therefore when the Caſe was, that an Abbot had a Mannor within the Pariſh of *D.* and a Compoſition was made betwixt the Parſon of D. and the ſaid Abbot, that the Parſon ſhould have Yearly certain Loads of Wood out of thirty Acres of the ſaid Mannor, for and in recompence of all the Tithes of Wood there, afterwards the Parſonage was Appropriated to the ſaid Abbot and then the Houſe was diſſolved, and the Mannor granted to one, and the Rectory, to another it was holden, that the portion of Tithes was revived, for he had them, (*ſcil.*) the Mannor and the Tithes in ſeveral rights and *Manwood* Chief Baron and *Periam* Juſtice, to whom a Caſe depending in the Chancery was referred concerning the diſcharge of Tithes, by Unity of Poſſeſſion, delivered their opinions, that ſuch an Unity is not any diſcharge within the ſaid Statute, *Trin.* 33 *Eliz. B. R. Knightly and Spencer's Caſe*, 1. *Leonard* 335.

So when the Caſe was that an Abbot had a Parſonage appropriate in D. which was diſcharged of Tithes, and afterwards the Abbot purchaſed part of the Lands, ſo that the Tithes were ſuſpended during the poſſeſſion of the Abbot, but after that the Abby was ſurrendred into the hands of the King in the 30 Year of *H.* 8. and afterwards the ſame poſſeſſion were given to the King by the Statute of 31 *H.* 8. as they were in the hands of the Abbot, the opinion of Mr. *Plowden* was, that the Lands ſo purchaſed by the Abbot before the ſurrender, were not diſcharged of Tithes by the Statute, for that no

Lands

Lands are diſcharged by the Statute but ſuch Lands as were Lawfully diſcharged in right by compoſition, or other Lawful means, and the Lands in this Caſe were not diſcharged in right, but ſuſpended during the poſſeſſion of the Abbot in his own hands, and ſo he ſaid it is, when the Land is purchaſed by one, and the Parſonage by another, the Right of Tithes is renewed, and the Lands charged as before the purchaſe of the Abbot, and ſo it had been adjudged, *Mich.* 17 *Eliz. B. R. Godbolt*, p. 1.

Alſo when upon a Prohibition the ſurmiſe was, that the Land out of which the Tithes were demanded was Copyhold parcel of a Mannor of which a Prior was Seized in Fee, and was alſo *Parſon imparſonee*, and that by this Union the Tithes were Extinct, it was held, that the ſurmiſe was not good, for that the Union was no diſcharge of the Tithes of the Copyholders, *Mich.* 27 *and* 28 *Eliz. Bruncher's Caſe Moor* 219. And ſo *Popham* held in *Benton* and *Trot's* Caſe, *Mich* 40 *and* 41 *Eliz. Moor* 528.

Thoſe Lands that before the Diſſolution and to that time, were held diſcharged from the payment of Tithes, whilſt in the actual Occupation and Manurance of the owners thereof and diſſolved by the Statute of 31 *H.* 8, were the Lands held by thoſe of the Orders of the Ciſtertians, Hoſpitalers, and Præmonſtrans; for though in the time of *H.* 2. and about the Year 1150, Pope *Adrian* the Fourth, reſtrained this Privilege to three Orders, *viz.* the Ciſtertians, the Templars and Hoſpitalers, and after Pope *Clement* the third did by his Bull, give the ſame privilege to the Præmonſtratenſes, See *Dickenſons* Caſe, *Hill* 1 *Car. Bendloes* 164. *Seldon* of Tithes 120. So that Four Orders were then ſo Privileged, yet the Templars being condemned for Hereſy and diſſolved in the 4 *Ed.* 2 there remained but three of the aforeſaid Orders that were free from the paying Tithes for the Lands in their own hands when the Statute 31 *H.* 8. was made, and yet, not all the Lands they had at that time were ſo privileged; for no Lands obtained by any of thoſe Orders after the Council of *Lateran*, which was in the year of our Lord 1215, were freed from the payment of Tithes whilſt Manured by themſelves, and by conſequence, no Lands belonging to the Abbies of thoſe Orders that were Founded after that Council are diſcharged of the payment of Tithes, either in the owner, or in their Tenants hands, for by that Council the Privilege was limited to ſuch Lands as thoſe Orders had at the time of the Council, *Selden's Hiſtory of Tithes* 121. And it hath been held *per Curiam* that the Council of Latheran which thus freed theſe Orders, from the payment of Tithes, was a general Law received in *England*, and if Lands were diſcharged of Tithes by that Council, that no after Covenant, or Contract made by any Abbot to pay Tithes could diſpenſe with this Privilege, or make them liable to Tithes, for once diſcharged by this Council and always diſcharged, this Council being as forcible as an Act of Parliament which Concludes all parties: And the Court were alſo of opinion, that if there were an Agreement for payment of Tithes before this Council, that yet the Council as a general Law, which includes all mens conſent, had diſſolved ſuch agreement, *Paſch.* 1657, *in Scaccar. Stavely* v. *Ullithorn*, *Hardres Rep.* 101. nor were all the Houſes of thoſe Orders not ſurrendred, or diſſolved by Statute 27 *H.* 8. diſſolved, or ſurrendred by force of Statute 31 *H.* 8, for thoſe of the Hoſpital of St. *John's* of *Jeruſalem* were diſſolved by Statute 32 *H.* 8. *c.* 24. and not before, *Hurry* v. *Boyes*, *Brownlow and Gouldsburough* 2 *pt.* 8. ſo their Lands not Privileged from paying Tiths by Statute 31 *H.* 8. as will be ſhewed. But the Lands of ſuch of the Houſes of theſe Orders that were diſſolved by Statute 31 *H.* 8. ſhall be free from the Payment of Tithes, ſo far

far as they were free in the hands of the Church-men, *viz.* whilſt they ſhall be in the Hands and Manurance of the Owners thereof; it is therefore neceſſary for the party who pretends to have advantage of this Privilege, Expreſly to ſhew and averr, that the Lands are in his Hands and Manurance, for to ſay, that he is ſeiſed of the Land is not ſufficient, for he may be ſeiſed thereof, and yet another Manure them, *Hill.* 1 *Car. Dickenſon's Caſe, Bendloes* 164. *and Noyes opinion in Sir Richard Weſton's Caſe, Bendloes* 168, 169. And if the Lands of ſuch Orders ſo Privileged, were in Leaſe for years at the time of their diſſolution, and for certain years before, yet the Lay-owners ſince the diſſolution ſhall hold them diſcharged whilſt Manured by themſelves, for although the Farmer paid Tithes at the time of the diſſolution, yet as to the Abbot the Inheritance was then diſcharged of Tithes, and the King or his Patentee ſhall have and hold it diſcharged as the Abbot held it, *Hill.* 17. *Jac B. R. Porter* v. *Bathurſt*, 2 *Croke* 559. *and Paſch.* 13 *Car.* 2 *in Scaccar. Wilſon.* v. *Reedman Burton & al Hardres* 190.

Yet when an Abbot having ſuch Privilege, had in the time of *Ed.* 4. made a gift in tail, though the Abby was diſſolved by the 31 *H.* 8. it was reſolved that by the Clauſe of diſcharge of Tithes in the aforeſaid Statute, the Donee and his Heirs ſhould not be diſcharged of Tithes, for the Statute diſchargeth none, but as the Abbot was diſcharged at the time of the diſſolution, ſo that they muſt claim the Eſtate and Diſcharge under the Abbot, but if by a common Recovery, the Reverſion had been barred, before, or after the Statute, or if that the Land had returned to the Abbot, or King before, or after the Statute, the Caſe had been otherwiſe, *Hill.* 4 *Car. Farmer* v. *Sherman Hetley* 133. *ſame Caſe Hobart* 248.

Alſo whilſt the King's Title to ſuch Lands doth remain, ſo that they be Manured by his Farmers, or Tenants for Years, or at Will, no Tithe ſhall be paid of them, although Tithes of them ſhould have been paid by the Farmers, or Tenants of the Abbots, or Priors that had them, and the reaſon given is, becauſe, the King himſelf cannot Manure them; but if the King having Leaſed them, granteth over the Reverſion, or doth ſell them, the Farmers ſhall pay Tithes, by *Manwood* Chief, Baron 29 *Eliz.* in the *Exchequer*, the Counteſs of *Linnox's* Caſe, 2 *Leonord* 71. *ſame Caſe, Owen p.* 46. But *Tanfield* Chief Baron ſaid, that the King's Tenants for Life or Years, ſhall not be Free in this Caſe, but only his Tenants at Will, *Moor* 915. and it was agreed *per Curiam*, that the King's Patentee is to be Intended of the King's Farmers, not Patentees in Fee, for in the caſe of the Foreſt of *Savernacle* it was agreed, that the King's Patentee ſhould pay Tithes, *Paſch.* 18 *Car.* 2. *Bowles* v. *Atkins*, 2 *Keeble* 29. ſo is it alſo ſaid in the Caſe of *Compoſt* v.--- *Mich.* 14 *Car.* 2. *Hardres* 315. that if the King alien any of the Lands whereof he is diſcharged of Tithes, his Patentee ſhall pay Tithes, and not only ſo but the Preſcription is deſtroy'd for ever, though the ſame Lands ſhould afterwards come into the King's hands again, by Eſcheat, or otherwiſe, however, the Reverſioner and King's Patentee and their Aſſigns, ſhall have the ſame privilege that the Abbot had, *viz.* to hold them Free whilſt in his own hands, and Manured by him, and not let to, or Manured by another, *Paſch.* 21 *Jac. Stonehouſe* v. *Read Bendlows*, 143.

The next Statute after the 31 *H.* 8. for the Diſſolution of Religious Houſes, *&c.* was 32 *H.* 8 *c.* 24. which was made on purpoſe to diſſolve the Hoſpitals of St. *Johns* of *Jeruſalem* in *England* and *Ireland*, either for that (as ſome think) thoſe of this order had power to purchaſe, but not to ſurrender, or becauſe they were beyond Sea at this time, and would not, nor could not

not be compelled to ſurrender, as other Religious Houſes did, whoſe poſſeſſions therefore are at this day held Tithe-free as the Spiritual Men held them, by vertue of 31 *H.* 8. although ſurrendered after the Statute was made, and ſo would the Lands of the Hoſpital of Saint *Johns* of *Jeruſalem* without doubt, and the Templers Lands given to them by Stat. 17 *Ed.* 2. had they been ſurrendered as others were, and not diſſolved by ſpecial Act of Parliament, *viz.* 32 *H.* 2. upon which occaſion great doubt and diſpute hath been, whether they ſhall be held Tithe Free by the King and his Patentee, as the Religious Corporations held them, *viz.* whilſt they are Manured by the owners thereof. As to which, two queſtions have been made, Firſt, whether by the Stat. 31 *H.* 8. they were diſcharged, if not, if by the Stat. 32 *H.* 8. I find that when the Caſe was, that the Prior of Saint *John's* of *Jeruſalem, &c.* made a Leaſe for Years of a Manor, two or three Years before the Diſſolution, and the Leſſee did pay Tithes to the Church of *Rocheſter* proprietary, and after the Diſſolution, the King granted the Reverſion, in as ample manner as the Prior had the ſame; it was held in Chancery by the Lord Keeper, *Sanders*, *Southcott* and *Dyer*, upon conſideration of Stat. 31 *H.* 8 *c.* 13. that after the Lands came to the hands of the Reverſioner, they ſhall be diſcharged from the payment of Tithes until they be let out to others to Farm, *Trin* 10. *Eliz. Dyer* 277. After this upon a ſuit for the Tithes of Lands formerly belonging to the Templers, and which came to the Crown by the Diſſolution of the Hoſpital of Saint *Johns* of *Jeruſalem*, as all the Lands formerly the Templers did among others, it was held, that the Patentee of ſuch Lands, ſhould not crave the privilege to be diſcharged from paying Tithes in reſpect thereof; for by the Common Law, a Lay perſon was not capable of this Privilege. And if ſuch Lands had come to the King by the Relinquiſhment, or Diſſolution of any Monaſtery, the King ſhould not have had the benefit of that Privilege, until the Stat. of 31 *H.* 8. And by that Statute it is appointed, that all Monaſteries, Abbies, *&c.* which before had come, or afterwards ſhould come to the King by Suppreſſion, Surrender, *&c.* the King ſhould have in ſuch manner and form, *&c.* and that he ſhould have them diſcharged from the payment of Tithes, as the Abbots, *&c.* ſo as the makers of that Law intended, that by the firſt Clauſe without the laſt the King ſhould not hold them diſcharged, therefore they added that Clauſe. But this Statute extends only to ſuch Poſſeſſions, which came to the King by Surrender, *&c.* and ſhould be veſted in him by force of the ſaid Act, and doth not extend to poſſeſſions which veſted in him by another Act of Parliament, according to the Rule taken in 2 *Coke fol.* 46 *in the Arch-Biſhop of Canterbury's Caſe.* And theſe Lands were here given to the King, by a Special Act of Parliament, 32 *H.* 8. which hath the ſame words in the firſt Clauſe, as the Act of 31 *H.* 8 hath, but hath not the ſecond, therefore, there is no cauſe of holding them diſcharged from Tithes. And it was adjudged accordingly and in the ſame Term, a like Judgment was, between the ſame parties in a prohibition upon a Demurrer, *Hill.* 2 *Jac. B. R. Cornwallis* v. *Spurling*, 2 *Croke* 57. *Hill.* 44 *Eliz. Quarles* v. *Spurling*, *Moor* 913. *and in Urrey and Bowyers Caſe.* 2 *Brownlow* 8, 20. it was holden by *Coke* and *Nichols* againſt *Winch* and *Warberton*, that a purchaſer of Lands of St. *Johns* of *Jeruſalem* ſhould pay Tithes, and in the 18 of *Jac. C. B.* all the Judges but *Warburton* held, that the purchaſer ſhould pay Tithes as is ſaid, *Noy Paſch.* 3 *Car. B. R. in Whittle and Weſton's Caſe*, *Godbolt* 392. *and in Bendloes Rep. Hill.* 1 *Car. and Trin.* 2 *Car.* 168, 185. And at laſt it was argued at the Bench by the Four Juſtices. *Whitlock* held that the ſaid Lands were not diſcharged of Tithes, neither by the 31 *H.* 8. nor by the 32 *H.* 8. *Hide* Chief Juſtice held, that they were diſcharged by the 32 *H.* 8. and not by the 31 *H.* 8. *Dodderidg* and *Jones* held

held, that they were diſcharged by the Clauſe of diſcharge in the 31 *H.* 8. if not, yet by the 32 *H.* 8. ſo that of the Four Juſtices, only *Whitlock* held, that ſuch Lands were not free from the payment of Tithes, therefore Judgment was given that no Tithes ſhould be paid of ſuch Lands, *viz.* whilſt Manured by the King, or his Patentee, and not let to others, *Trin.* 4. *Car. B. R. Winton* v. *Weston*, *Jones* 182. *Latch.* 89. And afterwards, this matter came into queſtion again, and upon a ſpecial verdict found, it was adjudged by *Hales*, then being Lord Chief Juſtice, that the Lands which came to the Crown by Stat. 32 *H.* 8 *c.* 24. ſhall not pay Tithes by reaſon of the word (Privileges) in that Statute, and here all the Caſes before mentioned were cited and conſidered 25 *Car.* 2. *B. R.* *Foſſet* v. *Franklin*, *Raymond* 225. 3 *Keble* 208, 217.

After the King had gotten all, both leſſer, and greater Monaſteries, and the Hoſpital of St. *Johns* of *Jeruſalem*, the Parliament proceeded to diſſolve, and give away the Lands to the King belonging to Chanteries, and Free Chappels, for which end the Statutes of 37 *H.* 8. *c.* 4. *and* 1 *Ed.* 6 *c.* 14. were Enacted, but I find no Caſe of Law adjudged or mentioned in the Books, concerning the Lands that came to the Crown by Stat. 37 *H.* 8. but only upon thoſe that came by Stat. 1 *Ed.* 6. which ſeems to be the ſame, and therefore I ſuppoſe the Law is the ſame as to both.

As to the Statute 1 *Ed.* 6. The Caſe was, that the Maſter of a College, (the Lands belonging to which came to the King by this Statute) held ſome of his Lands with a Rectory, *Simul & Semel* diſcharged of Tithes at the making of this Statute and of the Stat. 31 *H.* 8. and after the Statute, the Farmer of the Rectory ſuing the Farmer of the Lands for the Tithes thereof, the Defendant ſhewed this matter, and alledged the branch of diſcharge in 31 *H* 8. and it was reſolved, that the College, *&c.* that came to the King by 1. *E.* 6. came to him by that Statute only, and not by the general words in 31 *H.* 8. **All Colleges, &c. which hereafter ſhall happen to be diſſolved, or by any other means come to the King's Highneſs** &c. **ſhall be adjudged to be in the actual poſſeſſion of the King** &c. *Firſt*, becauſe the words, all other means, cannot be intended of an Act of Parliament, being put after words inferiour thereunto, as renouncing, relinquiſhing, forfeiture, *&c.* an Act of Parliament being the higheſt manner of Conveyance, upon which reaſon, it hath been adjudged, that Biſhops are not intended in Statute 13 *Eliz. c.* 10. by the words (others holding Spiritual promotions thoſe words) being put after Colleges, Deans and Chapters, *&c. Secondly*, becauſe the Statute of 1 *Ed.* 6. doth Enact, **That all Colleges**, &c. **ſhall be by force of that Act adjudged to be in the actual and real Poſſeſſion of the King**; therefore, that Statute thus Enacting, they cannot be in the King by the former Statute. And it was alſo adjudged, that the branch in 31 *H.* 8. did not extend to any other Monaſtaries, then what came to the King by the Statute 31 *H.* 8. becauſe, what would be given by another Statute, or that any thing would be given thereby, could not be then foreſeen, and that Lands which came to the Crown by the 1. of *Ed.* 6. are not diſcharged of Tithes by the words of that Statute that the King ſhall have the Lands of Colleges, *&c.* **in as ample and large manner, as the ſaid Priefts, Wardens**, &c. **had or Enjoyed the ſame**, for that theſe general Words ſhall not diſcharge the Land of any Tithes, becauſe they do not iſſue out of the Land, but are things diſtinct from the Land, *Trin* 38. *Eliz. B. R. the Arch Biſhop of Canterbury's Caſe*, 2 *Coke* 46 *ſame Caſe*, *Moor* 420.

As

As by Act of Parliament Lands are made perpetually Tithe Free, as hath been ſhewed; ſo by Act of Parliament Lands are Free from the payment of Tithes for a certain time, as by 2 *and* 3 *Ed.* 6. in which there is this Proviſo, **Provided always, and be it enacted by the Authority aforeſaid, That all ſuch barren Heath or waſte ground, other than ſuch as be diſcharged for the payment of Tithes by Act of Parliament, which before this time have layen barren, and paid no Tithes by reaſon of the ſame barrenneſs, and now be, or hereafter ſhall be improved and converted into arable ground or meadow, ſhall from henceforth, after the end and term of ſeven years next after ſuch improvement fully ended and determined, pay Tithe for the Corn and Hay growing upon the ſame; any thing in this Act to the contrary in any wiſe notwithſtanding,**

Provided always, and be it enacted by the authority aforeſaid, That if any ſuch barren, waſte or Heath Ground, hath before this time been charged with the payment of any Tithes, and that the ſame be hereafter improved or converted into arable ground or meadow, that then the owner or owners thereof, ſhall during the ſeven years next following, from and after the improvement, pay ſuch kind of Tithe as was paid for the ſame before the ſaid improvement; any thing in this Act to the contrary in any wiſe notwithſtanding. Stat. 2 and 3 Ed. cap. 13.

The Heath and Barren ground intended by this Statute, ought to be ſuch Land which is barren in its own nature, and will not bear Corn. *&c.* of it ſelf without very great coſt in the extraordinary Manuring thereof, *Paſch.* 14 *Jac.* B. *R. Witt* v. *Buck*, 3 *Bulſtrode* 65. and albeit that it doth yield ſome Fruit, yet if it be barren Land *quoad agriculturam* as to tillage, which this Statute meant to advance, it is within this Act, 2 *Inſt.* 655. yet it is ſaid by *Richardſon*, that if ſuch Land yielded before the improvement any profit, as if Sheep were kept thereon, or if it produced any other profit that did yield Tithes, ſuch Tithes ſhall be paid as hath been paid thereof, *Mich.* 5. *Car. C. B. Flower* v. *Vaugham Hetley*, 147. this is by the expreſs words of the Proviſo in the Statute, But if the Land be truly barren in its own nature, although it paid before its improvement for Tillage by extraordinary Charge, Tithe of Wool and Lamb, yet no other Tithes ſhall be paid thereof than Wool and Lamb, and that by this Statute: *Mich.* 1 *and* 2 *Eliz. Dyer* 170, 171. But if Barren Land by reaſon of Sheep, *&c.* kept thereon might have included ſome Tithes, and yet no Tithes were paid thereof, if it be Land capable of a diſcharge from the payment of Tithes; of which this non-payment may be an Evidence if ſuch Land by charge and induſtry be improved and made fruitful, yet it ſhall not pay any Tithes; for the improvement of Land not Titheable by Law, cannot make it become Titheable, for this were to alter the Law and to make a conſtruction contrary to the intent of the Statute, which was to incourage improvements by freeing ſuch Land for Seven years from paying Tithes which elſe was liable; but not to charge Lands with the payment of Tithes, which by Law before the improvement were Tithe Free, *Stiles Regiſt.* 533. and the Statute doth particularly except Lands diſcharged from the payment of Tithes by Act of Parliament that ſuch Lands ſhall not after the ſeven years be liable to pay Tithes by force of this Statute, but if Lands have not paid Tithes within the memory of man by reaſon of its Barrenneſs, occaſioned by accident only, and not from its own natural ſterility, and the owner, or occupier, with great charge makes it fit for Tillage, Hay, or Paſture, yet Tithes ſhall be preſently paid upon the improvement thereof, without reſpect to the favour of this Proviſo.

Therefore, if Marſh and Sandy Land hath been covered with Salt-water, ſo that time out of mind, no Graſs had been there known to grow, nor any profit at all thereof made, until at length by great Charges and Induſtry, this Ground had been lately gained from the Sea, by making coſtly Banks and Sea Walls, and continual reparation thereof, yet this yielding no profit as being Barren by accident only, *viz.* through the Flowing of the Sea thereon, and not from its natural Barrenneſs, ſhall have no benefit of this Statute for Seven Years, but ſhall yield a Tithe to the Parſon immediately; and though Land that hath formerly paid Tithe, be after overflown for two, three, or more Years, the Parſon can have no Tithe for the time, yet if the Land be regained though at great Charges and Induſtry, Tithes ſhall be paid thereof, as of other Lands, according to the profit that it yields; and all this was agreed *per Cur. Paſch.* 14 *Jac.* B. *R. Witt.* v. *Buck.* 3 *Buſtrode* 65. *ſame Caſe*, *Rolls* 1 *Rep.* 354. and *Sherington* and *Fleetwood*'s Caſe, 3 *Croke* 475. ſo it hath been adjudged, that Fenny Land drained ſhall pay Tithes, notwithſtanding this Statute, *Hill.* 38 *Eliz. Moor* 430. So if Lands have been full of Thorns and Buſhes Time whereof, *&c.* and by grubbing, are made Arable, or Meadow Land, Tithes ſhall be preſently paid thereof, notwithſtanding this Statute, for ſuch Land of their own nature are not Barren, but by negligence, and ill husbandry became ſo, *Sherrington* and *Fleetwood*'s *Caſe*, 3 *Croke* 475. *ſame Caſe Moor* 909. and *Coke* Chief Juſtice ſaid, that it had been reſolved in one *Farrington*'s Caſe, that Wood ground is not Barren ground within this Statute, and that if one do ſtock or grub up Wood, and after convert it into Arable ground, though by this he hath Meliorated the Land, and that by great Coſt and Labour, yet he ſhall pay Tithes for this ground preſently, becauſe the Land in its own nature is not Barren, *in Witt. and Buck's Caſe*, *Paſch.* 1 *Jac. B. R.* 3 *Bulſtrode* 65. *and to this Dodderidg agreed in the ſame Caſe*, *Rolls* 1 *Rep.* 354. 2 *Inſtit.* 656. And if the queſtion be whether Barren Land or not, it ſhall be tried at the Common Law, and not in the Spiritual Court, *Paſch.* 13 *Car.* 2. 1. *Keeble* 253, therefore in a Suit for Tithes in the Spiritual Court, if the Defendant Pleads 'tis Baren Land, and that Plea be refuſed, or iſſue taken upon it, there a Prohibition ſhall be granted, but a Prohibition ſhall not be granted upon Suggeſtion, only that 'tis Barren Land, before it be pleaded in the Spiritual Court, *Mich.* 14 *Car.* 2. *B. R.* 1. *Keble* 387.

CHAP. XLIX.

Predial Tithes, what and in what manner payable, and what Modus Decimandi *in diſcharge of ſuch Tithes is good.*

BY what hath been ſaid it appears, that Tithes are to be paid, only for Lands not Exempted from the payment thereof; I am next to ſhew, in what reſpect Titheable Lands, are to yield their Tithe, or of what things with reſpect to the Lands, Tithes are, or are not to be paid. *Firſt* then we muſt remember what hath been ſaid that *De Jure Communi* Tithes are to be paid only in reſpect of Land, of the Fruits of the Earth,

Earth, or of ſuch things which do yield a Yearly Encreaſe by the Act of God' yet not of all ſuch things, or of them in all Caſes. That I may therefore ſhew, of what Fruits of the Earth, or things, Tithes by Law are payable, it may be of uſe here to note, that Tithes have been divided into predial, mixt, and perſonal. Predial Tithes are ſuch which ariſe meerly of the Earth, as the Fruits thereof, of which ſort are all kinds of Grain, 2 *Inſt.* 649. Hay, Underwood Tithable, Trees, and the Fruits of all Trees, as Acorns, Maſt, Apples, Pears, Cherries, Grapes, *&c.* 2 *Inſt.* 649. the Seeds of Rape and Woad, Hops, Saffron, Flax, Hemp; Garden Herbs, as Mint, Parſly, Annis, Rue, Sage, *&c.* Mixt Tithes, are thoſe which ariſe from the Earth alſo, but by means of Beaſts depaſtured thereupon, or otherwiſe nouriſhed with the Fruits thereof, as Colts, Calves, Lambs, Roes, Kids, 2 *Inſt.* 649. *Rolls Abr.* 1. 635. Milk, Cheeſe, Wool, Eggs, Chickens, Geeſe, Ducks, Swans, *&c.* 2 *Inſt* 649. Perſonal Tithes, are ſuch profits, which ariſe by the honeſt Labour, and induſtry of man, imploying himſelf in ſome perſonal Work, Artifice, or Negotiation, as by Buying, Selling, Merchandizing, Fiſhing, Fowling, Hunting, following any Trade, as of Carpenter, Smith, Maſon, Butcher, *&c.*

This being premiſed, I proceed farther to declare, what things are Tithable, and what are not; and Firſt I ſhall ſpeak of Predial Tithes, as to which, the Tithe of all Corn, or Grain ought to be duly ſet forth and paid. Yet this Rule doth admit of Exceptions, for a Preſcription may be within a Pariſh that by reaſon that they have not ſufficient Meadow for Milch Kine, and draught Cattel, they have uſed to cut ſome of their Tares green, and give them to the aforeſaid Stock, and to be diſcharged of Tithes for the ſame; this is a good Cuſtom, and conſideration; for that the Parſon hath an advantage thereby, as well as the Pariſhioner, *viz.* in the Tithe Milk, and Manuring of the other Corn-land; and (*Wray*) ſaid the matter is the want of Meadow, and Paſture, and that the ſurmiſe is as if it had been ſaid, that for want of Meadow and Paſture, they had uſed to Eat their Meadows, with their Plow Cattel, and for ſo much as they did Eat, to pay no Tithes, which had been good, *Mich.* 30 *Eliz. B. R. Perry* v. *Somes* 2 *Leonard* 27, *and ſame Caſe Croke* 3 *pt.* 139. ſo if a man according to the cuſtom of the Country, doth Sow his Land to Feed his Horſes for Tillage, and the uſe hath been to ſuffer the Horſes to be fed upon the Land without any mowing of the Grain; the Parſon ſhall not have any Tithes thereof, becauſe it is no more than Paſture for his Horſes, *Mich.* 3 *Jac. B. R.* and this is ſaid to be one *Somes's* Caſe of *Eſſex*, 1 *Rolls Abr.* 646. But it ſeems that without ſuch Cuſtom, Green Tares cut to feed Labouring Cattel, ſhall be priz'd Tithes, and ſo ſhall the Tithe of Corn Sowed on Head-lands, though imployed to the ſame uſe. For when one Libelled for the Tithes of Green Tares cut, and Corn ſowed on Head-lands, fed with Labouring Horſes, a Prohibition was granted, not upon the general ſuggeſtion, but upon the Cuſtom of the Pariſh, that no Tithes were paid in thoſe caſes, *Hill.* 10 *Car. B. R. Mead.* v. *Thirman Jones* 357. *ſame Caſe* 1 *Croke* 393. 1 *Rolls Abr.* 650. and in theſe caſes it is ſaid, that in a Prohibition it is not needful to preſcribe to be diſcharged of Tithes for ſuch Horſes, for that they be diſcharged by the Law, *Hill.* 14 *Jac. B. R. Kneebon* v. *Woodreſt* by *Mountague* and *Dodderidg*, but *Haughton* thought the contrary, for that their labour is in manner of a *Modus* for their Tithes; but *Clinch* and *Clarke* ſaid, that of Latter times they have not uſed to preſcribe, but that otherwiſe it was Anciently, 1 *Rolls Abr.* 646, 647. In like manner if a man gather green Peaſe to eat in his

houſe, no Tithe ſhall be paid of them, and that by the Law of the Land, but otherwiſe it is if he gather them to ſell, or to feed his Hoggs, *Paſch.* 12 *Jac. B. R. per Cur.* 1 *Rolls Abr.* 647. And in Evidence to a Jury it was ſaid by *(Windham)* that of Hay Mown to feed Deer no Tiths are paid, but by *Glyn* and *Finch*, they are due of common right, and ſhall be paid, unleſs there be a Cuſtom to the contrary, *Paſch.* 18 *Car.* 2. *Proger* v. *Venning*, 2 *Keeble* 22.

Of common right, the owner of the Corn ought to cut down, and prepare the ſame, *Mich.* 3. *Jac. B. R. Perry and Chancey, adjudged* 1 *Rolls Abr.* 644. and to make it up into Sheafs, Cocks, or Shocks, *Hill.* 15 *Jac. C. B. Doctor Bridgman's Caſe, Noy* 31. *Paſch.* 7 *Jac. Rolls Rep.* 172. *and Paſch.* 18 *Car.* 2. *B. R. Ledgar* v. *Langley* 1 *Siderfin* 283. *and* 2 *Keble* 25. and if the owner refuſe to do it, the Parſon may Sue him therefore in the Spiritual Court; but then the Suit ought to be ſpecial, for not ſetting them forth in Cocks; and not generally for not ſetting them forth, *Layton's Caſe*, *Latch.* 125. But having made the Corn into Sheafs, he is not bound to ſet it up in Heaps, unleſs the Cuſtom of the place oblige him thereunto, but having bound it into Sheafs, or made it into Cocks, he may ſet forth the Tithes thereof, and thereby they become Lay Chattels, *Smith's* Caſe *C. B. Gouldsborough*, and then he may heap his own Sheafs, or do with them as he pleaſeth, and the Tithes being ſet forth, the owner is not bound to watch or look after them till the Parſon carries them away, *Hill.* 15. *Jac. C. B. Doctor Bridgman's Caſe, Noy.* 31 *Hill.* 6. *Jac. B. R. per Cur.* 1 *Rolls Abr.* 644.

If the Cuſtom of the place be, to meaſure forth to the Parſons the tenth part of the Corn whilſt growing upon the Land, this manner of Tithe-ing is I conceive to be obſerved, and the Parſon muſt ſit down by it; or if the Cuſtom be, that the Parſon ought to have for his Tithe of Corn the tenth Land of Corn, beginning at ſuch Land as is next to the Church, this Cuſtom is good, and when in ſuch Caſe, the Pariſhioners by Covin to defraud the Parſon did not Manure and Seed ſuch Lands, (the Corn upon which would by the Cuſtom be to the Parſon) ſo ſufficiently as their other Lands, and the Parſon therefore did Sue in the Spiritual Court, generally for the tenth Sheaf and Shock, a Prohibition was awarded, notwithſtanding the Covin; becauſe 'twas ſaid, that the Parſon might have his remedy at the Common Law, for the fraud, *Paſch.* 30 *Eliz. Stebbs and Goodlock's Caſe*, *Moor* 913. *ſame Caſe*, 2 *Leon. and* 70. But *Wray* Juſtice was of the opinion, that the Cuſtom was againſt common reaſon, but agreed that if that Cuſtom be good, the Parſon ſhall have his Action on the Caſe for the fraudulent Sowing and Manuring of the Lands.

When the Tithes of any ſort of Corn are ſet forth, the Tenth thereof muſt be appointed for the Parſon, that is, of common right, therefore, if a Preſcription be to pay certain Sheafs of Corn for all Tithes of Corn, this is no good Preſcription, for the Pariſhioner ought to make it into Sheafs, and therefore part of his duty in kind, cannnot be in Satisfaction of the reſidue, *Paſch.* 13 *Jac. B. R.* 1 *Rolls Rep.* 173. But where Tithes are not due of common right, but by particular Cuſtom, there a Cuſtom to pay a leſs ſhare than a tenth, without other conſideration; (as for Tithe Fiſh, *&c.*) may be good, although this is left as a Quere, *Paſch.* 18. *Car.* 2 *B. R Shippard* v. *Penrows*, 1 *Siderfin* 278. *and* 2 *Keeble* 2. *Holland* v. *Heale Noy* 108. and when one did preſcribe to pay in one part of the Land the third part of the Tenth, and in another part the Moiety of the tenth of Corn, for all manner of Tithes, the Court did incline that the ſame was

a good preſcription, *Hill* 29 *Eliz. B. R. Root's Caſe, Godbolt* 7. And if the Cuſtom be, that if the odd Sheafs, or Shocks, under the number of ten ſhall not be Tithed, by reaſon that they ſet the Tithes up in heaps, or Shocks, which of common right the owner of the Corn is not bound to do, the owner is not bound to divide the ſaid Sheafes, or Shocks, and ſet forth the tenth thereof, for that ſuch Cuſtom upon ſuch conſideration is good. *Anonymus, Latch, Rep.* 226.

The tenth Sheaf, or Shock being ſet forth for the Parſon, if the owner of the Corn after the Sheafs, or Shocks be carried away, ſhall rake his Land on which they grew, by the Cuſtom of this Realm no Tithe ſhall be paid of the Rakings, as was ſaid to be adjudged, 41 *and* 42 *Eliz. B. R. in Grent and Hunt's Caſe, cited in Berd and Adams's Caſe, Trin.* 31. *Eliz. Moor* 278. 1 *Anderſon* 199. But in that Caſe of *Berd* and *Adams*, the contrary was adjudged, *viz.* that Tithes ſhall be paid of Rakings, becauſe the tenth Sheaf, or Shock of Corn, is ſatisfaction for no more than the Grain of which it is the Tithe, and no ſatisfaction for the Rakings, and this ſeems alſo to be agreed, and is ſaid to be adjudged accordingly, *Mich.* 36 *and* 37 *Eliz. B. R. Jeſop* v. *Paine* 3 *Croke* 363. ſo is it ſaid to have been adjudged in Sir *Charles Moriſon's* Caſe, that if one preſcribed to pay the tenth part of Corn in the Sheaf, for the Tithes of all that is in the Sheafs, and of all which is raked, it is a void Preſcription, becauſe the owners of the Corn are to pay the Tithes of both, and it is an unreaſonable Preſcription, for that then the owner might put the leſſer part into Sheafs, and leave the greater part to be raked, *Griſman's Caſe* v. *Lewis, Mich.* 37 *and* 38 *Eliz. C. B.* 3 *Croke* 446.

But to reconcile this difference, if the Cuſtom be laid, to put the Corn into Sheafs, or Cocks, and to pay the tenth Cock in ſatisfaction of the Tithes of the Corn, and of the Rakings, *Minus Voluntarie* diſperſed, this is good, *Mich.* 41 *Eliz. B. R. Green* v. *Hun.* 3 *Croke* 702. *Mich.* 2 *Jac. B. R. Parry* v. *Chaney, Noy* 15. and the Books generally ſay, that if the Corn Reaped be not Covenouſly ſcattered, or left unbound, to the intent to deceive the Parſon, then no Tithes are to be paid of the Rakings, but if fraudulently left, and Raked, the Tithe of all the Rakings is to be paid, *Hill* 8 *Car. Saunders and Paramour's Caſe, per Cur. Mich.* 14 *Jac. B. R. Joyce and Parker's Caſe, and Hill* 14 *Jac. Peck and Harris's Caſe* 1 *Rolls Abr.* 645. *Paſch.* 41 *Eliz. Awberry's Caſe, Moor* 910. *Paſch.* 14 *Jac. B. R. Pitt* v. *Harris,* 1 *Rolls Rep.* 379. *Paſch.* 41 *Eliz. B. R. Johnſon* v. *Awbery,* 3 *Croke* 660. *Mich* 41 *Eliz. Green* v. *Hun.* 3. *Croke* 702. *Sherrington* v. *Fleetwood,* 3 *Croke* 475. *and by Haughton Juſtice in Foſſe and Parker's Caſe, Bulſtrode* 3 *pt.* 243. *Peters* v. *Prideux,* 3 *Keeble* 251. 284. If a Prohibition be granted upon a Suggeſtion, that a perſon is Sued for Rakings, in the Spiritual Court, without any averment that the Rakings were *Minus Voluntarie* diſperſed, tis good, for that ought to be ſhewed on the part of the Defendant to have a Conſultation, if the Rakings were foul Rakings, and of conſiderable value, *Paſch.* 14 *Jac. B. R. Pitt* v. *Harris.* 1 *Rolls Rep.* 379. *Mich.* 41 *Eliz. Green* v. *Hun.* 3 *Croke* 702. yet in this Caſe of *Pit* and *Harris*, as abridged 1 *Ro. Abr.* 645. it is ſaid to be adjudged, that upon a Prohibition the Suggeſtion ought to be that the Rakings were *Minus Voluntarie Sparſæ*, otherwiſe it is not good, and that it is not ſufficient to ſay that they were *Lapſæ & Diſſipatæ in Collectione.* See the Caſe of *Peters* v. *Prideux* before cited 3 *Keeble* 251. 284. neither is it a good Suggeſtion, that in conſideration that the Pariſhioner having Barly, the greater part of which he cut down and bound into Sheafs, and put into Cocks, whereof

whereof the Parſon hath the tenth Cock, that he uſed to leave a ſmall parcel of the Barly ſtanding, to the intent to cut it down afterwards to make Bands for the Rakings involuntarily ſcattered, and to be diſcharged of the Tithes of this ſmall parcel of Barly, when cut down, *Hill* 8 *Car. B. R. Saunders and Paramour's Caſe, per Cur.* 1 *Rolls Abr.* 650.

As no Tithes are to be paid of the Rakings of Corn duly Tithed, ſo neither of the Stubble left on the ground in the Reaping thereof, though the ſame be cut for Thatch, or other uſes, and this Juſtice *Tanfield* ſaid, had been adjudged in one *Edolp's* Caſe, *Green and Auſten's Caſe*, *Paſch.* 4 *Jac. B. R. Yelverton* 86. *F. N. B.* 53. *b.* 1 *Rolls Abr.* 640, 641. neither is the owner of the Corn having ſet forth and paid the Tithes thereof, to pay any Tithe of the after Crop, or Grotten, or Graſs of the ſame Lands, *Baxter* v. *Hopes Mich.* 9 *Jac. Brownlow and Gouldsborough* 2 *pt.* 30. 2 *Inſtit.* 652. *nor for any agiſtment in ſuch Lands*, 1 *Rolls Abr.* 641. Yet I conceive, that if Corn do ſhed in the Fields, being beaten out by Winds, or loſt upon the ground, for that it was not ſeaſonably cut, and this Corn doth grow, and become a Crop in the year following, (which ſometimes happens) and is called ſelf-ſown Corn, Tithes ſhall be paid thereof, as the Tithes of the Land for the following year, if Tithe hath been paid of Corn growing in one year, and in the next year the ſame Land is not ſeeded but lies fallow, to the end of making it the more Fruitful in the the third year, and then is Manured and Sown, no Tithe is to be paid for ſuch Land the ſecond year, *Paſch.* 7 *Jac. B. R. Smith's Caſe per Cur.* 1 *Rolls Abr.* 642. And it is a good *Modus Decimandi*, that in conſideration that they that Sow the Land, ought to Reap, Bind, and ſever the tenth part from the nine, and ſet it up into heaps, that the Parſon ſhall not have any Tithes of this Land the next year enſuing, the Land lying Ley, and not Tilled nor converted into Meadow; for of common right the Pariſhioner is not bound to gather, and ſet up the Tithes in heaps, *Hill* 6 *Jac. B. R. per Cur.* 1 *Rolls Abr.* 649.

The Tithe of Hay alſo of all Lands Tithable in each Pariſh, and of graſs cut for Hay in Orchards, is a predial Tithe, and to be yeilded to every Parſon and Vicar, who hath right thereto, 2 *Inſt.* 652.

Yet the payment of this Tithe alſo, is directed and guided by Preſcrptions and Cuſtom uſed within particular Pariſhes, as if in a Pariſh there be a Cuſtom, that the owners of the Head-lands, have uſed time out of mind, to make the Tithe of Hay of that Pariſh for the Parſon, and in conſideration thereof, to be diſcharged of the Tithes growing upon Headlands, being ſmall Headland on which a Team turns in Plowing, this is a good conſideration to make the Preſcription good, *Mich.* 5 *Car. C. B. Wood and Carvener* v. *Symond*, *Hetley* 147. *Lanes Rep.* 16. But a Preſcription, to pay the tenth part of Corn, for the Hay alſo that grows upon the Head lands, is not good, becauſe the tenth part is due for the Corn, *Mich.* 2 *Jac. B. R. Parrey* v. *Chaunſey*, *Noy* 15. yet if the Preſcription be, that the Pariſhioner, hath uſed to cut, or reap, bind, or ſhock the Parſons Corn; and in conſideration thereof, to be diſcharged from Tithing the Hay of his Head-lands, *&c.* this is ſaid to be good, and a reaſonable conſideration; becauſe the Pariſhioner is not bound to Reap, *&c.* the Parſon's part, and by the Civil Law, the Parſon is to have the tenth ridge of Corn. But this reaſon I take to be falſe, and contrary to other Caſes as before ſhewed, but the ſetting the Parſon's Corn into heaps, may be a reſonable conſideration of the Preſcription; becauſe, this they are not tied to do of common right, *Hill* 29 *Eliz. C. B.* 2 *Leonard* 70. But it ſeems, that a Preſcription

tion not to pay the Tithe of Hay growing upon Head-lands, on which the Horſes and Plow turns, is good without laying any thing in conſideration thereof; but then it muſt be averred, that the Head-lands are but ſufficient to turn the Plow upon, *per Cur. Hill.* 10 *Car. B. R. Mead and Thurland, and Paſch.* 15 *Car. Bird and White,* 1 *Rolls Abr.* 646.

So if a Farmer do cut down his Graſs, and only doth put it into Swarths, and then carry it away, and doth give it green to his own Cattel for their neceſſary ſuſtenance, not having Graſs ſufficient to maintain them otherwiſe, no Tithes ſhall be paid thereof, *Mich.* 2 *Car. C. B. Crawley* v. *Wells* 1 *Rolls Abr.* 645.

And if Lands be ſo ſtrong, as to afford two Crops of Hay in one year, and the occupier of the Land can preſcribe, in conſideration that the owner doth make the firſt tonſure into good, and ſufficient Hay, and ſet it forth in Cocks ſufficiently dryed, that he ſhall be diſcharged of the Tithes of the after mowth, this is a good preſcription and diſcharge, by reaſon of his coſts he beſtowed in making the firſt tonſure into Hay, *Paſch.* 11 *Car. B. R. Langford's Caſe reſolved, and Trin.* 36 *Eliz. B. R. Johnſon and Keblethwait,* 1 *Rolls Abr. p.* 648. *Paſch.* 11 *Car. B. R. Anonymus* 1 *Croke* 404. *and Paſch.* 41 *Eliz. Rot* 284, *Johnſon and Awberry's Caſe,* 3 *Croke* 660. *Paſch.* 4. *Jac. Green* v. *Auſten* 2 *Croke* 116. *and* Moor 910. *Mich.* 2 *Jac. Hall and Fettyplace's Caſe,* 2 *Croke* 42. or if the preſcription be to be diſcharged of the Tithe of the after Mowth only, upon conſideration that they have uſed time whereof, *&c.* to cut down the Graſs of the firſt Mowth to feed, and gather the ſaid graſs ſo diſperſed into Weaks and Windrows, and put it into ſmall Cocks at their own coſt, this is ſufficient though it be not made into perfect Hay, *Paſch.* 2 *Jac. Hall* v. *Fetiplace* 2 *Croke* 42. But it ſeems of the after-Mowth, that Tithes *De Jure* are to be paid without ſuch like preſcription for a diſcharge, *Paſch.* 41 *Eliz. B. R. per Cur. and Hill* 10 *Jac. B. R. the Parſon of Standfields Caſe, per Cur.* 1 *Rolls Abr.* 640. alſo ſuch preparing of the Graſs Mowed for Hay, is a good conſideration upon which to be diſcharged of the tenth of all after-profit, that may be made the ſame year of the ſame Land, ſo that if the after-graſs be eaten with Cattel, no Tithe ſhall be paid for them, *Paſch.* 4 *Jac. B. R. Green* v. *Auſten, Yelverton* 86. *Trin.* 4 *Car. C. B. Anonymus, Hetly* 98 *Mich.* 42 *and* 43 *Eliz. Johnſon and Popinger* 1 *Jac. Eeles and Vachin.* 3 *Jac. Eeles and Saunder, Hill* 8 *Jac. Eeles and Winterbolt.* in all theſe Caſes, Prohibitions were granted in *B. R.* and *Mich.* 14 *Jac. Johnſon* moved for a Conſultation upon the ſaid Prohibition granted in the 43 *Eliz.* againſt *Popinger,* but it was denied, *Paſch.* 41 *Eliz. B. R. between Awberry and Johnſon. Paſch.* 11 *Car. B. R. Langford's Caſe.* Prohibition granted upon ſuch ſurmiſe for after-Mowth *Paſch.* 14 *Car. B. R.* between *Manning* and *Clapham,* a Prohibition was granted for fatting of Sheep upon the after Paſture, *Paſch.* 16 *Jac. B. R. between Nichols and Hooper,* 1 *Rolls Abr.* 648 *and* 649. But *Popham* ſaid, that he had known it to be reſolved, that of right without any ſpecial Cuſtom alledged, no Tithes ſhall be paid of the Hay of the after-Mowth, for that the Rule of the Law is, that Tithes ſhall be paid *Ex annuatis renovantibus ſimul & ſemel,* and ſo by conſequence not of the after-Graſs depaſtured, *Paſch.* 2 *Jac. Hall* v. *Fettyplace,* 2 *Croke* 42. *Hobart* 250. and it hath been reſolved, that no Tithe is to be paid of after-Graſs, *De Jure, Paſch.* 16 *Car. Nichols and Hoppers Caſe per Cur. and* 3 *Jac. B. R. Spencer and Johnſon's Caſe and Paſch.* 17 *Jac. B. R. Kinneſton's Caſe* 1 *Rolls Abr.* 640. But this is to be underſtood only, where no more Graſs is left by the Sith, than is uſual, for if Graſs be fraudulently left the Caſe is other-

otherwiſe, 2 *Bulſtrode* 238. Therefore it is ſaid, that if an Inn-keeper doth pay Tith Hay of certain Land, and the reſidue of the year after, doth put into the ſame Land the Horſes of his Gueſts which come to the Market in the ſame Town, no Tithes ſhall be paid for the Herbage of thoſe Horſes, for this is but the after-paſture of the Land, whereof he hath before paid Tithes, *Trin.* 16 *Jac. B. R. between Richardſon and Cable per Cur.* 1 *Rolls Abr.* 641. nor ſhall Tithes be paid for agiſtment, in ſuch after-Paſture, 2 *H.* 4. *Rot. par. Num.* 93.

Though as hath been ſaid Tith Hay of common right be to be paid in kind, yet by cuſtom, or preſcription, ſome other conſideration may be due and payable in lieu thereof, but then what is paid, how little ſoever it be, muſt be to the benefit of him to whom the Tithe Hay of common right was payable; for example, when one ſurmiſed that time out of mind, the owners of certain Lands had found Straw for the Body of the Church, in diſcharge of all Tithes of Hay, it was held by the opinion of the whole Court, that this is no cauſe of diſcharge, for that the Parſon was not chargeable with the finding of the Straw, nor had any benefit by the others finding it, but otherwiſe it had been, if it had been alledged, that the Straw was given to the Parſon, and he beſtowed it in the Body of the Church, and tis ſaid to be ruled, *Hill.* 30 *Eliz.* that where one preſcribed, that he had uſed to pay the Pariſh Clark his wages, in ſatisfaction of Tithe Hay this was no diſcharge, *Paſch.* 34 *Eliz. B. R. Scory* v. *Baber*, 3 *Croke* 276.

If there is a *Modus* ſufficient to diſcharge Lands of the Tith of Hay, and the ſame Lands be ſowed divers years with Corn, this doth not deſtroy the *Modus*, but the ſame ſhall continue when the Lands are again turned into Meadow, and whilſt they are ſowed with Corn the Parſon ſhall have Tithe in kind thereof, *Trin.* 10 *Jac. C. B. Brown's Caſe*, *Godbolt.*

When the Tithe of Hay is to be paid in kind, the owner ought of common right to cut down and make the Graſs into Hay, *per Cur. Paſch.* 13 *Jac. B. R.* 1 *Rolls Rep.* 172. for when the Caſe was, that one had uſed to pay a Load of Hay, for all Tithes of Hay growing and renewing upon the Land where, *&c.* and alledged, that they uſed to make the Graſs into Hay, by their own labour, a Prohibition was denyed *per totam Curiam* upon this Reaſon, that the Pariſhioner ought to make the Graſs into Hay and ſo this is but Tithes in kind, which cannot be a conſideration of a *Modus Decimandi*, no more than if a man doth preſcribe to pay certain Sheafs of Corn, for all Tithes of Corn, for he ought to make it into Sheafs, and therefore part of the duty in kind, cannot be a ſatisfaction for the reſidue, *per Cur. Paſch.* 13 *Jac. B. R.* 1 *Rolls Rep.* 172. yet it hath alſo been held, that to make the Parſons Hay is more than the owner is bound to do, and that the uſe for making it for the Parſon, may be a good conſideration of a diſcharge, as to ſome other thing, *Mich.* 5 *Car. C. B. Wood and Carvener* v. *Symond*, *Hetley* 147. *Paſch.* 37 *Eliz. Rot.* 284. *Awbery* v. *Johnſon vouched Paſch.* 2 *Jac. in Hall and Fettyplace's Caſe*, 2 *Croke* 42. and it hath alſo been held, that the Pariſhioner is not bound of common right, to ted, and ſhake the Graſs abroad, and to gather it into Weaks or Windrows, for that the Tithe may be ſet forth in graſs-cocks, before it be teded, and that the doing of that only, is a good conſideration, of a diſchage of the after-mowth, *Hill.* 16. *Jac. Hyde* v. *Ellis*, *Hobort* 250. *Paſch.* 2 *Jac. Hall* v. *Fettyplace*, 2 *Croke* 42 1 *Rolls Abr.* 644. But as *Moor* reports this Caſe of *Hall* v. *Fettyplace*, to make the Graſs into ſmall Cocks is no conſideration for the diſcharge, but to make it into great Cocks is a good conſideration, and ſo

'tis

'tis ſaid to be held in *Johnſon*'s *Caſe*, *Moor* 758. from which it ſeems to follow, that Graſs of common right is Tithable, when it is put into graſs-cocks and not before, for that then the tenth may be ſevered from the nine parts; and accordingly it hath been adjudged *per Cur. Paſch.* 14 *Jac. Hide* v. *Ellis*, *Hobart* 250. *Contra per Cur. Hill.* 14 *Jac. B. R. Barbum* v. *Gooſe Trin.* 15 *Jac. per Cur. Popinger* v. *Johnſon* and a Prohibition denied, 1 *Rolls Abr.* 644. *Quære.*

But whatever the owner is oblig'd to do of Common Right, the Cuſtom of each place is to be obſerved, and therefore, if the Cuſtom be to meaſure out the tenth part of the Graſs ſtanding for the Tithe thereof, and that the Parſon ſhall cut and make it, this is good, *Hobart* 250. and in this and all other caſes when the Tithe of the Graſs is ſet forth, and the owner not to make the Parſon's Tithe into Hay, the Parſon *De Jure* may make the Graſs into Hay upon the Land in which it grew, although the uſage time whereof, *&c.* hath been to the contrary, and it is needleſs for the Parſon to alledge a Cuſtom for the doing of it, and the Parſon may paſs over the Pariſhioners ground to that end, keeping the Path leading thereto if there be one, for this is incident to the other, *Hill* 14 *Jac. B. R. Newberry and Reynold*'s *Caſe per Cur.* 1 *Rolls Abr.* 643. and for theſe things denyed, the Parſon hath remedy in the Eccleſiaſtical Court, and by *Fitzherbert N. B.* may have his Action on the Caſe at Common Law, *Mich.* 14 *Jac.* 1 *Rolls Rep.* 420.

The Tithe of Wood being accounted a predial and great Tithe, ſhall next be ſpoken of. *Firſt* then, the Tithe Wood of Copices, and of all Underwoods are to be paid, that is, *De jure*, after they are cut, or if there be a Cuſtom for it, by meaſuring for the Parſon the tenth Acre, *Hoberts Rep.* 250. not only when they are cut to grow again, but alſo of the Roots and Branches, when grubbed up to make the Land Arable, and alſo the Roots of Hedges or Hedg-rows when they ſhall be grubbed up, *Trin.* 12 *Jac. B. R. Price and Maſcal*, 2 *Bulſtrode* 238. ſo Tithes are to be paid of Heath, Turf, and Broom; but if the Occupier of the Lands hath paid time out of mind, Tithe of Wool, Milk, *&c.* ariſing from Cattel depaſtured thereupon, and in reſpect thereof, hath been free from the payment of other Tithes, this may diſcharge him of the reſt, *Mich.* 28 *and* 29 *Eliz. B. R. Godbolt p.* 44. But of this conſideration as to the reaſon of the diſcharge, I much doubt; however, if Broom be Grubbed up, the Tithe thereof ought to be paid, although that it be Grubbed up, for the end of making the Land Arable, *per Cur. Trin.* 12 *Jac. B. R. Price* v. *Maſcall*, 2 *Bulſtrod* 239. Yet it is ſaid to be adjudged, *per Curiam*, that if a man doth cut a Copice, and thereof doth pay the Tithe of the Wood, and then before any new Branches are grown, doth Grub up the Roots and Stubs of the Wood, he ſhall not pay Tithes of them, becauſe they are parcel of the Freehold, and do not renew Yearly, *Mich.* 15 *Car. B. R. Bedford* v. *Dr. Skinner*, 1 *Rolls. Abr.* 637. But *per Legem Terræ*, Tithes of all Underwoods are to be paid. yea though the Wood be ſpent for Fuel, in the Houſes of perſons uſing Lands in the Pariſh where it is cut; for when the Tithe of ſuch Wood was demanded in the Spiritual Court, and a Prohibition was granted upon a Surmiſe, that the Wood was ſpent in the Houſe for Firing, and that there was a Cuſtom in the Pariſh, that the Owners of any Houſe, or Land, within the ſame Pariſh who pay Tithes to the Parſon, ought not to pay Tithe of Wood ſpent in their Houſes, and Iſſue being joyned upon the Cuſtom, it was found for the Defendant, and moved in arreſt of Judgment; that although it be found that there is no ſuch Cuſtom, yet no Tithes ought to be paid of Wood ſpent in Houſes, nor for fencing ſtuff for Hedges, but that ſuch ought to be diſcharged of them, *per Legem terræ*; yet the

Court reſolved the contrary, and ſaid, that it was uſual in Prohibitions, to alledge Cuſtoms upon conſideration of an Hearth penny, or that they had other Lands whereof they pay Tithes, and by reaſon of the Wood burnt better Tithes, ſo that the Parſon hath a benefit thereby, but not to alledge a diſcharge, *per Legem terræ*, and a Conſultation was awarded, *Trin.* 4 *Car. C. B. Norton* v. *Fermer*, 1 *Croke* 113. *Paſch.* 4 *Car. C. B. Norton and Busket* v. *Hopper*, *Hetley* 88. Therefore if a man hath an Houſe of Husbandry with Lands, and Demiſeth the Lands reſerving the Houſe, upon this reaſon, by *Huiton* Tithe of Fire-wood is payable, And by *Harvey*, if a Libel be for Tithes of Hedging, and Fencing a Surmiſe, ought to be made to diſcharge ſuch Tithes demanded, *Paſch.* 4 *Car. C. B. Thornhill's Caſe*, *Hetley* 93. *Paſch.* 14 *Jac. Lane's Caſe*, *Moor* 917. And yet it is ſaid to be held generally by all the Juſtices, that for Broom, Furs, or any other Fuel expended in a Pariſhioner's Houſe, no Tithes ought to be paid, *Paſch.* 40 *Eliz. B. R. Auſtin* v. *Lucas*, 3 *Croke* 609. *Jame Caſe*, *Moor* 909. nor for Wood cut for fencing of Tithable Lands, *Trin.* 38 *Eliz. B. R. Ran.* v. *Patteſon*, *Trin.* 10 *Car. Brown and Nixon's Caſe*, 1 *Rolls Abr.* 644. and although all the Wood cut for fencing be not ſo imploy'd, yet Tithes ſhall not be paid of that which remains, 3 *Croke* 499. and when a Prohibition was prayed to ſtay a ſuit for Tithes of Wood, the Plaintiff Suggeſted, that he had a Houſe in the Pariſh, and that the Wood was cut for Fuel burnt in this Houſe; the Court ſaid, that this would not ſerve, unleſs it was expreſſed that the Houſe was for maintenance of Husbandry, by reaſon of which the Parſon had *Uberiores Decimas*, *Paſch.* 22 *Car.* 2 *B. R. Anonimus*, 1 *Ventris* 75. *the ſame Caſe*, 2 *Keble* 628. this Caſe ſeems to admit, that Wood cut for Fuel to be ſpent in Houſes for maintenance of Husbandry, by the Law of the Land is Tith-free, yet when to have a Prohibition it was ſuggeſted, that there was above 400 Acres of Arable Land within the Pariſh, and that the Corn thereon growing, could not be preſerved without fencing the Land whereupon it grew, and that the Tithes of the Corn ſo fenced, had always been paid to the Impropriator, *&c.* and that within the Pariſh there was this Cuſtom, that if any Underwod be cut and imployed in fencing the Corn, whereof Tithes are to be paid, and do not ſell nor otherwiſe diſpoſe of it, ſuch Underwood hath been always diſcharged of Tithes, and ſhews that the Under-wood cut was ſo imployed in fencing the Corn, *&c.* In this Caſe in as much as the Corn fenced did not appear to be the Plaintiff's own Corn, (although the Plaintiff did averr, that he did not ſell any of the Wood,) it was adjudged, that the Preſcription was not good, for that if the Plaintiff give his Wood to others to fence their Corn, Tithes ſhall be paid for ſuch Wood; but *Wild* Serjeant being of Council with the Plaintiff, ſaid that the Caſe deſerved greater Conſidera tion than the Court took of it, *Hill.* 19 *and* 20 *Car.* 2. *Croucher* v. *Collins*, 1 *Sanders Rep.* 141. *ſame Caſe*, 2 *Keble* 319. If Wood be cut to make Hop-poles, where the Parſon, or Vicar have Tithe-hops, no Tithes ſhall be paid of this Wood, *Hugh. Abr.* 689. However by Cuſtom Tithes may be paid of Wood conſumed in an Houſe, *Mich.* 14 *Jac. B. Watley and Hanfurie's Caſe*, 1 *Rolls Abr.* 642. And by Cuſtom alſo upon a conſideration, Wood ſpent in the Houſe without doubt may be Tithe-free, for *Hutton* ſaid, that it is a Cuſtom in the North parts, to give an half-penny for Eſtovers burnt, by which they are free from the Tithe of Wood burnt for Fuel, *Paſch.* 4 *Car. C. B. Wolmerſton's Caſe*, *Hetley* 85. *and by Hutton*, *Croke and Yelverton. Trin.* 4 *Car. Norton's Caſe*, *Hetley* 88. *ſame Caſe*, *Littleton's Rep.* 143. See alſo in the ſame Book, *fol.* 5. *and Paſch.* 4. *Car. C. B. Thornhill's Caſe*, *Hetley* 93. if a man cut his Woods, and burn it to make Bricks for the reparation of his Houſe within

within the Pariſh for the habitation of Him and his Family, no Tithes ſhall be paid thereof, becauſe, that the Parſon had the Benefit of the Labour of his Family.

Alſo if a man cuts his Woods, and burns it to make Bricks for the Enlargement of his Houſe within the Pariſh, for the neceſſary habitation of his Family, no Tithes ſhall be paid for ſuch Wood. But if a man cuts his Wood, and burns it to make Bricks for the inlargement of his Houſe within the Pariſh, more than was neceſſary for his Family, only for his pleaſure and delight, he ſhall pay Tithes thereof, and a Conſultation was granted accordingly, where the Plaintiff in the Prohibition had affirmed, that he burnt it for the reparation and inlargement of his Houſe, generally, without ſaying, for the neceſſary habitation of his Family, for the Court ſaid, that by this Surmiſe he might make a Caſtle, and yet pay no Tithes, *Trin.* 10 *Car. B. R. Nixon and Brown's Caſe. per Cur.* 1 *Rolls Abr.* 645.

It ſeems, that in Ancient times, Controverſy was betwixt the Clergy, and Laity about the Tithes of Timber Trees, which was ſetled by Act of Parliament, as followeth. Item, **At the complaint of the ſaid great men and Commons, ſhewing by their Petition, That whereas they ſell their great Wood of the age of twenty years, or of greater age, to Merchants to their own profit, or in aid of the King in his Wars, Parſons and Vicars of holy Church do implead and draw the ſaid Merchants in the Spiritual Court for the Tithes of the ſaid Wood in the name of this word called** Sylva cædua, **whereby they cannot ſell their Woods to the very value, to the great damage of them and of the Realm: It is ordained and eſtabliſhed, That a Prohibition in this caſe ſhall be granted, and upon the ſame an Attachment, as it hath been uſed before this time.** Stat. 45 Ed. 3. c. 3.

By this Statute, it is out of doubt, that Timber Trees of Twenty years growth, or more, that are apt for Timber are free from the payment of Tithes, and are ſaid to be parcel of the inheritance, *Mich.* 12 *Jac.* B. *R. Stamp* v. *Clinton alias Lifford*, 1 *Rolls rep.* 100. *and Hill.* 2 *Jac. Rott.* 229 *Brook and Rogers Caſe*, there vouched and reported, *Moor* 908. But ſtill the doubt remains what Trees are to be accounted great Wood, or Timber by the aforeſaid Statute, and thereby made free from yeilding a Tithe; and firſt it is evident by the Statute, that none under the age of twenty years, of what ſort or benefit ſoever they may be of, for the uſe of Building, are thereby accounted great Wood, and Tithfree, *Hill.* 44 *Eliz. B. R. Foſter and Peacock* v. *Leonard*, 3 *Croke. p.* 1. *Paſch.* 5 *Jac. Man* v. *Somerton*, 1 *Brownlow and Gouldſborough* 94. and yet it is ſaid to be held, by *Wray* and *Clench*, that if one doth cut Trees which are, or may be Timber Trees, as Oakes, Elmes, *&c.* although they be under the age of Twenty Years, no Tithes are due for them. And ſo if Trees of that age be cut, and new Germins grow, no Tithe is due, though they be cut under that Age, *Paſch.* 29 *Eliz. B. R.* 3 *Croke* 55. *ſame Caſe*, *Moor* 908. However it is to be granted, that if any ſuch young Trees, or others be cut for Houſe-boot, Hedg-boot, Plough-boot, Cart-boot, or Fire-boot, no Tithes be due thereof, *Hill.* 43 *Eliz. Ramſey's Caſe*, *Gouldsborough* 145. 172. nor are all Trees, if of twenty years growth or more, free from the payment of Tithes, *Paſch.* 5 *Jac. Moon* v. *Somerton* 1 *Brownlow, and Gouldsborough* 94. and yet, there is no queſtion, but Oak, Elm and Aſh of that growth, are Free, as being moſt uſeful for the building of Houſes, and Ships, and therefore moſt valuable, and of theſe therefore the Statute is intended, *Hill.* 17 *Eliz. B. R. Soby* v. *Molyns*, *Plowden* 468. and 'tis made a *Quære*, whether the Parſon by Preſcription, may have the Tithe of ſuch Trees againſt the Common Law, and Statute of *Sylva Cedua*, 1 *Rolls*

Abr. 640. But as for Beech, *Tanfield* Juſtice held, that by the Common Law, they are not Timber, and ſaid, that it was ſo adjudged in *Cary* and *Paget's* Caſe, therefore of Common Right they ought to pay Tithe of what growth ſoever they be, *Trin.* 38 *Eliz. Leonard's Caſe*, 1 *Rolls Abr.* 640. But this is to be underſtood to be true but in ſome Woody Countries, where better Trees are plentiful, for in *Buckingham-ſhire*, and ſuch like Countries where Wood is ſcarce, Beech is accounted Timber, and there, it ſhall have the Privilege of being Tithfree, *Paſch.* 5 *Jac. Man* v. *Somerton*, 1 *Brownlow and Gouldsborough*, 94. *Paſch.* 14 *Jac. B. R. Lapthorn's Caſe*, 1 *Rolls Rep.* 355. *Hill.* 15 *Jac. C. B. Pinder* v. *Spencer*, *Noy* 30. *Mich.* 39 *and* 40 *Eliz. Holiday* v. *Lee*, *Moor* 541. But Birch is not accounted Timber in any Country, nor is it ſuch Wood as the Statute intends by the name of groſs Woods, as not being uſeful for Building, therefore a Tithe thereof ſhall be paid, although it be not cut until it be above twenty years growth, *Hill.* 44 *Eliz. B. R. Foſter and Peacock* v. *Leonard*, 3 *Croke*, *p.* 1. *ſame Caſe*, *Moor* 707. *Anonymus*, 2 *Croke.* 199. And the Law is the ſame, to *Willows*, *Guſley* v. *Pinder*, *Hobart* 219. *Noy* 30. though they grow by a Houſe, and it be waſt to cut them, reſolved, *Mich.* 5 *Jac. B. R.* 1 *Rolls Abr.* 640 the ſame as to Aſp. *Hill.* 43 *Eliz. Ramſey's Caſe*, *Gouldsborough* 161. ſo to Holly, Olders and Maples, *Anonymus*, 2 *Croke* 199. *Mich.* 5 *Jac.* 1 *Rolls Abr.* 640. and to Hornbeam, Hazel, Sallowes, and ſuch other like Trees of baſe and inferiour nature unfit for buildings, *Hill.* 17 *Eliz. B. R. Soby* v. *Molins*, *Plowden* 468. but per-adventure, the ſcarcity of other Timber, and Cuſtom of the Country, to put theſe Trees to the uſes of good Timber, may free them being twenty years growth or more, from the payment of Tithes, *Hill.* 15 *Jac. C. B. Pinder* v. *Spencer*, *Noy* 30.

And although Trees once good Timber, do ſtand ſo long as to be fit at length for no better uſe than Fire-wood, and are cut for that uſe; yet no Tithes ſhall be paid thereof, for that being once diſcharged of Tithes, they ſhall always be diſcharged, *Trin.* 38 *Eliz. B. R. Ram.* v. *Patteſon*, 3 *Croke* 477. *ſame Caſe*, *Gouldsborough* 145. *Mich.* 39 *and* 40 *Eliz. Holyday* v. *Lee*, *Moor* 541 *Mich.* 3 *Jac. B. R. Brook and Roger's Caſe*, 2 *Croke* 100. *Mich.* 12 *Jac. B. R. Stamp.* v. *Clinton*, *alias Liſſord*, 1 *Rolls Rep.* 100. Yet *Croke* is ſaid in his Argument of this Caſe to hold, that for ſuch Trees, Tithes ought to be paid.

Such Trees as are diſcharged from the payment of Tithes, are Free, not only as to the Trunk or Timber it ſelf, but alſo, as to the Bark, Root, and Germins that grew upon the Ancient ſtock, *Mich.* 12 *Jac. B. R.* 1 *Rolls Rep.* 100. *Coke* 11. 48. *b. Liford's Caſe*, and likewiſe, as to the Branches, although that they be Lopped every Seven years, *Hill.* 38 *Eliz. B. R. Ram.* v. *Pattenſon*, *Moor* 908. *Hill.* 2 *Jac. Brook* v. *Rogers*, *Moor* 908. *ſame Caſe*, 2 *Croke* 100. *Paſch.* 9 *Jac. C. B. Dr. Newman's Caſe*, *Godbolt*, *Hill.* 17 *Eliz. B. R. Soby* v. *Molyns*, *Plowden* 468. 11 *H.* 4. 89. 1 *Rolls rep.* 100 *Littleton's rep.* 149. *Dr. and Student* 175. nor is it mateiral, whether they be Lopped within every twenty years or not, for they remain ſtill free, *Trin.* 2 *Jac. in Reynold's Caſe*, *Moor* 762. *Trin.* 38 *Eliz. B. R. Ram.* v *Pattenſon*, 3 *Croke* 477, *Sampſon and Worthington's Caſe*, 1 *Rolls Abr.* 640. but if ſo be, that Timber Trees that be twenty years growth, or more, were Lopped before they were of that growth, (in which Caſe the Loppings are to be Tithed,) and then after the twenty years, they be Lopped every ten, or more years, Tithes ſhall be paid of ſuch Loppings, *Hill.* 2 *Jac. Brook* v. *Rogers*, *Moor* 908. But then the Parſon ſuing for the Tithe of ſuch Loppings in the Spiritual Court, if a Prohibition be brought, to have a Conſultation, he ought to alledge, and ſue this in the Temporal Court, *Paſch.* 26 *Eliz.* *B. R.*

B. R. and Mollins's Caſe, 2 *Leonard* 79. from which it may be collected, that although the Trees be of more than Twenty years growth, or ſo old that their age is not known, upon which account it cannot be proved, that they were lopped before they were twenty yeares old; yet if the Tithes of the Loppings have been uſually paid, this may be ſufficient, for that it may well be preſumed, that they were Lopped before the Trees for their age did by Law become Tithfree. Yet note, that it is ſaid to be held by the whole Court, that if a man doth top a Tree, under the growth of twenty years, and ſuffering the Body to remain, doth after it is Timber, and free from the payment of Tithes, Lop it again, no Tithes ſhall be paid of ſuch Loppings, 1 *Bronlow and Gouldsborough* 33. *and Mich.* 10 *Jac. by Coke*, 1 *Rolls Abr.* 640. But if there be a Wood commonly uſed as Coppice, and the owner will let it grow till it be forty years growth, to the intent it may not pay Tithes, yet when it is cut, it ſhall pay Tithes, for one ſhall not by this means avoid the payment of Tithes, ſo long as the Wood cut is intended for Firing, *Mich.* 18 *Car.* 2 *B. R.* 1 *Siderfin* 300. *the ſame Caſe*, 2 *Keble* 90.

Not only the Loppings of Timber Trees ſhall be free from the Payment of Tithes, but theſe Loppings as the Caſe may be, may free the Loppings of other Trees in their nature Tithable and alſo Underwood from yielding of Tithes to the Parſon; for if there be a Wood, the moſt part of the Trees therein being Timber, and free from Tithe; and there do grow *Sparſim* amongſt theſe Trees, other Trees, in their nature Tithable, and the Owner doth fell the whole Wood, and cauſe it to be promiſcuouſly cut out, and bound up into Faggots together; for that the moſt part of every Faggot is of Wood Tith-free, and the reſidue of ſo little value, that the ſeverance thereof from the Tith-free Wood, would not quit the charge; in ſuch Caſe, Tithes ſhall not be paid for any of the Wood or Faggots. But on the otherſide, if moſt part of the Wood be Underwood, or Trees Tithable when cut, and *Sparſim* there grow Oaks, *&c.* and the owner cuts down all the Wood, and makes it into Faggots promiſcuouſly; in ſuch Caſe Tithes ſhall be paid (I ſuppoſe of the whole, by Parity of Reaſon) *Paſch.* 26 *Eliz. B. R. Dawes and Mollins's Caſe*, 2 *Leonard* 79. Yet it is ſaid, that in this very Caſe a ſpecial Conſultation was granted upon a ſpecial Plea, that the Faggots, were part of Wood Titheable, *Buckhurſt and Newton's Caſe*, 3 *Croke* 347. by which it ſeems to be then taken, that the greater part being Tith free Wood, ſhall not free the leſſer. However, if in this Caſe, only ſome ſmall part of the Faggots is of Wood Tith-free, (poſſibly put in with deſign of defrauding the Parſon) And the Parſon ſuing in the Spiritual Court for the Tithes of the Faggots a Prohibition is obtained upon a Surmiſe that they are made of Wood Tith-free; the Parſon to have a Conſultation muſt ſhew the ſpecial matter, *viz.* how much of the Faggots were of Tithable Wood, and that the Wood Tithfree was ſo intermixed therewith, that he could not otherwiſe ſue, than for the Faggots, and thereupon pray a Conſultation, as to the Tithable Wood, otherwiſe no Conſultation is to be granted, *Mich.* 36 *and* 37 *Eliz. Buckhurſt* v. *Newton*, 3 *Croke* 347. *Hill.* 43 *Eliz. Gouldsborough* 127. *See Mich.* 18 *Car.* 2. *Cornell* v. *Haws* 1 *Siderfin* 300. *the ſame Caſe*, 2 *Keble* 90.

As of Wood and Trees for Fewel, *&c.* as is aforeſaid, Tithes ſhall be paid, ſo if young Fruit or other Trees planted in a Nurſery upon deſign to be rooted up, and ſold to be Planted in other Pariſhes, Tithes ſhall be paid thereof, *Hill.* 14 *Car. B. R. Gibs and Wybourne*, 1 *Croke* 526. *ſame Caſe Jones* 416. *and* 1 *Rolls Abr.* 637. and upon a Bill in Equity for the Tithes of a Nurſery, at hearing of the Cauſe, divers doubts and queſtions were made;

made; *Firſt*, whether Tithes ſhould be paid of Nurſeries if they yeilded no other Fruit; *Secondly*, whether Tithes ſhould be paid for thoſe Trees that yield Fruit which pay Tithes, or if ſome yield Fruit, and ſome not, whether or no, thoſe Trees that yield Fruit ſhall privilege and exempt the other that yield none, when they are ſold together, and laſtly, whether Tithes ſhall be paid for them, when they are ſold and tranſplanted within the ſame Pariſh; And it was decreed that Tithes were Payable in all ſuch Caſes, *Mich.* 16 *Car.* 2. *Scaccar. Hardres* 380.

Whatever the Parſons due be as to the Tithe of Wood, or Trees of Common Right, yet by Cuſtom, or Preſcription upon a Conſideration alledged, a Perſon, Town, or Hamlet may be freed from the payment thereof. As for Example; if a Parſon hath a certain Wood, or a certain parcel of Wood allotted to him by the Lord of a Mannor, and that in conſideration thereof He and his Tenants, have been time of Memory free from the payment of the Tithe of their Underwoods, and Tithable Trees within the Pariſh or the like; this is a good diſcharge; and *Coke* ſaid, that in the Pariſh where he lived, Tith had not been ever paid of Wood, and that the Parſon had a Wood which is called the Tith-Wood, for which he pays yearly to the Lord Four-pence of whom he holds it, and therefore it ſhall be intended, that it was given upon a conſideration for all Tithwood within that Pariſh, for that no Tithwood hath ever been paid there, *Paſch.* 14 *Jac. B. R. Lapthorn's Caſe*, 1 *Rolls Rep.* 355.

But if one preſcribes to pay a certain Rate for the Tithes of all Willows, cut down by him within the Pariſh, this is not good, unleſs he ſay upon his own Lands, *Mich.* 28 *Eliz. B.* R. *Godbolt* 60. *and Linwood, and Dr. and Student fol.* 166. *b.* ſay that a whole Country may preſcribe in *non Decimando*, and likewiſe ſo we find that in a Suit for the Tith of Underwood in the Wild of Kent, a Prohibition was prayed, upon a Suggeſtion, that they had a Preſcription to be diſcharged of the payment of Tithe of Underwood growing in the Wild there, (which is ſaid to contain about Forty Pariſhes:) But *Coke* Chief Juſtice anſwered, that what was ſaid by *Lindwode and Dr. and Student* was with this Proviſo, that there be beſides this ſufficient Maintenance for the Parſons, otherwiſe it is not good, and that the Statute of 2 *Ed.* 6. *c.* 13. did not at all aid in this Caſe, for that a private man cannot in this manner Preſcribe; yea, and that the Statute was againſt them although that no Tithe had been ever paid, and further he ſaid, that no Tith could be paid, formerly of Underwoods in this place, becauſe there were only great Timber Trees there growing, which are free by Law: But now theſe Trees being deſtroyed by Iron Mills, and Underwood being grown up in the place of them, Tithes ſhall be paid thereof as in other places, and the whole Court was clearly of this opinion. And *Doderidg* ſaid, that by *Lindwode and Dr. and Student* a whole Country may be diſcharged of the payment of Tithes, but this at the firſt of neceſſity ought to have a Lawful Commencement by way of Compoſition, or the like, which could not here be ſhewed, and with him *Coke*, and the whole Court agreed, and ſo a Prohibition was denied, *Mich.* 12 *Jac. B. R. Ruſſel* v. *Barkhurſt*, 2 *Bulſtrode*, 285. *Paſch.* 12 *Jac. B. R. Porter* v. *Tike* 1 *Rolls Rep.* 22. yet to my knowledge no Tithes of Wood, are at this day paid in the Wilds of *Kent* and *Suſſex* upon the pretence of ſuch Preſcriptions, and they have been upon Trials allowed to be good. And ſo *Finch* Recorder ſaid, that it was reſolved in one *Dawleys* Caſe for the Wild of *Suſſex*, and *Mich.* 13 *Jac. B. R.* and in the Caſe of *Porter* and *Dike* for the Wild of *Kent*, that their Preſcription *De non Decimando*, was adjudged good, *Norton's* Caſe, *Trin.* 4 *Car. C. B. Hetley* 110. ſo where a Prohibition was granted againſt the

the Proprietor of the Parſonage of *Tunbridge* to be diſcharged of Tithes of Wood, and upon a Suggeſtion that it was within the precinct of the Wild of *Kent*, which time whereof, *&c.* was diſcharged of Tithes; the Preſcription was Traverſed, and found for the Plaintiff, and allowed to be good, on *Mich.* 17 *Jac.* B. *R. Earl of Clanrickard's Caſe*, *Palmer* 37. And theſe Preſcriptions of *Non Decimando* for Wood have been allowed alſo for other places, and chiefly as I ſuppoſe, upon this reaſon; that Wood is not Tithable of Common Right, but by Cuſtom only (it is ſaid that the Tithe of Wood was firſt introduced to be paid to the Clergy in the 17 *E.* 3. by Canon made by *John Stratford* Arch-Biſhop of *Canterbury*, *Palmer* 38. 2 *Rolls Rep.* 122.) and therefore as by Cuſtom Wood is made Tithable; ſo by the like Cuſtom it may be exempt from the payment of Tithes; but ſuch Preſcriptions of *Non Decimando*, have never been allowed to diſcharge Corn, Hay, or any ſuch like thing which be of Common Right Tithable.

As of divers ſorts of Trees, Tithes ſhall be paid, ſo of the Fruits thereof, and though Timber Trees of the age of twenty years, or above, with the Roots, Germins, Barks and Loppings be free from yielding of Tithe, yet of Acorns, or Maſt, ſevered from the Trees, Tithes are to be paid (which are alſo predial Tithes,) becauſe theſe renew yearly, *Lifford's Caſe*, *Coke* 11. 49. 1 *Rolls Rep.* 100. *Trin. Jac. Reynold's Caſe*, *Moor* 762. But then the Acorns muſt be gathered, and ſold, for if they in the Seaſon drop from the Trees of themſelves, and the Owners Hogs doth Eat them, no Tithe ſhall be paid thereof, *Trin.* 2 *Car. Hetley p.* 27. *Littleton Rep.* 40.

And as of Acorns and Maſt Tithes are to be paid, ſo of the Fruits of all other Trees, whereof profit may be made, the Tithe is to be paid; as of Apples, Pears, Cherries, *&c.* which Fruits if they be Stoln, and not gathered by the Owner, the Parſon as well as the Owner ſhall bear the loſs; but if the Owner doth ſuffer a ſtranger to pull or take his Fruits, the Tithe ſhall be anſwered; and ſo it is, if he ſuffer them to hang too long by negligence, and after that time they be imbeſled, *Trin.* 4. *Car. B. R. Anonymus*, *Hetley* 100 If the Soil of the Orchard be Sown with any kind of Grain, the payment of the Tithes of the Fruit of the Trees, ſhall be no diſcharge for the Tithes of the Grain, for that they be of ſeveral and diſtinct kinds, 2 *Inſtitutes* 652. But if a man doth pay Tithes for the Fruit of the Trees, and afterwards doth cut the ſame Trees, and make them into Billets, or Faggots, and ſell them, he ſhall not pay Tithes for the Billets or Faggots, for that is not a new increaſe, 2 *Inſtit.* 651. 622. Alſo of all Garden Herbs, as Mint, Parſly, Annis, Rue, Sage, Cabbage, Turneps, *&c.* Tithes are to be paid, and they are Minute Tithes, *Palmer* 222. but in many places by Cuſtom, ſome ſmall rate as Four-pence, *&c.* is paid for the Tithe of an Orchard, or Garden, and if in a place where ſuch Preſcription is, a new Orchard be Planted, the Owner thereof ſhall be Tith-free of it, paying the accuſtomary rate as for the old Orchards, *Paſch.* 4 *Car. C. B. Wolmerſton's Caſe*, *Hetley* 85. Yet *Hutton* ſaid, that if a man had an Ancient Garden, for which he paid a penny yearly, and that is enlarged, of that enlargement Tithes ought to be paid in *Specie*, *Paſch.* 4 *Car. C. B. Thornhill's Caſe*, *Hetley* 94. But the reaſon of this Caſe is (I ſuppoſe) becauſe the Preſcription was particular for that Garden only. But if the Cuſtom of the Pariſh had been to have paid yearly a penny for each Garden in the Pariſh, the addition, or Enlargement of a Garden would not make any Tithes due in *Specie*.

Alſo

Alſo Tithes ſhall be paid of Rape Seed, Saffron, Hops, Flax, Woad, Hemp, Weld, and of the like Fruits yielded by the Earth, and theſe are not to be accounted predial, but Minute Tithes, *Palmer* 222. *Udal and Tindal's Caſe Hutton* 77, *ſame Caſe*, 1 *Croke* 28. *and Bendlow's* 139. 159. And as to Hops, the Owner is not bound to dry them before the Tithe be ſet forth, 1 *Rolls Abr.* 644. But how the Tithe of Hops ſhall be ſet forth, whether by the Tenth Pole, or by meaſure, is not agreed, as is ſaid by *Twiſden Juſt. in the Caſe of Ledgar* v. *Langley*, *Paſch.* 18 *Car.* 2. *B. R.* 1 *Siderfin* 283. 443. and there cannot be a Preſcription of a *Modus* for Tithe Hops, becauſe the Court will take notice that Hops have not been Ancient, but uſed in Beer of late time only; yet a Preſcription to pay ſo much in Lieu of all ſmall Tithes may be good for Hops, and ſuch other ſmall things of new Invention, *Hill.* 21 *and* 22 *Car.* 2. *Crouch* v. *Riſden* 1 *Siderfin* 443. 1 *Ventris* 61. 2 *Keble* 612.

Honey and Wax of Bees, being Predial Tithes, ſhall here alſo be ſpoken of, as to which, the Tithe of Honey, and Wax of Bees in an Hive, *&c.* ought to be paid in Kind, *De Jure*, as was adjudged in a Prohibition upon a Demurrer, *Mich.* 15 *Car. B. R. Barefoot and Norton's Caſe*, 1 *Rolls Abr.* 635. *ſame Caſe*, *Jones* 447. and 1 *Croke* 559. *F. N. B.* 51. *a.* But when one Preſcribed to be diſcharged of the Tithe of the Tenth Swarm of Bees, in conſideration that he paid the Tithe of the Honey and Wax, and fed them in Winter, and found them Hives, and (for that they were *Feræ Naturæ*,) took great care, and ſpent much Labour to Preſerve them, when they ſwarmed, a Prohibition was granted upon theſe Surmiſes, *Paſch.* 11 *Car. B. R. Anonymus*, 1 *Croke* 404. But ſome of the Judges held, that the *Modus* is not good, for that conſideration is no more than the Duty that the Law requires. But they agreed, that Tithes were due of the Tenth Swarm, for that Bees be *Feræ Naturæ*, *Paſch.* 1 *Car. B R. Landford's Caſe*, 1 *Rolls Abr.* 651.

And for the better Aſcertaining the Tithes of Hemp and Flax, It hath been Enacted, **That all Perſons that ſhall Sow, or cauſe to be Sown any Hemp or Flax, in any Pariſh or place in the Kingdom of** England, **Dominion of** Wales, **and Town of** Berwick **upon** Tweed, **ſhall pay or cauſe to be paid to every Parſon, Vicar or Impropriator of any ſuch Pariſh or place, yearly and every year for each Acre of Hemp or Flax ſo Sown, Pulled or Drawn, a conſtant annual ſumm of Money not exceeding Four ſhillings, before the ſame be carried off the Ground, and ſo proportionably for more or leſs Ground ſo Sown, and Pulled or Drawn as aforeſaid; For the Recovery of which Sum or Sums of Money, the Parſon, Vicar or Impropriator ſhall have the common and uſual remedy allowed of by the Laws of** England.

Provided that this Act, or any thing therein contained, ſhall not extend to charge any Lands diſcharged by any Modus Decimandi, **ancient compoſition, or otherwiſe diſcharged of Tithes by Law.**

Provided that this Law ſhall continue for Seven years, and to the end of the next Seſſion of Parliament after the ſaid Seven years are expired. Stat. 3 and 4 *W. and M. c.* 3.

Whereas an Act made in the Third year of the Reign of his Majeſty and the late Queen, Intituled, An Act for the better Aſcertaining the Tithes of Hemp and Flax, **was made to continue but for Seven years, and to the end of the next Seſſion of Parliament after ſuch Term ended, and is now Expired: And whereas the ſaid Act hath by Experience been found very uſeful and neceſſary, Be it therefore Enacted by the Kings moſt Excellent Majeſty, by and with the advice and Conſent of the Lords Spiritual and**

and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That from and after the Five and twentieth Day of March, which shall be in the Year of our Lord, One thousand seven hundred, all and every Person or Persons, who shall sow or cause to be sown, any Hemp or Flax in any Parish or Place in the Kingdom of England, Dominion of Wales, and Town of Berwick upon Tweed, shall Pay or cause to be Paid to every Parson, Vicar and Impropriator of any such Parish or Place, yearly and every year, the Sum of Five Shillings, and no more, for each Acre of Hemp or Flax so sown, before the same be carried off the Ground, and so Proportionably for more or less Ground so sown: For the Recovery of which Sum or Sums of Mony, the Parson, Vicar or Impropriator, shall have the common and usual Remedy allowed of by the Laws of the Land.

Provided, That this Act, or any thing therein contained, shall not extend to Charge any Lands Discharged by any Modus Decimandi, Ancient Composition, or otherwise discharged of Tithes by Law.

Provided always, That nothing herein contained, shall extend, or be construed to extend, to make any Alteration in the Right or Manner of Payment of Tithes of Flax and Hemp to any Ecclesiastical Parson, Incumbent of any Parsonage, Vicarage or Curacy, or to any Impropriator or Body Corporate, having or holding any Impropriation, for such Ground as hath at any time since the Second day of February, One thousand six hundred eighty four, and before the Second Day of February, One thousand six hundred ninety one, been sown with Flax or Hemp, and paid Tithe in kind to such Incumbent, Impropriate or Body Corporate respectively, but that the same shall Continue and be Payable and Paid, as fully and in such manner as formerly; any thing in this Act to the contrary notwithstanding.

Provided, That this Law shall continue in Force for Seven years, to be accounted from the said Five and twentieth Day of March, and from thence to the end of the next Sessions of Parliament and no longer. Stat. 11 & 12 W. 3. c. 16.

CHAP. L.

Mixt Tithes, as of Cattle, Fowles Agistment, &c. *when, and in what manner Payable, and what* Modus, &c. *good to discharge such Tithes.*

HAving spoken of Predial Tithes of all sorts; mixt Tithes are next to be consider'd, which are, the Tithes of the severral Creatures, nourished by the Fruits of the Earth. And first of such with which the Farmer is wont to Stock or Pasture his Lands, as Horses, Oxen, Cows, Sheep, Goats, to which may be added Hogs, *&c.* and the young of each, which may yield their Tithes in kind: Therefore if a man hath ten Colts, Calves, Lambs, Kids, or Piggs, in one year, one of them shall be to the Parson, or Vicar, *&c.* But if he hath a less number of any sort, the Par-

ſon can have no Tithes in kind of them that year, without a ſpecial Cuſtom for it, but muſt have his Tithe *pro rata*, either in Money the ſame Year as the Cuſtom doth direct, or in kind the next year, reckoning both years together; but by Cuſtom, the Parſon may have one of the young, if there be but Seven, and if there be a leſs number, in one year, to pay an half-penny for each of them, this is a good Cuſtom, but when the Cuſtom is alſo, that he ſhall have one of Seven, as of Calves, Piggs, *&c.* there he ſhall not account the young in two years, and ſo the Second year have one in kind, but have an half-penny for each of them in both years, *Anonymus*, *Latch* 254. If a man hath but one or more Calves, Colts, or Lambs, *&c.* and doth ſell them, by the Cuſtom in many Pariſhes, he ſhall pay to the Parſon the Tenth Penny of the price, but Cuſtom in theſe caſes is generally to direct and to be obſerved. It is ſaid to be a good *Modus* for the Tithe of Calves to pay one Calf for the Tithe, if the Owner hath Seven in one year, and if he hath under Seven, to pay one half-penny for each of them, and that if he ſell any Calf, ſhall pay the tenth of the price for which he Sold it, *Mich.* 14 *Jac. B. R. Lee and Collins's Caſe*, 1 *Rolls Abr.* 648.

But if a man preſcribe to pay one half-penny for every Lamb that he ſhall ſell before the firſt day of *May*, without other Tithe of them, and he by Fraud to deceive the Parſon, Sells his Lambs but one day before *May*, this is no diſcharge by the Cuſtom of the Tithes, *Mich.* 17 *Jac. per Cur.* 1 *Rolls Abr.* 652. And as the Parſon is to have the Tithes of the young and Encreaſe of theſe Cattel, ſo he on his part is to obſerve the Cuſtom of the place for the better Propagating that increaſe, elſe any Pariſhioner grieved may have his Action of the Caſe againſt him, for ſo an Action of the Caſe was brought againſt a Parſon, declaring, that within the Pariſh there is a Cuſtom, that the Parſon at all times of the year, had uſed to keep a Common Bull, and a Boar, for the common uſe of the Kine and Sows of the Pariſhioners, for the increaſe of Calves, and Piggs within the Pariſh, and that the Defendant being Parſon there, had neglected to keep them, by reaſon whereof, the Plaintiff being an inhabitant, had loſt the Increaſe, *&c.* The Court were of opinion that this was a reaſonable Cuſtom, and that every inhabitant prejudiced, by not keeping the Bull and Boar, might maintain his Action, *Trin.* 39 *Eliz. Yeilding* v. *Fay.* 3 *Croke* 569. *and More* 355.

Of common Right young Cattle are Tithable, when they are Weanable, that is, can well live without the Dam on ſuch food with which the Dam is nouriſhed; and the Tithe of theſe is to be apportioned with reſpect to the places where they are ingendered, brought forth and nouriſhed.

Cattle that yield other profit to the owner than their young, the Tithe thereof is alſo to be paid to the Parſon; as of the Milk of Cowes, *Mich.* 9 *Car. Baxter* v. *Hopes*, *Brownlow and Goulsborough* 2 *pt.* 30. and ſo I ſuppoſe, of Goats and Sheep, when their Milk is preſerved by the Owner, but by Cuſtom acertain number of Cheeſes may be paid in diſcharge of the Tithe of Milk, *Trin.* 21 *Jac. B. R. Wiſeman and Dennyſe's Caſe*, *Godbolt*. Or by Cuſtom to pay the Tenth Cheeſe made from the firſt of *May*, to the firſt of *Auguſt*, in recompence of all Tith-Milk for the whole year, is a good diſcharge, for that comes by labour and is not due of it ſelf. So to pay the Tenth quart of Milk at the Parſonage Houſe, or other certain place, is good enough, *Paſch.* 40 *Eliz. B. R. Auſtin* v. *Lucas*, 3 *Croke* 609. *ſame Caſe*, *Moor* 909. And when one Surmiſed, that the Cuſtom of the Country where he Lived was, not to pay any Tithes of the Milk of Ews, Prohibition was granted *per Cur. Sewell and Bicknars Caſe*, 1 *Rolls Abr.* 654.

And

And note, that when the Tirhe of Milk is paid, no Tithe of Cheeſe is due; ſo when Tith-Cheeſe is paid, no Tithe Milk is to be required; And that when Cows yielding Milk are Sold, or otherwiſe removed into another Pariſh, the Tithe of the Milk for the time is to be paid to the Parſon of the Pariſh where they are depaſtured.

In a ſuit for ſmall Tithes by Engliſh Bill, and amongſt the reſt for Tith-Milk, upon the hearing of the Cauſe, a queſtion aroſe, whether the Defendant ſhall pay the Tenth part of the Milk every Meal, or only pay every Tenth Meal; it was decreed, that he ſhould pay every Tenth Meal entire. The next Queſtion was, whether *de Jure* the Pariſhioners ought to ſend the Tith-Milk to the Parſonage Houſe, or that the Parſon ought to fetch it from the Pariſhioners; it was agreed by the whole Court, that the Tith-Milk ought to be carried by the Pariſhioners, and by the Chief Baron and two other Barons, to be delivered in the Church Porch, becauſe the Neighbouring Pariſhes did ſo. But by *Raymond* it ſhould be delivered at the Parſonage Houſe, becauſe where there is no Cuſtom the Common Law prevails, *Dod.* v. *Engleton*, *Paſch.* 13 *Car.* 2. *in Scaccar. Raymond* 277. (But *Quære* of this Caſe,) how the Tith of Milk becomes different from other Tithes, which generally are to be ſet out and rendered in the place where they ariſe, and the Pariſhioner not compellable to carry and deliver them at the Parſonage Houſe, Church Porch, or any other place.

Not only the Tithe of the Lambs, but alſo of the Wool of Sheep is to be paid to the Parſon or Vicar or other proprietor of the Tithes, *viz.* proportionably for the time that they are in the Pariſh, 2 *Keble* 293. as thus; the Parſon ſhall have Eight pound of Wool in Eighty, of Forty Sheep in the Pariſh a whole Year; four pound of Wool, if they were there but half the Year; two pound of Wool, if they were there but three Months, and but the Tithe or tenth of the Twelfth part of the Wool, if they lay and fed but one Month in the Pariſh. And this is due *de Jure*, at the time when it is clipped, but by Preſcription it may be ſet out altogether at another time, and if the Spiritual Court will not allow of ſuch Preſcription, they are to be prohibited, *Mich.* 41 *Eliz. B. R. Green* v. *Hun*, 3 *Croke* 702. *vouched*, *Paſch.* 41 *Eliz. in Awberrie's Caſe*, *Moor* 910. And *Jones* ſaid, that if the Pariſhioner ſell his Sheep, the Parſon ſhall have allowance for the Tithes of them after their Sheering, *Anonymus*, *Latch*, p. 254. Yet when the Owner of the Sheep had depaſtured them in the Pariſh from *Michaelmaſs* to our *Lady-day*, and then ſold them, and a ſuit was in the Spiritual Court for a tenth part of the Bargain, and the Owner to have a Prohibition ſurmiſed, that he would pay the tenth of the Wool of them according to the cuſtom of the Pariſh, a Prohibition was denied; for as *Doderidge* Juſtice ſaid, by this way the Parſon ſhall be defrauded of all, if he ſhall not now have his recompence, for that it was not the time of Shearing when they were ſold, and the Sheep are gone into another Pariſh; and *Whitlock* ſaid, that *de animalibus inutilibus*, the Parſon ſhall have the tenth part of the Bargain, for depaſturing them, as Horſes, Oxen, *&c.* But *de animalibus utilibus*, he ſhall have the Tithe in Specie, as Cows, Sheep, *&c. Mich.* 2 *Car. B. R. Popham* 197. So if a man pay Tithe of Lamb at *Markſtide*, and at *Midſummer* following doth ſheere the reſidue of his Lambs, *viz.* the nine parts, he ought to pay Tithes alſo of their Wool, although that there is not above two Months, betwixt the time of the payment of the Tithes of the Lamb which were Tithed with their Fleeces, and the ſheering of the reſidue, for this is a new increaſe, and a Prohibition was denied accordingly, *Paſch.* 16 *Jac. B. R. Nicholls and Hooper's Caſe*, *Rolls* 1 *Abr.* 642.

And not only is the Tithe of the Wool upon the Bodies of the Sheep or Lambs due and payable, but alſo of the Head and Neck, though this be cut off before Sheering time, if what is cut be converted to the Owner's uſe, or profit, for that the Neck-wool is often fraudulently taken off to the ſpoiling of the Fleece; and when it was urged, that if ſuch abuſe was in the cutting of the Neck Fleeces, this ought to come on the other ſide to ſhew it to be ſo, as in the caſe of *Rakings*; the Court was againſt this, and at that time refuſed to grant a Prohibition. But at another day the Suggeſtion appearing to be, that they uſed to wind up the other Fleeces at their own Charges; for this cauſe a Prohibition was granted, *Mich.* 14 *Jac. B. R. Foſſe* v. *Parker*, &c. 3 *Bulſtrode* 242. *Rolls* 1 *Abr.* 645 *and* 646. *Littleton Rep.* 31. But when one preſcribed, that he paid the tenth Fleece of Wool in ſatisfaction of all Locks and Tithes due for Wool, it was moved, that the Preſcription was not good, becauſe it is but to have the ſame thing of the ſame nature in recompence, the Court held, that the ſubſtance of the Preſcription was good, and that the Locks being but of ſmall value were free, *Mich.* 36 *&* 37 *Eliz. B. R. Jeſop* v. *Payn*, 3 *Croke* 363. But a Preſcription to be diſcharged of the Locks of Wooll, ought to be ſhewed of Locks caſually loſt, *Mich.* 37 *&* 38 *Eliz. Moor* 911. And if a Pariſhioner doth cut off the dirty Locks from his Sheep before the time of ſhearing, the better to preſerve them from Vermin, and this be done without fraud, no Tithes ſhall be paid thereof, *per Curiam*, *Paſch.* 14 *Car. B. R. Dent and Salvin's Caſe*, *Rolls* 1 *Abr.* 646. eſpecially if that the Pariſhioner can preſcribe for it, in conſideration that he is to wind up the Parſons Tithe Fleeces, *&c. Mich.* 14 *Car. B. R. Williams and Wilock's Caſe*, *Rolls* 1 *Ab.* 646.

If Sheep be Shorn and die of the Rot, or other Diſeaſe before the *Eaſter* following, the Wool is not Tithable, unleſs the Parſon can preſcribe to have it, *F. N. B. Conſultation* 51. Yet by *Doderidge* and *Jones*, the Tythe of ſuch Wool ought to be paid to the Parſon, *Anonymus*, *Latch.* p 254. However, if a man doth kill his Sheep, he ſhall pay Tithe for their Wool, but not for their Skins, *Paſch.* 14 *Car. C. B. Dent and Salvin's Caſe*, *per Curiam*, *Rolls* 1 *Abr.* 646. but for the Bodies fed on his Land in the Pariſh, and eaten in his Houſe, no Tithe ſhall be paid, *Mich.* 7 *Car. Facy and Lange's Caſe*, *per Curiam*, *Rolls* 1 *Abr.* 647. *ſame Caſe* 1 *Croke* 237. And *Williams* ſaid, that if a man keep Sheep in one Pariſh until ſhearing time, and then ſell them into another Pariſh, in this Caſe the Vendee ſhall pay the Tithe-wool to the Pariſh where they were depaſtured in the greater part of the time of the growing of the Wool. But if there be a Preſcription, that the owner of the Sheep ſhall pay one half penny for the Wool of Sheep ſold after Shearing, and before *Michaelmas*, this is good, and the Vendee ſhall be diſcharged, *Mich.* 37 *&* 38. *Eliz. Moor* 911.

The owner having paid Tithes of the Wool of Sheep, he ſhall not pay any Tithe for their Herbage, for then he ſhould pay Tithes twice of one increaſe, *Trin.* 12. *Jac. B. R. Marſcall and Price's Caſe*, *Rolls* 1 *Abr.* 642. *and Rolls* 1 *Rep.* 62. and therefore, if he doth buy Weathers and after doth ſell them, for that theſe ſhall pay the Tithe of their Wool, no Tithes ſhall be paid for their Paſture, *Mich.* 7 *Car. C. B. Facy and Long's Caſe*, *per Curiam*, *Rolls* 1 *Abr.* 647.

If a Preſcription be, that if the owner hath under the number of ten Fleeces of Wool, that he ſhall pay a penny to the Parſon for the Tithe of each of them, and that if he hath more, then he ſhall deliver to the Parſon the tenth part of the Wool, upon his Conſcience, without Fraud and Covin, *ſine viſu vel tactu* of the Parſon of the ninth parts, this is not a good *Modus*, for that it is unreaſonable, and as if it was to give the Parſon what the Pariſhioner pleaſed, *Mich.* 12 *Jac. B. R. Wilſon and the Biſhop of Carliſle's Caſe*, *per Curiam*, *Rolls* 1 *Abr.* 648.

So

So if a Preſcription be, to pay every tenth pound of Wool for the Tithes of the Wool, and it be not ſhewed what he is to pay if the Wool doth not amount to ten pound, this is not good, for that it is a Preſcription in *non Decimando*, if it be under ten pound, and the tenth is due of common right, *Mich.* 7 *Jac. Delman and Barton's Caſe, per Curiam. Rolls* 1 *Abr.* 648. Neither is it a good Preſcription, that one hath paid the tenth of the Wool of all Sheep that he had before *Lady-day*, and ſheered or ſold or put into another Pariſh, or the value of the tenth thereof at that time, and this in full ſatisfaction, as well of all Wool of ſuch Sheep, as of all other Sheep brought into the Pariſh after our *Lady-day*; for it is not reaſonable, that the Tithes that one man pays ſhall be a diſcharge for all the other Pariſhioners; but this was intended to be a diſcharge of all the Sheep of the party himſelf brought into the Pariſh after our *Lady-day*, tho' not ſo expreſſed, and then the Preſcription had been good, *Mich.* 9 *Car. B. R. Market and Knight's Caſe*, and ſo adjudged in another Caſe the ſame Term upon a tryal at Bar, *Rolls* 1 *Abr.* 649.

So if the Pariſhioner can preſcribe, that in conſideration that he had time whereof, *&c.* paid Tithe-wool of all the Sheep that he ſheared, *viz.* as well of thoſe that he bought but two days before the ſhearing as of others that he had kept all the year, he had uſed to be diſcharged of the Tithe-wool of all Sheep that he ſold two days before ſhearing, this is a good Preſcription, becauſe by the Spiritual Law the whole Tithe-wool of the Sheep nouriſhed in another Pariſh, and ſo lately bought before that ſhearing, is not due to ſuch Parſon, *Mich.* 14 *Jac. B. R. adjudged Rolls* 1 *Abr.* 648. But a Cuſtom to pay Tithes in kind for Sheep, if they continue in the Pariſh all the year, and if they be ſold before ſhearing time, but an half penny for every one ſo ſold, was held to be an unreaſonable Cuſtom, for by ſuch means, the Parſon may be defeated of his Tithes, *Weeden* v. *Harden*, *Paſch.* 17 *Car. March. Caſe*, 128.

Not only the Tithes of ſuch Cattle which yield a Tithe in kind, are to be paid, but alſo for ſuch as are Barren-ſtock, as for Horſes, Oxen, *&c.* depaſtured to be ſold in the Pariſh where they be depaſtured, *Trin.* 4 *Car. C. B. Norton's Caſe, Hetley* 110. *Trin.* 4 *Car. C. B. Anonymus, Hetley* 100. *Sherrington and Fleetwood's Caſe* 3 *Cro.* 475. Therefore, after a man hath paid the tenth Colt, Calf, and Lamb, if he doth rear any of the reſt, and ſell them before they yield profit to the Parſon, or be uſed for the Plow, he ſhall pay a Tithe for them, *Trin.* 38 *Eliz. Sherrington and Fleetwood, Moor* 909. *ſame Caſe* 3 *Croke* 475. *Paſch.* 4 *Car. Wolmerſton's Caſe, Hetley* 85. So, if after Milch Cows grow old, they be kept dry, and depaſtured as other dry Cattle, though but for one Month, a Tithe ſhall be paid for them; and ſo it is if they be Fatted and ſold, *Trin.* 4 *Car. C. B. Anonymus, Hetley* 100. And if a man doth buy Cattle and feeds and ſells them, he ſhall pay a Tithe for them, for that they cannot render any other Tithe; but otherwiſe it is of Sheep, for that the Tithe is to be paid of the Wool. So if a man doth buy, or breed Beaſts, and doth feed, and ſpend them in his Houſe, he ſhall not pay any Tithe for them, *Mich.* 7 *Car. Harvy and Long's Caſe, and Trin.* 38 *Eliz. B. R. Sherrington and Fleetwood's Caſe, per Curiam, Rolls* 1 *Abr.* 647. *ſame Caſe Moor* 909. *and Gouldsborough* 174. *Mich.* 38 *and* 39. *Eliz. Greſham* v. *Lucas Moor* 911. *ſame Caſe* 3 *Croke* 446. So if he having paid Tithes of his Colts, or Calves, doth rear any of the reſt, or buy others, for to till Land in the ſame Pariſh, or doth rear Cow Calves for to bear Calves and for the Dary, no Tithes ſhall be paid for the Paſture that they eat in the mean time, *Paſch.* 4 *Car. C. B. Wolmerſton's Caſe, Hetley* 85. *Mich.* 14 *Jac. B. R. Watley and Hanberry's Caſe, and Mich.* 14 *Jac. B. R. Joyce and Parker's Caſe, and Mich.* 14 *Jac. B. R. Dr. Beſt and William's Caſe, Hill.* 14 *Jac. B. R. Knechin and Woodrell's Caſe. Trin.* 12 *Jac. B. R. Maſ-*

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cal and Prices Caſe, Rolls 1 *Abr.* 646. *Trin.* 12 *Jac. B. R. Price* v. *Maſcal* 2 *Bulſtrode* 238. *Same Caſe, Rolls* 1 *Rep.* 38. *Trin.* 30 *Eliz. Sherrington* v. *Fleetwood, Moor* 909. *Mich.* 41 *Eliz. B. R. Green* v. *Hun.* 3 *Croke* 702. *Mich.* 9 *Jac. Baxter* v. *Hope, Brownlow and Gouldsborough* 2 *part*, 30.

Nor ſhall Tithes be paid for the Paſture of Oxen uſed to till the Land in the ſame Pariſh, or for the Beaſts of the Pail, at ſuch time when they are put to that uſe, *Mich.* 9 *Jac. Baxter and Hope's Caſe, per Curiam, Rolls* 1 *Abr.* 646. Nor ſhall he pay for the Paſture of Horſes, when put to the ſame uſe, *Trin.* 15 *Jac. B. R. Bell and Tard's Caſe, Rolls* 1 *Ab.* 646. Or if a Perſon doth keep an Horſe within a Pariſh only for his Saddle, no Tithes ſhall be paid for his graſs, *Trin.* 9 *Jac. B. R. Pothall* v. *May*, 1 *Bulſtrode* 171. *Paſch.* 4. *Car. C. B. Thornhill's Caſe, Hetley* 94. 1 *Ventris* 236. And if Oxen have been uſed to the Plough, and afterwards Fatted in order for Sale, Tithes ſhall be paid for the Agiſtment of ſuch Oxen, during the time they were Grazed and Fatted in order to be ſold, notwithſtanding they had been formerly uſed to the Plough, for the reaſon of their diſcharge now ceaſeth, they being become no way beneficial to the Parſon in any other Tithes, *Sandys* v. *Eaſtmond and Nayle in Scacc.* For the advantage the Parſon is ſuppoſed to have by the labour, *&c.* of ſuch Cattle, whereby his Tithes are to be increaſed, is the reaſon of the diſcharge of the Tithes of ſuch Cattle; therefore, I conceive, that if one breed up Cattle for the Plow, *&c.* but hath not any arable Land within the ſame Pariſh whereupon to Imploy thoſe Cattle, but doth imploy them in another Pariſh, theſe Cattle ſhall pay Tithes to the Parſon of the Pariſh wherein they are depaſtured. See *Holbeech* v. *Whadcoke, Paſch.* 13 *Car.* 2. *in Scaccar. Hardres Rep.* 184.

So it hath been held, that if an Horſe be kept to carry Coals, Tithes ſhall be paid for his Paſture: And if when the Caſe is ſo, the owner doth Surmiſe, that he is kept for the uſe of Husbandry, the other may alledge, that he is kept to carry Coals, and the Allegation is Traverſable; ſo if the Owner alledge that dry Cattle are kept for the Plow, the other may alledge, that they are kept for Sale, without that, that he keeps them for the Plough, *Paſch.* 4 *Car. B. R. Thornhill's Caſe, Hetley* 93, 94.

When upon a ſuit for Tithes of Dry Cattle, to have a Prohibition the ſurmiſe was, that one uſed to pay the Tenth Sheaf of Corn, the Tenth Cock of Hay, the Tenth Fleece of Wool, the Seventh Calf, and the Parſon to pay three half-pence, and the Eighth Calf if he had Eight, and the Parſon to pay One penny, and ſo to Ten, and if he had under the number of Seven, to pay only a halfe-penny for every one, and after theſe rates for Lambs and Colts, and that it was in Satisfaction for the Tithes of dry Cattle, and for all other Tithes of Corn, Hay and Cattle. The opinion of the whole Court was, that this Surmiſe is not ſufficient, for that which he uſed to pay is but the Tithes in kind, therefore cannot be in Satisfaction for the Tithes of other things than themſelves: But if it had been only for dry Cattle for Plough and Pail, it had been good, *Mich.* 42 *Eliz. B. R. Ingolsby againſt Johnſon*, 3 *Croke* 786. ſo when a ſurmiſe was of an uſage to pay a Penny Yearly for every Milch Cow, and an half-penny for every other Cow, and a half-penny for every Mare, in Satisfaction for the Tithes of all Cows, Horſes, Steers, and other Cattle, and adjudged inſufficient for the ſame Reaſon, *Mich.* 38 *and* 39 *Eliz. Greſham* v. *Lucas. Moor* 911. The like Caſes were, *Trin.* 38 *Eliz. Sherrington* v. *Fleetwood. Moor* 909. *Mich.* 3 *Jac. B. R.* 1 *Rolls Abr.* 651. *Mich.* 37 *and* 38 *Eliz. Griſman* v. *Lewis*, 3 *Croke* 446. *Trin.* 38 *Eliz. Monday* v. *Lovace, Moor* 454. But if the uſage hath been, that they that have Milch Kine in the Pariſh have paid nine Cheeſes yearly at a day, in diſcharge of Tith Milk, and Fatting Cattle; this may

may ſerve for a good ſurmiſe, becauſe the Cheeſe are made by labour, and are thereby become things of another nature than the Milk, *Mich.* 12 *Jac. B. R. Maſcal and Price*, 1 *Rolls rep.* 62. *ſame Caſe*, *Bulſtrode* 2 *pt.* 238.

But the great doubt is, whether Cattle for the Plow, Pail and Saddle, ſhall be accounted Tith-free, without the Surmiſe of ſome Cuſtom. *Richardſon* ſaid, that a Surmiſe ought to be made, and that he had ſearched the Books, and the *Book of Entries* and found, that ever ſome Surmiſe is made. But *Croke* replyed, that in the Kings-Bench, he had Twenty times ſeen Prohibitions granted in ſuch Caſes without any Surmiſe, that is, to Suits in the Spiritual Court, for Tithe for Horſes, and young Cattle kept for Plow and Pail, *Paſch.* 4 *Car. C. B. Thornhil's Caſe*, *Hetley* 94. And it is ſaid by the Lord Chief Baron *Hales*, that of Common right, Tithes are not due for Cattle Bred for the Plow and the Pail to be uſed in the ſame Pariſh, but if they belong to another Pariſh, Tithes are due for them, and of that opinion was the whole Court, *Paſch.* 13 *Car.* 2 *in Scaccar. Holbeech* v. *Whadcock*, *Hardres* 184. But whether the aforeſaid Cattle be Free or not without a Preſcription, upon conſideration of ſome Benefit to the Parſon, yet if the Parſon can preſcribe to have Tithe for young Cattle, whilſt rearing for the Plow or Pail, as to have yearly one penny, or the like for each of them, this is good, but not without a Cuſtom for it, by *Hutton and Yelverton*, only preſent, *Paſch.* 4 *Car. C. B. Woolmerſton's Caſe*, *Hetley* 85.

The Tithe of Barren Stock Tithable is to be yielded, (where no Cuſtom is) when they be Fatted or Sold; for 'tis not reaſon that the Parſon ſhould have profit of them from the Owner, before the Owner hath received any, *Paſch.* 2 *Car. C. B. Thornhill's Caſe*, *Hetley* 93. and if kept in divers Pariſhes after bought, or in Breeding, the Tenth of the Gains, if bought, or value if reared, is to be to the Parſons Proportionably, *Mich.* 2 *Car. Popham* 197.

The Occupier of Land is not only to pay for his own Stock depaſtured upon his Land, but alſo for the Stock of other Perſons thereon maintained, *Sherrington* v. *Fleetwood*, 3 *Croke.* 475. And therefore, if an Inkeeper doth agiſt the Horſes of Travellers, or Strangers on his Lands, he ſhall pay Tithes for them, otherwiſe the Owner of the Land ſhall make a profit of his Land, and defeat the Parſon of all Tithe thereof, *Hill.* 1655. *in Scaccar. Guilbert* v. *Everſly*, *Hardres* 35. yet if a Perſon having Lands in a Pariſh, doth Rent out his Land, reſerving the Running of his Saddle Horſe therein, no Tithes ſhall be paid for the Graſs he Eats, *by Montague, Croke and Dodderidge* v. *Haughton*, who held that for all Barren Beaſts, Tithes ſhall be paid, except for ſuch as be for Husbandry, *Trin.* 15 *Jac. B. R. Laurkin and Wild's Caſe*, 1 *Rolls Abr.* 641. But then it muſt be averred and proved, that the Horſe is uſed for Labour, for if an Horſe be kept for Sale, Tithes ſhall be paid for him, *Trin.* 15 *Jac. Hampton* v. *Wild*, 2 *Croke* 430. *ſame Caſe*, 1 *Rolls Abr.* 647. *Trin.* 15 *Jac. Laurkin and Wild's Caſe*, *Popham* 126. And it hath been lately held *per Curiam*, that Tithes for agiſtment of Cattle, are Payable by the Owner of the Cattle, for the Cattle take the Profits and Herbage of the Soil: So in the Caſe of Commoners, and it cannot be ſaid that the profits are taken by the Owner of the Soil; and the Lord Chief Baron *Hales* ſaid, the Owner of the Soil might pay them, but clearly the Agiſter is Compellable to pay them, *Paſch.* 13 *Car.* 2. *in Scaccar. Pory* v. *Wright & al. Hardres* 184. *ſee Guilbert* v. *Everſly*, *Hardres* 35. *and Face and Cauge's Caſe* there cited, where it was held, that Tithes for Agiſtment of Cattle ſhall be paid by the Occupier of the Lands.

If it be asked how the Tithes for Agiſtment are to be paid, the Anſwer is, that if there be any Cuſtom in the Place, that is to be obſerved to direct it; if not, the Tenth part of the Money to be received for the Agiſtment is to be to the Parſon, *Mich.* 2 *Car. B. R. Popham* 197. and by *Hales* Chief Baron, Tithes of Baron Cattle are due *de Communi Jure*, according to the value of the Land, after the rate of two Shillings *per* Pound, for that they cannot be otherwiſe valued or accounted for, becauſe the Profits of the Lands for which they are paid, are perceived by the Mouths of Beaſts; But by Cuſtom or Preſcription, ſuch Tithes may be paid in other manner, as by the Acre; and for all manner of Cattle Barren, and for the Plow and Pale, *Paſch.* 13 *Car.* 2 *in Scaccar*, *Holbeech* v. *Whadcock*, *Hardres* 184. So in an Engliſh Bill in the Exchequer Chamber, againſt an Inn-keeper, who depaſtured Travellers Horſes, for which there was no cuſtomary payment, and the value of the Land depaſtured was proved to be 30*l. per Annum*, the Court was in doubt, what Decree to make for a certain rate to the Parſon, it not being aſcertained by Cuſtom, but conceived, that they ought to have regard to the Value of the Land, and allow 2*s.* in the Pound. But agreed clearly, that Tithes are Payable for ſuch Herbage Eaten by the Mouths of Travellers Horſes, *Hill.* 1655. *in Scaccar. Guilbert* v. *Everſly*, *Hardres* 35.

When it is ſaid that Tithes muſt be paid for Agiſtment, this is not to be underſtood, for Cattle agiſted in the after Graſs of a Meadow that hath paid Tith-Hay, 2 *H.* 4. *Rotulo Parliamenti* 93. 1 *Rolls Abr.* 641. therefore where an Inkeper hath paid the Tith-Hay of certain Lands, and for the reſidue of the ſame Year hath depaſtured thereon the Horſes of Gueſts, no Tithes ſhall be paid for the ſame, *Trin.* 16 *Jac. B. R. Richardſon and Cable's Caſe, per Cur.* 1 *Rolls Abr.* 641. And if an Inn-keeper Preſcribe, that in conſideration that he and all others whoſe Eſtate he hath *&c.* have paid Tithes of Hay and Grain growing upon the Land appertaining to his Inn, and have paid Tithes of all their own Beaſts depaſtured upon the ſame Lands, that they have been time whereof, *&c.* diſcharged of the Tithes of the Horſes of their Gueſts agiſted in the ſaid Lands, and this is ſaid to be a good Preſcription, for by ſome 'tis held to be only a Perſonal Tithe, and by others, that no Tithes are due by the Common Law for ſuch Agiſtment without a Cuſtom, *Gabel and Richardſon's Caſe*, 1 *Rolls Abr.* 650. But I take this Caſe not to be Law, as to ſuch of the Lands which yielded not to the Parſon either Tithe Corn, or Hay, for here is no more alledged to be paid, than ought to be paid of Common right, nor are the reaſons of the Caſe true, *viz.* that this is but a perſonal Tithe, or that no Tithes are due in ſuch Caſe *De Jure* without a Cuſtom. And when upon a Suit for Agiſtment, the Defendant in the Spiritual Court did plead, that he had always paid Twelve pence by the year for every Milch Cow, going on ſuch a Paſture, and that for this Payment he had been diſcharged of the payment of Tithes for all Agiſtments in that Land, this payment of Money for Milch Beaſts, ſhall not diſcharge from the payment of Tithes for other Beaſts, by *Popham*, *Hill.* 43 *Eliz. Sherrinton* v. *Fleetwood*, *Gouldsborough* 147. But if he had preſcribed that he had paid one penny for all Cows and Beaſts agiſted, that peradventure had been good *per Cur. ſame Caſe*, 3 *Croke* 475. 1 *Rolls Abr.* 651.

And Here Note that it hath been Enacted as Followeth, **where heretofore ſuch a cuſtom hath been in many parts of** Wales, **that of ſuch cattel and other goods as hath been given with the Marriage of any perſon, their Tithes have been exacted and levied by the Parſons and Curats in thoſe parts: which cuſtom being diſſonant from any part of this Realm, as it ſeemed when the ſaid Country of** Wales **was through civil diſſention uncul-**

culted, for want of other ſufficient profits that might otherwiſe grow to the Curates and Miniſters there, to have been for that time tolerable: ſo now the Countrey being well manured and husbanded, and the Tithe is duly paid there, of Corn, Hay, Wool and Cheeſe, and of other increaſe of all manner of Cattel, as it is commonly in all other parts of this Realm, the ſame cuſtom ſeems to be grievous and unreaſonable, ſpecially where the Benefices are elſe ſufficient for the finding of the ſaid Miniſters and Curates: that it be therefore enacted by the Authority aforeſaid, That from and after the firſt day of May next coming, no ſuch Tithes of marriage-goods be exacted or required of any perſon within the ſaid Dominion of Wales, or Marches of the ſame; any thing in this Act contained, or any other Act, cuſtom, or preſcription had or made to the contrary hereof notwithſtanding. Stat. 2 and 3 Edw. 6. cap. 13.

There are other Beaſts beſides the Domeſticks before ſpoken of, fed upon Lands, and which may take off the Paſture thereof and be a profit to the Owner, as Deer and Conies. As to Deer, no Tithes are to be paid of them, becauſe they are *Feræ naturæ*, *Mich.* 5 *Car. C. B. Flower* v. *Vaughan*, *Hetley* 147. And as for Conies, theſe being alſo, as is ſaid, *Feræ naturæ*, no Tithes *de Jure* are to be paid for them without a Cuſtom for it, *Trin.* 8 *Car. B. R. Worden and Bennett's Caſe*, and *Paſch.* 13 *Car. B. R. Sir John Beven and Dr. Bradiſh, per Curiam*, *Hill.* 13 *Car. B. R. Vincent* v. *Tutt*, *Mich.* 14 *Car. B. R. Williams* v. *Wilcox*, *and Mich.* 15 *Car. Damport and Onge's Caſe*, 1 *Rolls Abr.* 635. *Paſch.* 22 *Jac. Haie's Caſe*, *Bendloe* 144. *Flower* v. *Vaughan*, *Mich.* 5 *Car. Hetley* 147. *and Randal* v. *Head & al' Paſch.* 13 *Car.* 2. *in Scaccar' Hardres* 188. *Mich.* 15 *Car.* 2. *Towerſon* v. *Wiggel*, 1 *Keble* 602. But this ſeems to be very hard on the Parſons ſide, for that theſe Beaſts may take away the whole profit of great Parcels of Land, and yield an anſwerable benefit to the Owner; and ſometimes Arable Lands are turned into Coneygrees and Parks, which is not only grievouſly hurtful to the Parſons in whoſe Pariſhes they be, but alſo to the Commonwealth, and therefore deſerve no favour.

As of many of the Beaſts of Profit, ſo of Fowls, are Tithes to be paid; and firſt of Domeſtick Fowls, as of Hens, Geeſe, Ducks; and I ſhould have added Turkeys, but that I find them liſted amongſt the Fowls that are ſaid to be *Feræ Naturæ*, and therefore affirmed to be Tithe-free, *Mich.* 37 *and* 38 *Eliz. Hugton* v. *Prince*, *Moor* 599. *but Quære.* And of theſe Fowls either the tenth Egg, or the Tenth of the Young, is to be paid: And where the Tythe of Eggs is paid which comes of any Fowl, no Tythe of the Young is to be paid; and where Tythe of the Young is paid, no Tythe of the Eggs is due, *Hill.* 15 *Jac. B. R. Reſolved* 1 *Rolls Abr.* 642. And it is ſaid to be a good *Modus* for Eggs, to pay thirty Eggs in Lent for all Tythes of Eggs, *Mich.* 14 *Jac. B. R. Lee and Collins's Caſe*, 1 *Rolls Abr.* 648. So when a Prohibition was prayed to a Suit for the Feathers of old Geeſe ſheered, and alſo of the young, ſuggeſting a *Modus* of a young Gooſe with the Feathers, paid the firſt day of *Auguſt* yearly, in full of Tithes of all Geeſe and Feathers: And a Prohibition was granted, becauſe it is more than the Pariſhioner was otherwiſe bound to do to keep a Gooſe feathered till the firſt of *Auguſt*, *Mich.* 28 *Car.* 2. *Huit* v. *Hill*, 3 *Keble* 705.

But no Tithes are to be paid either of the Eggs, or Young of Pheaſants, whether they go at large, or be taken clipped and kept in a place incloſed, becauſe they be *Feræ Naturæ*, and ſtill remain ſo, though under reſtraint, *Mich.* 11 *Car. C. B. Winbrooke* v. *Evans*, 1 *Rolls Abr.* 636. And 'tis ſaid that if Pheaſants or Partridges be made tame, yet no Tithes ſhall be paid for them upon the reaſon that they are *Feræ Naturæ*. *Mich.* 37 *and* 38 *Eliz. Hugton* v. *Prince*, *Moor* 599. Yet it hath been reſolved, that Tithes ſhall be paid *de Jure* of

young Pidgeons, *Mich.* 14 *Jac. B. R. Whatley* v. *Hanbury, and Hill.* 15 *Jac. Gaſtrell's Caſe*, 1 *Rolls Abr.* 635. But in *Stoutſil's Caſe, Paſch.* 28 *Car.* 2. *C. B.* it is ſaid that Tithes ſhall not be paid for Pidgeons, unleſs it be by ſpecial Cuſtom, 2 *Mod. Rep.* 77. (and they ſeem to be *Feræ Naturæ*, though it is made Felony to take them out of a Dove-coat) eſpecially if the Pidgeons be ſpent in the Owner's Houſe no Tithe ſhall be paid, for that they are for the maintenance of them who labour in other things whereof the Parſon hath Tithes of them, *Mich.* 5 *Car. C. B. Flower* v. *Vaughan, Hetley* 147. *Mich.* 14. *Jac. B. R. Watley* v. *Hanbury*, 1 *Rolls Abr.* 644. *Trin.* 3 *Car. C. B. Hetley p.* 27. So if a man doth maintain a Family, and hath Pidgeon-holes about his Houſe, where are bred young Pidgeons, no Tithes ſhall be paid of thoſe of them that are ſpent in his Houſe,&c. *Hill.* 13 *Car. B. R. Vincent* v. *Tutt*, 1 *Rolls Abr.* 644. yet by Cuſtom Tithes ſhall be paid of Pidgeons ſpent in an Houſe, though not of Common Right, *Mich.* 14 *Jac. B. R. Whatley and Hanbury's Caſe*, 1 *Rolls Abr.* 644.

CHAP. LI.

Perſonal Tithes, what; by whom, and in what manner payable.

HAVING ſpoken of ſuch Tithes as are accounted predial and mixt, *Perſonal Tithes* are next to be conſidered. Of which (as hath been ſaid) are the Tenth part of the clear Profits which ariſe by the honeſt Labour and Induſtry of Man imploying himſelf in ſome Perſonal Work, Artifice or Negotiation, as by Buying, Selling, Merchandizing, Fiſhing, Fowling, Hunting, Following any Trade, as of Carpenter, Smith, Maſon, Butcher, *&c.* 2 *Inſt.* 621, 657, 649. *Mich.* 14 *Jac. B. R. by Doderidge*, 1 *Rolls Abr.* 656. And for the payment of theſe Tithes, it hath been Enacted, **That every perſon exerciſing merchandizes, bargaining and ſelling, clothing, handicraft, or other art or faculty, being ſuch kind of perſons, and in ſuch places as heretofore within theſe forty years have accuſtomably uſed to pay ſuch perſonal Tithes, or of right ought to pay (other than ſuch as been common Day-labourers) ſhall yearly at or before the Feaſt of Eaſter, pay for his perſonal Tithes, the tenth part of his clear gains, his charges and expences, according to his Eſtate, condition or degree, to be therein abated, allowed and deducted.**

Provided, That in all ſuch places where handicrafts men have uſed to pay their Tithes within theſe forty years, the ſame cuſtom of payment of Tithes to be obſerved and to continue; any thing in this Act to the contrary notwithſtanding. Stat. 2 and 3 Ed. 6. cap. 13.

By which Statute it appears, that only ſuch Perſons are to pay Perſonal Tithes which have accuſtomably paid them, and that they ſhall notwithſtanding pay other Tithes, and that from common Day-labourers no Perſonal Tithe is due; and ſo it hath been adjudged, that Servants of the Plough ſhall not pay any Tithes of their Wages, and a Prohibition granted accordingly, although that the Libel was only for a third part of their Wages, leaving the reſidue free; for it was ſaid, that by the ſame reaſon that the Beaſts of the Plough ſhall be free from Tithes, the Servants that attend the Plough ſhall be alſo free, *Paſch.* 14 *Jac. B. R. Ellis and Drake's Caſe*, 1 *Rolls Abr.* 646. So a Parſon libelled in the Spiritual Court againſt an Innkeeper, to have the Tithes of the Profits by him made of his Kitchen, Stable and Cellar, and laid particularly

larly that he made great gain in Selling of his Beer, having bought it for 500 l. and ſold the ſame for 1000 l. and that *negotiando & traficando*, he had gained 300 l. of which he ought to have Tithe: But upon motion, a Prohibition was granted, *Mich.* 11 *Jac. Dolley* v. *Davis*, 2 *Bulſtrode* 141.

The Tithe that may be had for Fiſh taken in the Sea is held to be a Perſonal Tithe; therefore if the Owners of a Ship do lend it to Mariners to go to an Iſland for Fiſh, for a certain quantity of Fiſh to be paid to him upon their return, no Tithes ſhall be paid by the Mariners unto the Parſon out of the Fiſh that the Owner ſhall have for the Hire of his Ship; for that it is a Perſonal Tithe, therefore ought to be paid but of the clear gain, *Mich.* 14 *Jac. B.R. by Dodderidge in Goſlin and Harding's Caſe*, 1 *Rolls Abr.* 656. *and Hill.* 14 *Car. B.R. Juſtice Jones* ſaid upon an Appeal out of *Ireland* to the Delegates in the *Lord Deſmond's Caſe*, it was agreed that for ſuch Fiſh ſo taken, only Perſonal Tithes are due, 1 *Rolls Abr.* 636. *ſee* 2 *Inſt.* 621. And when upon a Suit in the Spiritual Court for the Tithe of Fiſh taken in the Sea, a Prohibition was prayed; *Firſt*, Becauſe Fiſh in the Sea or great Rivers, are *Feræ Naturæ*: *Secondly*, Becauſe the Sea is not within any Pariſh, ſo that as no Parſon can ſay that that part thereof where the Fiſh are taken is within his Pariſh, the Prohibition was denied: For as *Jones* affirmed, Tithes of Fiſh are uſually paid in *Ireland*; and it was ſaid, that in *Cornwall* they pay Tithes for Fiſhing in the Sea to the Parſon of the Pariſh where they are landed; and that it is a Cuſtom in *Yarmouth* that Tithes ſhall be paid for Herrings, *Trin.* 8 *Car. B. R.* 1 *Croke* 264. But no Tithes ſhall be paid in kind of Fiſh taken in the High Sea out of any Pariſh, without a Cuſtom for it, *Hill.* 14 *Car. B. R. Long* v. *Dircell*, *per Curiam*, 1 *Rolls Abr.* 636. *Holland* v. *Heale*, *Noy* 108.

Alſo the Tithe of Fiſh taken in a common River is but a Perſonal Tithe, therefore not the whole Tenth is due *de Jure* without a Cuſtom; but the Expences in taking them are to be deducted, and this holds, although that they be taken by him who hath a ſeveral Piſcary, and the place where they are taken be within the Pariſh of the Parſon that claims them, the reaſon given is, for that they are *Feræ Naturæ*, *Paſch.* 15 *Car. B. R. Gould and Arthur's Caſe*, *and Mich.* 15 *Car. B. R. Wiſlake and Arthur*, *&c.* 1 *Rolls Abr.* 636. *Hill.* 9 *Car. B.R. Anonymus*, 1 *Croke* 339.

And as to the Tithe of Fiſh it hath been Enacted, **That this Act, or any thing therein contained,** (viz. with reſpect to Perſonal Tithes) **ſhall not extend to any pariſh which ſtands upon, and towards the Sea-coaſts, the Commodities and occupying whereof conſiſteth chiefly in Fiſhing, and have by reaſon thereof uſed to ſatisfie their Tithes by Fiſh; but that all and every ſuch pariſh and pariſhes, ſhall hereafter pay their Tithes according to the laudable cuſtoms, as they have heretofore of ancient time within theſe fourty years uſed and accuſtomed, and ſhall pay their Offerings as is aforeſaid.** Stat. 2 & 3 Ed. 6. cap. 13. And accordingly when one Libelled in the Spiritual Court for the Tithes of Pilchards taken in the Sea, a Prohibition was granted upon the Surmiſe of a Cuſtom there, that the Owner of the Fiſher-boat hath one Moiety of the Fiſhes, and the Fiſher-men the other Moiety, and that the Owner hath uſed to pay the Tenth of his Moiety for all; and this Surmiſe was held to be good and ſufficient, *Hill.* 1 *Jac. C. B. Holland* v. *Heale*, *Noy* 108. And ſo when a Surmiſe was, that all the Fiſh of a Ship ſhould be divided into ten Doles, after the Owners part is ſeparated from them, for the uſe of the Ship, and then the tenth Dole is to be divided, and one Moiety is to be to the Parſon, and the other Moiety to the Town, *viz.* of *Yarmouth*, this was admitted to be good, *Mich.* 14 *Jac. B. R. Goſlin* v. *Harden*, 1 *Rolls Rep.* 419.

The Tithe alſo at leaſt of ſome Mills is ſaid to be perſonal, as of Fulling Mills, Paper Mills, *&c.* 2 *Inſt.* 621. But *Coke* Chief Juſtice ſaid, that no perſonal Tithe by the Statute, *viz. Ed.* 6. is to be paid for Mills, but where by Special uſage the ſame hath been paid, to which the Court agreed, *Trin.* 14 *Jac. B. R. Jakes* v. *I. S.* 3 *Bulſtrode* 212. *and ſame Caſe*, 1 *Rolls Rep.* 405. And when a Prohibition was prayed to Stop a Suit in the Eccleſiaſtical Court for Tithes of a Fulling Mill, wherein it was Suggeſted in the Spiritual Court, that the Defendant did full with his Mill Weekly, Forty Cloths, and did gain by every Cloth two Shillings, wherefore he demanded the Tithes, and upon this Surmiſe only, that by the Law of the Land he ought not to demand Tithes of ſuch Mills, a Prohibition was granted, for that Tithes are not payable of ſuch things whereof comes the Gain only by the Labour of Men without a Cuſtom, *Hill.* 16 *Jac. B. R. Danderidge* v. *Johnſon*, 2 *Croke* 523. But reſolved it was afterwards, that Tithes by the Law are due of ſuch Mills, and a Prohibition denyed, *Mich.* 11 *Car. B. R. Johnſon* v. *Danridge*, 1 *Rolls Abr.* 641. But of a Corn Mill, whether driven by Wind, Water, Horſe, or Hand only, as Iron Mills, the Tithes are ſaid not to be perſonal, but predial, or mixt; And therefore according to the Cuſtom of the Realm, the Miller ought to pay the tenth Tole diſh for Tithes, 1 *Rolls Abr.* 656. *See* 2 *Inſt.* 621. 652. *Contra.* But this is not to be underſtood of old Corn Mills, but of Mills more lately erected; for thus it hath been Enacted.

Alſo if any do erect in his ground a Mill of new, and after the Parſon of the place demandeth Tithe for the ſame, the King's Prohibition doth iſſue in this form: Quia de tali Molendino hactenus Decimæ non fuerunt ſolutæ, prohibemus *&c.* Et ſententiam Excommunicationis, ſi quam hac occaſione promulgaveritis, revocetis omnino. The Anſwer. **In ſuch caſe the King's Prohibition was never granted by the King's aſſent, nor never ſhall, which hath decreed that it ſhall not hereafter lie in ſuch caſes.** Stat. 9 Ed. 2. c. 5. By which it appears, that all Corn Mills not Erected before the time of *Ed.* 2. are Titheable in themſelves, but becauſe that many ſince Erected may be to us Ancient, and their firſt Erection unknown, the Rule I conceive muſt be, that all Mills whoſe firſt building was before the Memory of any man living, and is not otherwiſe known, not having been ſubject to this day to the payment of Tithes, ſhall be intended to be Erected before the Statute, and ſo to be Tith-free. But as to Mills for which Tithes have been paid, and new Mills, Tithes muſt be paid as is aforeſaid, by *Coke. Trin.* 14 *Jac. B. R. Jake's Caſe*, 1 *Rolls Rep.* 405. Therefore when Prohibitions are moved for to ſtay a Suit, for Tithes in the Eccleſiaſtical Court for Ancient Mills it muſt not be only Suggeſted that the Mill is an Ancient Mill, but alſo that it hath never paid any Tithes, and the Courts of Common Law generally do require an Affidavit to be made of the Truth of ſuch Suggeſtion, *viz.* that the Mill is Ancient and hath not paid any Tithes, and if a new Mill be Erected upon Lands diſcharged of Tithes by the Statute of Monaſteries, 31 *H.* 8. 13. Tithes ſhall be paid thereof, by the whole Court, and a Prohibition denyed, for the Rule is *De Molendino de novo Erecto non jacet Prohibitio. Trin.* 15 *Jac. B.* R. *Anonymus* 2 *Croke* 429.

So if for two Meſſuages and two Ancient Water Mills to grind Corn, the Owner hath uſed time out of Memory to pay to the Parſon Twenty Shillings yearly, in Lieu of all Tithes iſſuing out of the ſaid Meſſuages and Mills, and after the Owner of the Meſſuages and Mills, doth erect two new Corn Mills within the ſaid Meſſuages, this *Modus* ſhall not diſcharge theſe new

Mills.

Mills from the payment of Tithes, for that the Tithe of a Mill is not meerly Predial, but mixed with the Perſonalty, and is more of the Perſonalty, then of the Predialty, *per Cur. Mich.* 13 *Car. B.R. Goodwin and Smith's Caſe*, 1 *Rolls. Abr.* 652. yet it is ſaid to be held by the Court, that if a Man doth preſcribe to pay to the Parſon a certain thing, as a *Modus Decimandi*, for all the Demeans of his Mannor, and afterwards he doth Erect a Wind-Mill, upon parcel of the ſaid Demeans, he ſhall not pay any Tithes for this Mill, but the *Modus* given for the Demeans ſhall go in diſcharge of it alſo, being builded upon the Land diſcharged, *Trin.* 39 *Eliz. B. R. Ruſſel and Moor.* 1 *Rolls Abr.* 651.

So if a man Seized of Eight Acres of Paſture and Meadow, for the Tithes of which, he hath uſed to pay time out of memory Five Shillings and Six Pence, and afterwards the Owner of it doth Erect upon it one Corn Mill, he ſhall pay no Tithes for the Corn Mill, for that the Land was diſcharged by the *Modus Decimandi*, 1 *Rolls Abr.* 652. 2 *Inſt.* 490.

But theſe Caſes though they differ in Circumſtance, yet the reaſon of Judging ſeems to be the ſame as to them all; if otherwiſe, I think the Caſe in *Croke* and alſo *Godwin* and *Smith's* Caſe to be more agreeable to reaſon; they are alſo the latter, for every *Modus* is ſuppoſed to ariſe from an Original agreement upon giving a recompence for the Tithes, which agreement cannot be preſumed to be made for other than the Fruits of the Land, there being no other thing than in being; and not for the Tithe of that which is of a different nature, therefore if a man hath a Meadow on which he hath alſo a Mill, and agrees with the Parſon for the Tithes, of the Profits ariſing from the Land only, it will be hard to ſay, that this agreement ſhall be extended to Free the Mill alſo, though it was then in being, becauſe the profit of the Mill, is another thing different from the profit of the Land (And *Coke* ſeems to be of Opinion that the Tithe of a Corn Mill is but a Perſonal Tithe, 2 *Inſt.* 621. if ſo, the Tithes of a Mill (if the Owner imploy'd it himſelf,) is paid with reſpect to his perſon, conſidered with his imployment, and not with reſpect to the Land; and none ſure will affirm, that a man who by his imployment, and Cuſtom of the place is to pay a Perſonal Tithe, purchaſing Land Tith-free, or for which a *Modus* it paid, is therefore free from paying a perſonal Tithe, no not though he erects his habitation upon ſuch Land, why then if he erects the Engine of his Art there, for ſuch are ſaid ſo to be however, a Corn Mill may be diſcharged of paying the Tenth of the Toll, by paying a *Modus* for it, and if the Owner in ſuch Caſe be Sued for the tenth, a Prohibition lies, *Trin.* 14 *Jac. B. R. Jake's Caſe*, 1 *Rolls Rep.* 405. But if the Surmiſe be of a Cuſtom to pay a certain rate for all Mills Erected and to be Erected, the Cuſtom ſhall not go to any new Mill, and therefore in ſuch Caſe by the Rule of the Court, a Conſultation was granted, as to a new Mill, and for the Ancient Mill the *Modus* was allowed to be good, *Trin.* 14. *Jac. B. R. Jakes. Bulſtrode*, 3 *pt.* 212. So if there be a Cuſtom in two Hundreds, (though in ſeveral Counties,) that if any common Baker of Bread, inhabiting in either of the Hundreds, doth Erect any Water-Mill, Wind-Mill, or Hand-Mill, within either of thoſe two Hundreds, to grind his Corn, to be imployed for making of Bread for himſelf in his Trade of a common Baker, for the maintenance of his Family, and to ſell to his Cuſtomers inhabiting there or near to the ſaid Hundreds for their Suſtentation, by which the Parſons in the ſaid Hundreds have the greater Tithes, *viz.* of them who have Lands or Tenements, and of others, as of Manual Tradeſmen, by way of Offerings, and ſuch like and in reſpect thereof no Tithes have been paid in time whereof, *&c.* for grinding of this Grain ſo imployed; this was held to be a good

Cuſtom

Cuſtom and a ſufficient diſcharge, and a Prohibition was granted, though the Baker did inhabit in one Hundred, and erected his Mill in another, for that two Hundreds may preſcribe in *non Decimando*, *Paſch.* 15 *Car. B. R. Kidden and Edwards's Caſe*, 1 *Rolls Abr.* 654. But *Quære*, Of the Conſideration of this Cuſtom, for that the Matters ſuggeſted ſeem to be no Conſideration to the Parſon for the Tithes of the Toll of the Mills.

CHAP. LII.

Mortuaries, Offerings, Oblations and Obventions.

BESIDES Lands, Glebe and Tithes, there are other ſmall Profits due and payable to the Incumbent of a Parſonage or Vicaridge; as Mortuaries and Offerings, called alſo *Oblations* and *Obventions*. The Law as to Mortuaries is declared and ſetled by Act of Parliament in theſe words: **Forasmuch as queſtion, ambiguity and doubt is chanced and riſen upon the order, manner and form of demanding, receiving and claiming of Mortuaries, otherwiſe called Corſe preſents, as well for the greatneſs and value of the ſame, which as hath lately been taken, is thought over exceſſive to the poor people and other perſons of this Realm, as alſo for that ſuch Mortuaries or Corſe-preſents have been demanded and levied for ſuch as at the time of their death have had no property in any goods or chattels, and many times for travelling and way-faring men, in the places where they have fortuned to die To the intent that all doubt, contention and incertainty herein may be removed, and as well the generality of the Kings people therein remedied, as alſo of the Parſons, Vicars, Pariſh Prieſts, and other having intereſt in ſuch Mortuaries and Corſe-preſents indifferently provided for.**

Be it therefore enacted, ordained and eſtabliſhed by the King our Sovereign Lord, and the Lords Spiritual and Temporal, and the Commons of this Parliament aſſembled, and by authority of the ſame, that from the firſt day of April, **in the year of our Lord God** M. D. XXX. **no Parſon, Vicar, Curate nor Pariſh-Prieſt, ne any other ſpiritual perſon, nor their Farmors, Bailiffs nor Leſſees, ſhall take, receive or demand of any perſon or perſons within this Realm, for any perſon or perſons dying within the ſame, any manner Mortuary or Corſe-preſent, ne any ſum or ſums of mony, ne any other thing for the ſame, more than is hereafter mentioned: Ne alſo ſhall convent or call any perſon or perſons before any Judge ſpiritual for the Recovery of any ſuch Mortuaries or Corſe-preſents, or any other thing for the ſame, more than is hereafter mentioned, upon pain to forfeit for every time ſo demanding, receiving, taking, or conventing, or calling any ſuch perſon or perſons before any ſpiritual Judge, ſo much in value as they ſhall take above the ſum limited by this Act: And over that** xl s. **to the party grieved contrary to this Act: for the which forfeiture the party ſo grieved contrary to this Act ſhall have an action of debt, by writ, bill, plaint or information in any of the Kings Courts, wherein no wager of Law, eſſoin, nor protection ſhall be allowed.**

Firſt, It is ordained, eſtabliſhed and enacted, That no manner of Mortuary ſhall be taken or demanded of any perſon whatſoever he be, which at the time of his death hath in moveable goods under the value of x **marks. Alſo that no Mortuary ſhall be given or demanded from henceforth of any manner perſon, but only in ſuch place where heretofore Mortuaries have been uſed to be paid and given, and in thoſe places none otherwiſe but after the rate and form hereafter**

after mentioned. Ne that any person pay Mortuaries in more places than one, that is to say, in the places of their most dwelling and habitation, and there but one Mortuary. Nor no Parson, Vicar, Curate, Parish Priest, or other, shall for any person dying or dead, and being at the time of his death, of the value in moveable goods of x marks or more, clearly above his debts paid, and under the sum of xxx li. take for a Mortuary above iij s. iv d. in the whole: and for any person dying or dead, being at the time of his death of the value of xxx li. or above clearly, above his debts paid, in moveable goods, and under the value of xl li. there shall no more be taken or demanded for a Mortuary than vj s. viij d. in the whole: and for any person dying or dead, having at the time of his death of the value in moveable goods of xl li. or above, to any sum, whatsoever it be, clearly above his debts paid, there shall be no more taken, paid or demanded for a Mortuary than x s. in the whole.

Provided alway, That for no woman being covert baron, nor child, ne for any person not keeping house, any manner Mortuary be paid, ne that any Parson, Vicar, Curate, Parish Priest or other, ask, demand or take for any such woman, child, or for any person not keeping house, dying or dead, any manner thing or mony, by way of Mortuary, ne also for any way-faring man, or other that dwelleth not, ne maketh residence in the place where they shall happen to die, but that the Mortuary of such way-faring persons be answerable in places where Mortuaries be accustomed to be paid, and in manner and form, and after the rate before mentioned, and none otherwise, in the place or places where such way-faring persons at the time of their death had their most habitation, house and dwelling places, and no where else.

Provided alway, That it shall be lawful to all manner Parsons, Vicars, Curates, Parish Priests, and other spiritual persons, to take and receive any manner sum of mony, or other thing, which by any person dying shall fortune to be disposed, given or bequeathed unto them, or any of them, or to the high Altar of the Church, This Act or any thing mentioned notwithstanding.

And be it also enacted by the authority aforesaid, That no Mortuaries nor Corse-presents, ne any sum or sums of mony, or other thing, for any Mortuary or Corse-present, shall be demanded, taken, received or had in the parts of Wales, nor in the Marches of the same, nor in the Towns of Calice or Berwick, nor in the Marches of the same, but only in such parts and places of Wales, Marches and Towns aforesaid, where Mortuaries have been accustomed to be taken and paid. And in those parts and places no Mortuaries nor Corse-presents, ne any other thing for Mortuary or Corse-present from henceforth shall be demanded, taken, received or had, but only after the form, order and manner above specified in this present Act, and none otherwise, ne of any other person or persons than is limited by this present Act, upon the pain contained in this present Act.

Provided also, That it shall be lawful to the Bishops of Bangor, Landaff, St. Davids and St. Asaph, and likewise to the Archdeacon of Chester, to take such Mortuaries of the Priests within their Dioceses and Jurisdictions, as heretofore have been accustomed. Provided also, That in such places where Mortuaries have been accustomed to be taken of less value than is aforesaid, that no person shall be compelled to pay in any such place any other Mortuary, or more for any Mortuary than hath been accustomed, ne that any Mortuary in such place shall be demanded, taken, received or had of any person or persons exempt by this Act, nor in any wise contrary to this Act, upon the pain afore limited. Stat. 21 H. 8. c. 6.

Foras-

Forasmuch as divers and many the King our Sovereign Lords Subjects, inhabited within the Archdeaconry of Richmond **in the County of** York, **be, and of long time have been sore and grievously eracted and impoverished by the Parsons, Vicars and others, such as have Benefices and Spiritual Promotions within the same, as by taking of every person, when he dyeth, in the name of a Pension or of a Portion, sometime the ninth part of all his Goods and Chattels, and sometime the third part, to the open and manifest impoverishing of most of all the King's poor Subjects inhabited and deceasing within the same.**

Wherefore be it ordained, enacted and established by the King our Sovereign Lord, the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that from the Feast of St. Mark **the Evangelist next coming, no manner of Spiritual person, or others now having, or that from the said Feast shall have any manner of Benefice, or other Spiritual Promotion within the said Archdeaconry, shall in no wise ask, levy, demand or take, after the decease of any person or persons, any such Portions or Pensions, nor any other demand or duty in the name or lieu of the same, upon pain to incur such dangers, forfeitures and penalties, as be contained in the Statute of Provisors, made the five and twentieth year of the Reign of our most noble Progenitor King** Edward **the Third: But that all and every the King's Subjects of the said Archdeaconry, and their Executors and Administrators, from henceforth shall be ordered, intreated and used for their Goods and Chattels after their decease, in like manner, form, order and condition, as is contained in the Statute made in the one and twentieth year of your most noble and victorious Reign, for probate of Testaments, and none otherwise, any such Custom, Bull, Composition, Prescription or Ordinance heretofore had, obtained or used to the contrary, within the aforesaid Archdeaconry, in any wise notwithstanding.** Stat. 26 H. 8. cap. 15.

As to Offerings, Oblations or Obventions, which are all the same, it hath also been enacted, **Provided always, and be it enacted by the authority aforesaid, That all and every person and persons which by the Laws and Customs of this Realm ought to make or pay their Offerings, shall yearly from henceforth well and truly content and pay his or their Offerings, to the Parson, Vicar, Proprietor, or their deputies or fermors of the Parish or Parishes where it shall fortune or happen him or them to dwell or abide: and that at such four Offering-days, as at any time heretofore within the space of four years last past, hath been used and accustomed for the payment of the same, and in default thereof to pay for the said Offerings at Easter then next following.** Stat 2 & 3 Ed. 6. cap. 13.

Under this Duty of Offerings are comprehended, not only those small accustomary Sums commonly paid by every person when he receives the Sacrament of the Lord's Supper at *Easter*, which in many places is by Custom Two Pence from every Communicant, and in *London* a Groat an House, but also the accustomary Payments for Marriages, Christnings, Churchings and Burials; These properly belong to the Parson or Vicar of the Church where they are made, and are recoverable by Law in such places and cases only, where there is a Custom for the payment of certain Sums upon the performance of these several Duties.

The Profits of some Churches also do consist partly in Pensions or Annuities, Portions of Tithes, Corrodies, Indempnities, Sinodies and Proxies due and payable from other Churches or Persons in respect thereof; Remedy to recover which is given by the Statute following.

Where

Where the Archbishops, Bishops, Archdeacons, and the other Ecclesiastical persons, of both the Provinces of Canterbury and York, within this Realm of England, have heretofore in the right of their Churches, had and received out of the late Monasteries, Abbathies, Priories, Nunneries, Colledges, Hospitals, Houses of Friers, and other Religious and Ecclesiastical Houses and places now dissolved, and out of the Manors, Lands, Tenements, and Hereditaments belonging to the same, divers pensions, portions, corodies, indemnities, synodies, Priories, and other profits: And where also in the Parliament begun and holden at Westminster, the eight and twentieth day of April, in the one and thirtieth year of the Reign of our Sovereign Lord Henry the Eighth, by the grace of GOD, King of England, France and Ireland, Defender of the Faith, and of the Church of England, and also of Ireland, in Earth the Supreme Head, It was ordained and enacted by the Authority of the same Parliament, That as well the said late Monasteries, Abbathies, Priories, Nunneries, Colledges, Hospitals, Houses of Friers, and other Religious and Ecclesiastical Houses and places, with the Manors, Lands, Tenements, Hereditamens, and other profits belonging unto the same late Monasteries, Abbathies, Priories, and other Religious and Ecclesiastical Houses and places as then were, or then hereafter should come unto the King's Highnels hands, should be vested, deemed and adjudged in the actual and real possession and seison of the King's Highnels, his Heirs and Successors:

Saving to all and every person and persons, and bodies politick, and their heirs and successors, and the heirs and successors of all and every of them, other then the late Abbots, Priors, Abbesses, Prioresses, and other Ecclesiastical Governors and Governesses of the said late Monasteries, Abbathies, Priories, Nunneries, Colledges, Hospitals, Houses of Friers, and other Religious and Ecclesiastical houses and places, and their Successors, and the Successors of every of them, and such as pretend to be Founders, Patrons or Donors of such Monasteries, Abbathies, Priories, Nunneries, Colleges, Hospitals, Houses of Friers, and other Ecclesiastical houses and places, or of any manors, messuages, lands, tenements, or other hereditaments belonging to the same, or to any of them, their Heirs and Successors, and the Heirs and Successors of every such Founder, Patron or Donor, and the then Abbots, Priors, Abbesses, Prioresses, and other Ecclesiastical Governors and Governesses of such Monasteries, Abbathies, Priories, Nunneries, Colleges, Hospitals, houses of Friers, and other Religious and Ecclesiastical houses and places, which then hereafter should happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or come to the Kings Highnels, and such as pretend to be Founders, Patrons or Donors of such Monasteries, Abbathies, Priories, Nunneries, Colleges, Hospitals, Houses of Friers, and other Ecclesiastical houses and places, or of any manors, messuages, lands, tenements or other hereditaments to the same belonging, or to any of them, their heirs and successors, and the heirs and successors of every of them, all such right, title, claim, interest, possession, rents, charges, annuities, leases, ferms, offices, fees, liveries, livings, portions, pensions, corrodies, commons, synodies, priories, and other profits which they or any of them have, claim, ought, may or might have had in or to the Premises, or to any part or parcel thereof, in such like manner, form and condition, to all intents, respects, constructions and purposes, as if the same Act had never been had ne made, (rents services, rents seck, and all other services and suits only except) as by the same Act among divers other things therein contained more plainly is shewed, and may appear.

And yet notwithstanding the said general saving contained in the said Act, the said Archbishops, Bishops, Archdeacons, and other Ecclesiastical persons of both the said Provinces of Canterbury and York, be and sithin the making of the said Act have been disturbed and denied of the having, receiving and gathering of the said pensions, portions, corrodies, indemnities, sinodies and proxies, with other profits belonging unto them, by divers of the fermors and occupiers of great part and parcel of the said manors, lands, tenements and hereditaments of the said late Monasteries, and other Ecclesiastical houses and places, or being parcel of the possessions of them, and have no direct mean to obtain, recover, or come to the same, not only to their great hurt and damage, bnt also like to grow, and be to the great loss and dicherison of the Kings Majesty, concerning his First fruits and Tenths:

For reformation whereof, be it ordained, established and enacted by the Kings Highnes, with the assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, That if any person or persons being fermor or occupier of any manors, lands, tenements, parsonages, benefices, or other hereditaments of any of the said late Monasteries, or Ecclesiastical houses or places, or belonging to them, or any of them, by the Kings Highnes gift, grant, sale, exchange or otherwise, out of which premises any such portions, pensions, corodies, indemnities, sinodies, proxies, or any other profits, have been heretofore lawfully going out, answered or paid to any of the Archbishops, Bishops, Archdeacons and other Ecclesiastical persons abovesaid, do at any time after the first day of April next coming, wilfully deny the payment thereof, at the days of payment heretofore accustomed, of any of the said Pensions, portions, corrodies, indemnities, sinodies, proxies, or any other profits, whereof the said Archbishops, Bishops, Archdeacons, or other Ecclesiastical persons were in possession, at or within ten years next before the time of the dissolution of any such Monasteries, or other Ecclesiastical Houses or places, that then it shall be Lawful for the same Archbishops, Bishops, Archdeacons, or other Ecclesiastical persons aforesaid, being so denied to be satisfied and paid thereof, and having right to the same thing in demand, to make such process as well against every such person and persons as shall so deny payment of the same pension, portions, corrodies, proxies, indemnities, sinodies, or any other profits which of right ought to be paid, as is aforesaid, as against the Church or Churches charged with the same, as heretofore they have lawfully done, and as by, and according to the Laws and Statutes of this Realm they may now Lawfully do, for the true payment and recovery thereof: And if the party defendant be lawfully convict in any such suit, cause or matter, according to the Ecclesiastical Laws: then the party plaintiff shall have and recover against the party defendant the thing in demand, and the value thereof in damages, with his Costs for his Suit.

And be it further ordained and enacted by the Authority aforesaid, That if it fortune the cause or matter of variance between any of the said parties be determinable at the common Law, that then the party grieved, to Sue for his recovery and remedy therein at the common Law: And if the party defendant fortune to be, by the course of the common Law, lawfully condemned to the party plaintiff, then the said party plaintiff shall likewise have and recover against the party defendant the thing in demand, and the value thereof in damages, with his Costs for his Suit.

Provided alway, and be it enacted by the authority aforesaid, That all and singular such of the said Archbishops, Bishops, Archdeacons, and other Ecclesiastical Persons, which have right or title to claim, demand, or enjoy any of the

the ſaid penſions, portions, corrodies, indemnities, ſinodies or proxies againſt any perſon or perſons, to whom the King hath made, or hereafter ſhall make in writing under Seal, any ſale, gift, grant, or leaſe, for term of life or lives, or years, of any of the ſaid manors, lands, tenements, parſonages, benefices, and other hereditaments, charged or chargeable to or with any of the ſaid penſions, portions, corrodies, indemnities, ſinodies or proxies, and alſo hath covenanted, granted, promiſed or agreed, or hereafter ſhall covenant, grant, promiſe or agree, by the ſaid writing to acquit, diſcharge, or ſave harmleſs the ſame perſon or perſons, of all penſions, portions, corrodies, indemnities, ſinodies and proxies, going out of the premiſes or any parcel thereof, as be or ſhall be mentioned in the ſame writings or any of them, ſhall Sue for their remedy and recovery thereof in the Court of the Augmentations of the Revenues of the King's Crown, and not elſewhere: And that the party defendant having any ſuch diſcharge, being convented, called or ſued to any other Court or place, or before any other Judge, for any the cauſes aboveſaid ſhall be diſcharged and diſmiſſed out of the ſame Court or place without any thing paying for the ſame, by the only ſhewing forth any of the ſaid writings, Sealed under any of the King's Seals, proving or declaring the King to have covenanted, promiſed or agreed to acquit, diſcharge or ſave harmleſs the ſaid party defendant thereof, as is aforeſaid; Any thing contained in this Act to the contrary notwithſtanding. Stat. 34 and 35 H. 8. c. 19.

And in Caſes when any of theſe Duties were due from any Religious Houſe diſſolved, and the King did of new Incorporate a Society, as Dean and Chapter, and give to them the whole Scite of ſuch Religious Houſe with all Mannors, Lands, Tenements and Hereditaments parcel thereof; ſuch Duties are due and payable from the new Corporation, and if a Corporation be ſurrendred ot diſſolved by the Death of the Members, and the King doth incorporate them by a new name, an Annuity before payable by the ſaid Corporation is not determined, *Trin.* 32 *Eliz. The Biſhop of Rocheſter's Caſe*, 2 *Anderſon* 106. Eſpecially theſe Duties remain by vertue of the aforeſaid Statute, becauſe they were in *Eſſe* at the time of the making thereof, and not Extinguiſhed by the ſurrender of the Religious Houſes, for their Corporations were not diſſolved by their Surrender, until all the Religious perſons had relinquiſhed their Houſes and Habits, *Trin.* 2 *Jac. in the Exchequer. The King and Dr. Forth's Caſe, Davis p.* 1.

CHAP. LIII.

Tithes, Mortuaries, Oblations and other Church duties in what Courts to be Sued for.

I Am come now to ſpeak to the Second Queſtion with reſpect to the Profits belonging to an Eccleſiaſtical Benefice, *viz.* what remedy the Law hath given the Owner for the recovery of them, or Satisfaction for them, being detained.

Theſe Profits do conſiſt of Tithes of all ſorts, or other Recompence for them, Penſions, Mortuaries, Offerings (called alſo Oblations and Obventions) under which are comprehended all cuſtomary payments for Marriages, Chriſtenings, Churchings and Buryals, and have been and yet are recoverable in the Eccleſiaſtical Court, as is notorious. Theſe Courts anciently were thought ſufficient to compel by Church Cenſures, the Laity to render unto Churchmen their ſeveral dues, but tho' ſuch reverence then was given to the Cenſures of the Church, yet ways were found out to vex the Incumbents by reaſon of their taking their Tithes, *&c. viz.* By *Scire Facias*, and Actions for Goods taken away, *&c.* whereupon it was firſt Enacted, **Whereas Writs of** Scire facias **have been granted to warn Prelates, religious and other Clerkes to anſwer diſmes in our Chancery, and to ſhew if they have any thing, or can any thing ſay, wherefore ſuch diſmes ought not to be reſtored to the ſaid demandants, and to anſwer as well to us as to the party to ſuch diſmes: That ſuch Writs from henceforth be not granted, and that the proceſs hanging upon ſuch Writs be annulled and repealed and that the parties be diſmiſſed from the Secular Judges of ſuch manner of pleas: Saving to us our right ſuch as we and our anceſtors have had, and were wont to have of reaſon. In witneſs whereof, at the requeſt of the ſaid Prelates, to theſe preſent Letters we have ſet our Seal. Dated at** London, **the** 8th **day of** July, **the year of our Reign of** England **the** 18th, **and of** France **the fifth.** Stat. 18 E. 3. c. 7.

(And afterwards it was Enacted thus) **It is accorded, that at what time that any perſon of the holy Church be drawn in plea in the ſecular Court for for his own Tithes taken by the name of goods taken away, and he which is ſo drawn in plea, maketh an exception, or alledgeth that the ſubſtance and ſuit of the buſineſs is only upon Tithes due of right and of poſſeſſion to his Church, or to another his Benefice: that in ſuch caſe the general averment ſhall not be taken without ſhewing ſpecially how the ſame was his Laycattle.** 1 Rich. 2. c. 14.

After this no Statute was made about the profits of the Church, Till Stat. 21 *H.* 8 *c.* 6. was made about Mortuaries which is ſet down *c.* 51. But this Law was made to the Prejudice rather than to the Advantage of the Church, and at a time when divers other Laws were made for the leſſening the Power and Intereſt of the Clergy, to the great abatement of that reverence which the People had to the Clergy and Cenſures of the Church, ſo that it was thought neceſſary to Enact as followeth.

Foraſmuch as divers numbers of evil diſpoſed perſons inhabited in ſundry Counties, Cities, Towns and Places of this Realm, having no reſpect to their duties to Almighty God, but againſt right and good conſcience, having attempted to ſubtract and withhold in ſome places the whole, and in ſome pla-

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ces great parts of their Tithes and Oblations, as well personal as predial, due unto God and holy Church, and pursuing such their detestable enormities and injuries, have attempted in late time past to disobey, contemn and despise the process, laws and decrees of the Ecclesiastical Court of this Realm, in more temerous and large manner than before this time hath been seen: For reformation of which said injuries, and for unity and peace to be preserved amongst the Kings subjects of this Realm, our Sovereign Lord the King being supream head on earth under God, of the Church of England, willing the spiritual rights and duties of that Church to be preserved, continued and maintained, hath ordained and enacted by authority of this present Parliament, That every of his subjects of this Realm, England, Ireland, Wales and Caleis, and Marches of the same, according to the Ecclesiastical laws and ordinances of his Church of England, and after the laudable uses and customs of their Parish, or other place where he dwelleth, or occupieth, shall yield and pay his Tithes and Offerings, and other duties of holy Church, and that for such subtractions of any of the said Tithes, Offerings, or other duties, the Parson, Vicar, Curate, or other party in that behalf grieved, may by due process of the Kings Ecclesiastical laws of the Church of England, convent the person or persons offending, before his Ordinary, or other competent Judge of this Realm, having authority to hear and determine the right of Tithes, and also to compel the same person or persons offending, to do and yield their said duties in that behalf, and in case the Ordinary of the dioces, or his Commissary, or the Archdeacon or his Official, or any other competent Judge aforesaid, for any contempt, contumacy, disobedience, or other misdemeanor of the party defendant, make information and request to any of the Kings most honourable Council, or to the Justices of the Peace of the Shire where such offendor dwelleth, to assist and aid the same Ordinary, Commissary, Archdeacon, Official or Judge, to order or reform any such person in any cause before rehearsed: that then he of the Kings said honourable Council, or such two Justices of Peace, whereof the one to be of the Quorum, to whom such information or request shall be made, shall have full power and authority by virtue of this Act, to attach, or cause to be attached the person or persons against whom such information or request shall be made, and to commit the same person or persons to ward, there to remain without bail or mainprise, till that he or they shall have found sufficient surety, to be bound by recognizance, or otherwise before the Kings said Chancellor, or Justice of Peace, or any other like Chancellor, or Justice of Peace, to the use of our said Sovereign Lord the King, to give due obedience to the process, proceedings, decrees and sentences of the Ecclesiastical Court of this Realm wherein such suit or matter for the premisses shall depend or be. And that every of the Kings said Councellors, or two Justices of the Peace, whereof the one to be of the Quorum, as is aforesaid, shall have full power and authority by virtue of this Act, to take, receive and record Recognisances and Obligations in any of the causes above witten.

Provided alway, That this Act or any thing therein contained, shall not extend to any inhabitant of the City of London, for or concerning any manner of Tithe, Offering, or other Ecclesiastical duty, grown and due to be paid or yielden within the same City, because there is another order made for the payment of Tithes and other duties within the said City.

Provided also, That every person and persons, being party or parties to any such suit, shall and may make and have his and their lawful action, demand or prosecution, appeals, prohibitions and all other their lawful defences and remedies

medies in every ſuch ſuit, according to the ſaid Eccleſiaſtical Laws, and Laws and Statutes of this Realm, in as ample and liberal manner and form as they or any of them might have had, if this Act had never been made: Any thing in this Act above written notwithſtanding.

Provided always, and be it enacted by authority aforeſaid, That this Act for recovering of Tithes, ne any thing therein contained, ſhall take force and effect, but only until ſuch time as the Kings Highneſs, and ſuch other xxxij perſons, which his Highneſs ſhall name and appoint for the making and eſtabliſhing of ſuch Laws as his Highneſs ſhall affirm and ratifie to be called the Eccleſiaſtical Laws of the Church of England: and after the ſaid Laws ſo ratified and confirmed as is aforeſaid, that then the ſaid Tithes to be paid to every Eccleſiaſtical perſon, according to ſuch Laws, and none otherwiſe. Stat. 27 H. 8. cap. 20.

Note, That the aforeſaid Statute doth not only extend to Tithes, but alſo to Offerings, and all other Duties of the Church, and it is yet in force, notwithſtanding the laſt Clauſe therein, For that the King and Thirty two Perſons by him appointed, never made and eſtabliſhed any Laws, to be called The Kings Eccleſiaſtical Laws, and this Statute is confirmed by *Stat.* 2 & 3 *Ed.*6. *cap.*13.

After the aforeſaid Statute upon the Diſſolution of Abbies, &c. Tithes, &c. came to the King, and from him to divers Lay People, who by the courſe of the Eccleſiaſtical Laws could not ſue for them in the Eccleſiaſtical Courts; and having at that time no remedy for them in the Temporal Courts, the following Act was made for their relief:

Whereas divers and many perſons inhabiting in ſundry Countries and places of this Realm, and other the Kings dominions, not regarding their duties to Almighty God, and to the King our Sovereign Lord, but in few years paſt more contemptuouſly and commonly preſuming to offend and infringe the good and wholſom Laws of this Realm, and gracious commandments of our ſaid Sovereign Lord, than in times paſt hath been ſeen or known, have not letted to ſubtract and withdraw the lawful and accuſtomed Tithes of Corn, Hay, Paſturages, and other ſort of Tithes and Oblations commonly due to the Owners, Proprietaries and Poſſeſſors of the Parſonages, Vicarages, and other Eccleſiaſtical places of and within the ſaid Realm and Dominions, being the more encouraged thereto, for that divers of the Kings Subjects, being Lay perſons, having Parſonages, Vicarages and Tithes to them and their Heirs, or to them and to their Heirs of their bodies lawfully begotten, or for term of life or years, cannot by the order and courſe of the Eccleſiaſtical Laws of this Realm ſue in any Eccleſiaſtical Court for the wrongful withholding and detaining of the ſaid Tithes or other duties, nor cannot by the order of the Common Laws of this Realm have any due remedy againſt any perſon or perſons, their Heirs or Aſſigns, that wrongfully detaineth or withholdeth the ſame: by occaſion whereof much controverſie, ſuit, variance and diſcord is like to inſurge and enſue among the Kings ſubjects, to the great detriment, damage and decay of many of them, if convenient and ſpeedy remedy therefore be not had and provided.

Wherefore it is ordained and enacted by our ſaid Sovereign Lord the King, with the aſſent of the Lords ſpiritual and temporal, and the Commons in this preſent Parliament aſſembled, and by authority of the ſame, that all and ſingular perſons of this his ſaid Realm, or other his Dominions, of what eſtate, degree or condition ſoever he or they be, ſhall fully, truly and effectually divide, ſet out, yield, or pay all and ſingular Tithes and Offerings aforeſaid, according to the lawful Cuſtoms and Uſages of the Pariſhes and places where ſuch

Tithes

Tithes or Duties shall grow, arise, come or be due. And in case that shall happen any person or persons of his or their ungodly or perverse will and mind, to detain and withhold any of the said Tithes or Offerings, or any part or parcel thereof, then the person or persons being Ecclesiastical or Lay person, having cause to demand or have the said Tithes or Offerings, being thereby wronged or grieved, shall and may convent the person or persons so offending before the Ordinary, his Commissary, or other competent Minister or lawful Judge of the place where such wrong shall be done, according to the Ecclesiastical Laws: And in every such case or matter of suit, the same Ordinary, Commissary, or other competent Minister or lawful Judge, having the parties or their lawful Procurators before him or them, shall and may by virtue of this Act proceed to the examination, hearing and determination of every such cause or matter ordinarily or summarily, according to the course and process of the said Ecclesiastical Laws, and thereupon may give sentence accordingly.

And in case that any of the parties, for any cause or matter concerning that suit, do appeal from the Sentence, Order and definitive Judgment of the said Ordinary or other competent Judge, as is aforesaid, then the same Judge by virtue of this Act, forthwith upon such appellation made, shall adjudge to the other party the reasonable costs of his suit therein before expended, and shall compel the same party appellant to satisfie and pay the same costs so adjudged by compulsory process and censures of the said Laws Ecclesiastical, taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the appellant, if after, the principal cause of that suit of appeal shall be adjudged against the same party, to whom the said costs shall be yielden: And so every Ordinary or other competent Judge Ecclesiastical, by virtue of this Act, shall adjudge costs to the other party upon every appeal to be made in any suit or cause of subtraction or detension of any Tithes or Offerings, or in any other suit to be made for or concerning the duty of such Tithes or Offerings.

And further be it enacted by the authority aforesaid, That if any person or persons, after such sentence definitive given against them, obstinately and wilfully refuse for to pay their Tithes, or such sums of Money so adjudged, wherein they be condemned for the same, that then two Justices of the Peace for the same Shire, whereof one to be of the Quorum, shall have authority by this Act, upon information, certificate or complaint to them made by writing by the said Ecclesiastical Judge that gave the same sentence, to cause the same party so refusing, to be attached, and committed to the next Goal, and there to remain without bail or mainprise, till he or they shall have found sufficient sureties to be bound by recognisance or otherwise, before the same Justices, to the use of our Sovereign Lord the King, to perform the said definitive sentence and Judgment.

Provided always, and be it enacted by the authority aforesaid, That no person or persons shall be sued or otherwise compelled to yield, give or pay any manner of Tithes, for any Manors, Lands, Tenements or other Hereditaments, which by Laws or Statutes of this Realm are discharged or not chargeable with the payment of any such Tithes.

Provided also, and be it enacted by authority aforesaid, That this Act nor any thing therein contained shall in any wise bind the Inhabitants of the City of London and Suburbs of the same, for to pay their Tithes and Offerings within the same City and Suburbs otherwise than they ought or should have done before the making of this Act; any thing in this Act contained to the contrary notwithstanding.

And

And be it further enacted by the authority aforesaid, That in all cases, where any person or persons which now have or which hereafter shall have any estate of inheritance, freehold, term, right or interest, of, in or to, any Parsonage, Vicarage, Portion, Pension, Tithes, Oblations, or other Ecclesiastical or Spiritual profit, which now be, or which hereafter shall be made temporal, or admitted to be, abide and go to or in temporal hands and lay uses and profits by the Law or Statutes of this Realm, shall hereafter fortune to be disseised, deforced, wronged, or otherwise kept or put from their lawful inheritance, estate seison, possession, occupation, term, right or interest of, in or to the same, or of, in or to any parcel thereof, by any other person or persons claiming or pretending to have interest or title in or to the same: That then in all and every such case or cases, the person or persons so disseised, deforced, or wrongfully kept or put from his or their right or possession, as is afore rehearsed, their heirs, wives, and such other to whom such injury and wrong shall be done or committed, shall and may have their remedy in the King's temporal Courts, or other temporal Courts, as the case shall require, for the recovery, getting or obtaining of such inheritance, estate, freehold, seison, possession, term, right or interest; by Writs original of Præc' quod reddat, Ass. of novel desseisin, Mortdanc', Quod ei deforceat, Writs of Dower or other Writs original, as the case shall require, to be devised and granted in the Kings Court of Chancery, of every such Parsonage, Vicarage, Portion, Pension, or other profit called Ecclesiastical or Spiritual, so to be demanded according to the nature and cause of the suit thereof, in like manner and form as they should, ought or might have had of or for Lands, Tenements, or other Hereditaments in such manner to be demanded: And that Writs of Covenant and other Writs for Fines to be levied, and all other Assurances to be had, made or conveyed of any such Parsonage, Vicarage, Portion, Pension, or other profit called Ecclesiastical or Spiritual, as is aforesaid, shall be hereafter devised and granted in the said Chancery, according as hath been used for Fines to be levied and assurance to be had or made, or conveyed of Lands, Tenements or other Hereditaments: And that all Judgments, to be given upon any of the said Writs original so to be devised or granted of or for any the premises, or any of them, and all Fines to be levied and acknowledged in any of the Kings said Courts thereof, shall be of like force and effect in the Law, to all intents and purposes, as Judgments given and Fines levied of Lands, Tenements and Hereditaments in the same Courts upon Writs Original therefore duly pursued and prosecuted, albeit no such form of Writs original out of the said Court of Chancery have heretofore proceeded or been awarded.

Provided always, That this last Act shall not extend nor be expounded to give any remedy, cause of action or suit in the Courts temporal against any person or persons which shall refuse or deny to set out his or their tithes, or which shall detain, withhold or refuse to pay his tithes or offerings, or any parcel thereof: but that in all such cases the person or party being Ecclesiastical or Lay person, having cause to demand or have the said tithes or offerings, and thereby wronged or grieved, shall take and have their remedy for their said tithes or offerings in every such case in the spiritual Courts, according to the Ordinance in the first part of this Act mentioned, and not otherwise; any thing herein expressed to the contrary thereof notwithstanding. Stat. 32 H. 8. c. 7.

Note,

Note, that this Statute doth only extend to Tithes and Offerings; under which are comprehended, as is ſaid, all accuſtomary payments for Marriages, Chriſtnings, Churchings and Burials, but not to other Church Duties, as Mortuaries, Penſions, Corrodies, Proxies, *&c.* therefore Lay-men have no remedy for them in the Eccleſiaſtical Court by this Statute, nor are the Clergy Advantaged by it, by Appeals or Sentences given, as in other Caſes, *viz.* Suits for Tithes and Offerings.

Note alſo, (tho' by this Statute the Appellant ſhall pay coſts of Suit to the other Party) that it was ruled, that if Sentence be given in the Spiritual Court, and coſts taxed, and the Defendant brings an Appeal; yet if the Suit did not appertain Originally, or properly to them, a Prohibition ſhall be awarded, as well to the Coſts as to the Principal Suit; for that the Statute is to take place only, when the Cauſe belongs properly to the Spiritual Court, *Paſch. 7 Jac. Noy* 137. Accordingly the Caſe was, that *A.* Parſon of *B.* ſued for Tithes in the Eccleſiaſtical Court, and *C.* Rector of *D.* came in *pro intereſſe ſuo* there, and ſaid, that the Land for which Tithes are demanded were within his Pariſh, upon which they were at Iſſue; and this being found for him, Sentence was given for him. *A.* appeals, *&c.* and pending the Appeal, Coſts were aſſeſſed againſt him in the firſt Court according to this Statute, and Proceſs awarded againſt him. In this Caſe *A.* (becauſe the Iſſue was tryable only at Common Law) brought a Prohibition to the firſt Court from which he had appealed. But becauſe no Suit was there depending, for that he had removed it thence by Appeal, a Conſultation was awarded, and held, that they might well proceed for the Coſts, but if he had not removed his Suit by Appeal, a Prohibition had been maintainable for him as to the Coſts, as well as the Principal, tho' he was Party to the Libel, *Paſch. 32 Eliz. B. R. Tranſam's Caſe*, 3 *Croke* 178.

Tho in the recovery of Mortuaries, Penſions, Annuities, Proxies, *&c.* the Eccleſiaſtical Court is not Aided by this Statute, as hath been noted, yet theſe as other Church duties are recoverable in the ſaid Court, which appears as to Mortuaries, by Stat. 21 *H.* 8. *c.* 6. made for the ſetling and ending differences about Mortuaries, which ſee before in *Chap.* 52. but to the prejudice rather than the benefit of the Clergy.

Anciently, *viz.* before the Stat. 21 *H.* 8. *c.* 6. was made, if doubt did ariſe whether there was a Cuſtom in a place to have ſuch things for a Mortuary, this was meerly triable in the Spiritual Court by the Statute of *Articuli Cleri*, which ſaith, **That where a Suit is for a Mortuary, Prohibition ſhall not be granted** *Fitzh. Nat. Brev.* 51 *and* 53. 10 *H.* 4. 2. *and* 13 *Ri.* 2 *Jurisd.* 20. *Kelleway fol* 110. And when a Prohibition was granted, becauſe the Biſhop of *Cheſter* Sued in the Conſiſtory of *Cheſter* before the Commiſſary there, after the death of a Prieſt of the ſaid Dioceſs, Surmiſing, that by Cuſtom there, he ought to have for a Mortuary after the death of every Prieſt dying within the Archdeaconary of *Cheſter*, his beſt Horſe, or Mare, Bridle, Saddle, Spurrs, his beſt Gown or Cloak, his beſt Hat, his beſt upper Garment under his Gown, his Tippet, his Signet or Ring, as due to him the ſaid Biſhop, and recites the Statute 21 *H.* 8. concerning Mortuaries. And the Plaintiff averr'd that there is no ſuch Cuſtom there, and that ſhe had paid a Mortuary to the Parſon of *Bumbery*. *Jones* and *Whitlock* were of opinion, that a Prohibition ought not to be granted, and that it is not now grantable upon the Statute 21 *H.* 8. by reaſon that by the Proviſo therein, Mortuaries ſhall be paid in the Archdeaconry of *Cheſter* as before they have been accuſtomed, and ſo is out of the Statute, therefore the Cuſtom is triable in the Court Chriſtian; yet becauſe *Richardſon* and *Croke* held the contrary, *viz.* that the ſurmiſe to have a Prohibition was good, *viz.* that there is no ſuch Cuſtom, and that it may be well tried at Common Law, for that the Statute appoints now what Mortuaries ſhall be

paid, and that in the Archdeaconary of *Cheſter*, *&c.* ſuch Mortuaries ſhall be paid as have been accuſtomed, which they ſaid is iſſuable, and triable at Common Law, eſpecially as this Caſe is, the Plaintiff ſurmiſing, that ſhe paid the Mortuary to the Parſon of her Pariſh, and that there is no ſuch Cuſtom that ſhe ſhould pay it to the Defendant, therefore it was appointed that the Defendant ſhould plead or demurr, and then the Court would give Judgment upon the Record before them, *Mich.* 7 *Car. B. R. Margaret Hind and Epiſcopus Ceſtriæ*, 1 *Croke* 237. So if any one be drawn into the Spiritual Court for any matter contrary to the ſaid Statute, a Prohibition lies, as was reſolved in 16 *Eliz. Mich.* 31 *and* 32 *Eliz. B. R. White's Caſe*, 3 *Croke* 151.

So a Prohibition was moved for, where a Vicar Sued one in the Spiritual Court for a Mortuary, ſuggeſting that it was not due by Cuſtom to the Vicar, but to the Impropriator, and that he had paid it to the Impropriator, and that the Statute 21 *H.* 8. had taken away all Mortuaries, but only where they were Payable by Cuſtom, and that Cuſtom is to be tried at the Common Law, not in the Eccleſiaſtical Court. But the Court refuſed to grant a Prohibition, and ſaid, that the Spiritual Court may hold Plea of Mortuaries, notwithſtanding this Statute, for the Statute only takes away ſuch as were not due by Cuſtom; but here 'tis agreed that it is due by Cuſtom, but they differ only in the perſon to whom it ſhall be paid; and by *Keeling* and *Windham* Juſtices, the Statute Enacts nothing *de Novo*, but leaves Mortuaries to be paid as formerly; and they being Originally Suable in the Spiritual Court, the incident queſtion here of Property, ſhall not alter the Juriſdiction; and they ſaid, that a Mortuary was due of Common Right at Common Law, without any Cuſtom, and that a Mortuary at Common Law was *Secundum melius animal* after the Lords Hariot paid, *Trin.* 17 *Car.* 2 *B. R. Mark* v. *Guilbert.* 1 *Siderfin* 263, *ſame Caſe*, 1 *Keble* 919. Alſo a Prohibition was prayed to the Arches in a Suit there by Appeal, but begun in *Landaff*, where a Vicar Libelled, that after Debts and Legacies paid he ought to have a Mortuary, but did not lay any Cuſtom, becauſe *Wales* and *Cheſter* are excepted out of the Statute, and the Suggeſtion to have the Prohibition was, that no Mortuary hath been uſed to be paid there, which Plea was refuſed by the Spiritual Court; but it appears not what was done in this Caſe, only 'tis ſaid, that the Court inclined, that no Suit can be in *Wales* on the Statute, *Mich.* 24 *Car.* 2. *B. R. John and Loid*, 3 *Keble* 75. And it is ſaid, that if a Suit be commenced for a Mortuary in the Spiritual Court, no Prohibition ſhall be granted to ſtay their proceedings, unleſs they proceed contrary to the Statute; *Parſons Councellor* 359. But the Court granted a Prohibition *Niſi*, upon Suggeſtion that there was no ſuch Cuſtom, and that the Court below had refuſed that Plea, *Mich.* 23 *Car.* 2 *B. R.* 2 *Keble* 835. So the Cuſtom for paying any Mortuary being denied, and that matter ſuggeſted to the Court in order to obtain a Prohibition; it was ſaid by the Court, that Prohibitions have been granted, and alſo denied upon the like Suggeſtions, and therefore ordered that the Defendant ſhould take a Declaration in a Prohibition as to a Mortuary and to try the Cuſtom at Law, *Mich.* 1 *W. and M. B. R. Proud* v. *Piper*, 3 *Modern Rep.* 268.

By the Opinion of the Lord *Coke*, no Mortuary is due by Law, but only by Cuſtom, which he ſays is proved by the words of rhe Statute of *Circumſpecte agatis*, which are, *ubi Mortuarium dare conſuevit*, &c. 2 *Inſt.* 491. the conſtant courſe of pleading in Caſe of Mortuaries claiming them always to be due by Cuſtom ſhews it alſo to be ſo, 10 *H.* 4. 1. 7 *H.* 6. 26. 16 *H.* 7. 5. And this opinion ſeems to be ſtill further confirmed by *Linwood* in his Gloſs upon the Canon made by *Simon Langham*, which Canon is only a Confirmation and Explanation of one before made by *Robert Winchelſey*, where by the ſaid Canon the

the reaſon of the payment of Mortuaries is declared to be, as a recompence to the Pariſh Church for the Perſonal Tithes and Oblations not duly paid by the deceaſed party in his lifetime: Therefore *Linwood* ſays, where no Perſonal Tithes and Oblations have been ſubſtracted, but duly paid, the Second beſt Beaſt, (being the Mortuary directed to be paid by Canon) is not due by that Canon but the Cuſtom of the place in ſuch caſe, is to be reſpected; by which words he ſeems to referr the payment of Mortuaries not within the reaſon of the Canon to Cuſtom only, *Linw. de Conſuetudine, c. Statutam* v. *Subtractionis*, Mr. *Selden* tells us, that the uſage Anciently was (according to the Canons) to bring the Mortuary along with the Corps, when it came to be buried, and to offer it to the Church as a Satisfaction for the ſuppoſed negligence and omiſſion the defunct had been guilty of in not paying his perſonal Tithes; and from thence it was called a corſe preſent, *Selden* Hiſtory of Tithes 287.

It hath been alſo held that ſuch a right was veſted in the Parſon to have the Second beſt Beaſt for a Mortuary, (where by Cuſtom it was due) that he might Seize it where ever he could find it, 7 *H.* 6. 26. 16 *H.* 7. 5. And it is ſaid by ſome, that ſince the Statute 21 *H.* 8. *c.* 6. whereby Mortuaries are reduced to a certainty to be paid in Money, that an Action of Debt will lie upon the ſaid Statute in the Courts of Common Law, for recovery of the Sum due for a Mortuary, although before that Statute Mortuaries were only recoverable in the Spiritual Courts; for although the Statute be only in the Negative, yet it Implies an affirmative, that thoſe rates ſet down in the Statute may be taken where by Cuſtom Mortuaries are due, ſo that the Statute has made it a Duty fixed in the party, and then by conſequence the Law will give a proper remedy for the recovery of it, See *Parſon's Councellor* 359. But as I have never heard of any ſuch Action of Debt brought for a Mortuary, ſo I very much doubt whether ſuch Action is maintainabe, and rather think that it is not, but that it ſtill remains as a matter Suable for, only in the Spiritual Court: See 5 *Coke, de Jure Regis Eccleſiaſtico f.* 40. If any Parſon, Vicar, *&c.* ſhall demand and take for a Mortuary more than is allowed by the Statute, or ſhall convent any perſon before any Eccleſiaſtical Judge to recover the ſame, ſhall forfeit ſo much in value as he ſhall take more than is by the Statute limited, and Forty Shillings more to the party grieved, which ſhall be recovered by Action of Debt. See *Coke's Entries* 164, ſuch an Action brought.

As to Penſions, Portions, Synodals, *&c.* tho' the Court Chriſtian is not aided by the aforeſaid Statute of the 32 *H.* 8. yet as to ſuch of them which were Saved to Eccleſiaſticks by the Stat. 31 *H.* 8. *c.* 13. *viz.* from the King, and Lay Poſſeſſors, the ſaid Court is Aided by the Stat. 34 and 35 *H.* 8. *c.* 19.

Note, that tho' the Portions, Penſions, *&c.* belonging to Eccleſiaſticks, were ſaved to them by a ſaving in Stat. 31 *H.* 8. yet there was no remedy for them in the Spiritual Court, untill this Statute, which recites the miſchief, and gave Jurisdiction to the Ordinary, as 'tis ſaid in *Roper and Balbroke's* Caſe, *Paſch. 7 Jac. C. B. Noy* 149. And if a perſon Aided by this Statute Libels in the Eccleſiaſtical Court for a Penſion, *&c.* which was never demanded by him, although the Statute ſaith, that where it is willfully denied, the Party ſhall be Sued in the Eccleſiaſtical Court, yet no Prohibition ſhall be granted for that Cauſe, for that the Suit appertains Originally to that Court, *Hill. 6 Jac. B. R. between Bulbroke and Bridges, per Cur. Rolls 2 Abr.* 300. *nu.* 8.

Note, that this Statute gives Remedy only for Penſions, and other dues that did ariſe out of Lands, *&c.* which came to the Crown by the Statute of Diſſolutions; and therefore damages and coſts are not to be had by the Aid thereof, upon Suits for other Penſions, *&c.* And it gives relief only for ſuch payments, of which Biſhops and other Spiritual perſons were in poſſeſſion, at or within ten years next before the diſſolution of the Houſe to which the thing belonged, by reaſon of which the Duty is demanded; wherefore, ſuch Duties which have not been uſually paid within Memory, are not now recoverable, unleſs by the general ſaving in Stat. 31 *H.* 8. *c.* 17. by Engliſh Bill in the Exchequer, or Chancery: (*Quære*) But if they have been uſually paid, it will then be preſumed, that they were due and paid at the time of the Diſſolution, and ſo are recoverable with coſts and damages by this Statute, whence it follows, that Biſhops, *&c.* are not relieved by the Statute upon a Title ſhewed by Deed only, without Preſcription.

And for other Penſions, and ſuch like Duties not ſaved by this Statute, but due commonly from Eccleſiaſtical perſons, they are alſo recoverable in the Spiritual Court: And though the Libel ſhews, how that *Tam per realem compoſitionem quam per antiquam & laudabilem conſuetudinem, ipſe & prædeceſſores ſui habuerunt & habere conſueverunt annualem penſionem*, &c. and ſo, as was urged the Penſion is demanded upon Temporal grounds, *viz.* Preſcription and real Compoſition; yet *Coke* and the reſt of the Juſtices held, that a Prohibition ought not to be granted, for that the party had Election to Sue for the ſame in the Spiritual Court, or at the Common Law, both the parties being Spiritual Perſons. But they further ſaid, that if the party Sueth once at Common Law for a Penſion, and ſhall after Sue in the Spiritual Court for the ſame, a Prohibition lies, becauſe by the firſt Suit he hath determined his Election, *Trin.* 10 *Jac. C. B. Sprat and Nicolſon. Godbolt, Trin.* 41 *Eliz. B. R. Collier's Caſe*, 3 *Croke* 675. And *Popham* and *Fenner* ſaid, that there would be a difference, where the Ordinary Ordains a payment as Judge, as in the Endowment of a Vicar; there ſhall the Suit be in the Spiritual Court, and where the Patron and Ordinary make a grant in the time of Vacation, for there they charge as an Intereſt, and *Gaudy* ſaid, that for ſuch a Penſion, Suit may be either in the Temporal, or Spiritual Court, *Trin.* 41 *Eliz. B. R. Collier's Caſe*, 3 *Croke* 675. 20 *H.* 6. *f.* 17. 19 *Ed.* 3. *Juriſdict.* 28. See more of this matter *Chap.* 57.

If a Suit be to be brought for a Penſion, or other thing due out of a Parſonage, *&c.* it ſeems the Occupier tho' a Tenant, ought to be Sued; and if part of the Rectory be in the hand of the Owner, and part in the occupation of a Tenant, the Suit is to be againſt them both, *Mich.* 25 *and* 26 *Eliz. C. B. Sutton and Bowſel's Caſe*, 1 *Leonard* 11.

CHAP.

CHAP. LIV.

Statutes 32 H. 8. *and* 2 *and* 3 E. 6. *for the Payment of Tithes: What ſhall be a ſufficient ſetting forth of Tithes: Double or treble value for not ſetting forth Tithes, in what Courts to be ſued for.*

THE Statutes mentioned in the former Chapter, not being thought ſufficient to enforce the payment of Church Duties, and to ſupport the Eccleſiaſtical Courts in the recovery of them, it was further Enacted, **Where in the Parliament holden at** Weſtminſter **the fourth day of** February, **in the Twenty ſeventh year of the Reign of the late King of moſt famous memory, King** Henry **the Eighth, there was an Act made concerning payment of Tithes prædial and perſonal: And alſo in another Parliament holden at** Weſtminſter **the four and twentieth day of** July, **in the Two and thirtieth year of the Reign of the ſaid late King** Henry **the Eighth, another Act was made concerning true payment of Tithes and Offerings; in which ſeveral Acts many and divers things be omitted and left out, which were convenient and very neceſſary to be added to the ſame: In conſideration whereof, and to the intent the ſaid Tithes may be hereafter truly paid, according to the mind of the makers of the ſaid Acts, be it ordained and enacted by the King our Sovereign Lord, with the aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent parliament aſſembled, and by the authority of the ſame, That not only the ſaid Acts, made in the ſaid ſeven and twentieth, and two and thirtieth years of the Reign of the ſaid late King** Henry **the Eighth, concerning true payment of Tithes, and every Article and Branch therein contained, ſhall abide and ſtand in their full ſtrength and vertue, but alſo be it further enacted by the authority of this preſent Parliament, that every of the Kings Subjects ſhall from henceforth truly and juſtly, without fraud or guile, divide, ſet out, yield and pay, all manner of their prædial Tithes, in their proper kind, as they riſe and happen, in ſuch manner and form as hath of right been yelded and payed within forty years next before the making of this Act, or of right or cuſtom ought to have been paid: And that no perſon ſhall from henceforth take or carry away any ſuch or like Tithes, which have been yelded or paid within the ſaid forty years, or of right ought to have been paid, in the place or places Tithable of the ſame, before he hath juſtly divided or ſet forth for the Tithe thereof the tenth part of the ſame, or otherwiſe agreed for the ſame Tithes with the Parſon, Vicar, or other owner, Proprietor or fermor of the ſame Tithes, under the pain of forfeiture of treble value of the Tithes ſo taken and carried away.**

And be it alſo enacted by the authority aforeſaid, That at all times whenſoever, and as often as the ſaid prædial Tithes ſhall be due at the Tithing time of the ſame, it to be lawful to every party to whom any of the ſaid Tithes ought to be paid, or his deputy or ſervant, to view and ſee their ſaid Tithes to be juſtly and truly ſet forth and ſevered from the nine parts, and the ſame quietly to take and carry away, and if any perſon carry away his Corn or Hay, or his other prædial Tithes, before the Tithe thereof be ſet forth, or willingly withdraw his Tithes of the ſame, or of ſuch other things whereof prædial Tithes ought to be paid; or do ſtop or let the Parſon, Vicar, Proprietary, owner or other their deputies or fermors, to view, take, and carry away their Tithes as is aboveſaid, by reaſon whereof the ſaid Tithe or Tenth is loſt, impaired or hurt, that then upon

upon due proof thereof made before the Spiritual Judge, or any other Judge to whom heretofore he might have made complaint, the party so carrying away, withdrawing, letting or stopping, shall pay the double value of the Tenths or Tithe so taken, lost, withdrawn or carried away, over and besides the costs, charges, and expences of the Suit in the same: the same to be recovered before the Ecclesiastical Judge, according to the Kings Ecclesiastical Laws. Stat. 2 & 3 Ed. 6. c. 13.

As to this Statute of the 2 & 3 *Ed.* 6. in general, this is to be Noted, That it hath been usually misrecited, *viz.* thus, That on the 4 *Novemb.* 2 *Ed.* 6. it was Enacted, Whereas the Parliament commenced 1 *Ed.* 6. and continued by Prorogation until the 4*th. Novemb.* 2 *Ed.* 6. but this mistake and variance being moved in Arrest of Judgment, it was not allowed, for that the presidents were all in the same manner, and in respect of the continual use in the same form, as the Plaintiff had declared, the Court said, they would not alter it, for that was to disturb all the Judgments that were ever given upon it in that Court, *Pasch.* 6. *Jac. Oliver* v. *Collins*, *Brownlow and Gouldsborough*, 1 *part* 100. *Mich.* 1 *and* 2 *Eliz. B. R. Delles* v. *Sanderson*, *Dyer* 171. *Pasch.* 18 *Car.* 2 *B. R. Owen* v. *Evans*, 2 *Keble* 327. yet where the Plaintiff by his Declaration recited this Statute to be made 2*d Novemb.* Anno 2 & 3 *E.* 6. after Verdict the Judgment was arrested, because the same day could not be in two years of the said King, *Mich.* 33 & 34 *Eliz. Langley* v. *Haynes*, *Moor* 302.

Secondly Note, That the two Clauses of this Statute before mentioned do only extend to predial Tithes, not to mixt Tithes, as Wool, Lamb, *&c.* or small Tithes, 1 *Brownlow and Gouldsborough*, 31. therefore when a Plaintiff declared for predial Tithes (for which he might well bring his Action) and for other Tithes also, as of Wool and Lamb (for which no action did lie) and upon tryal, the Jury found for all for the Plaintiff, *viz.* as well for those for which the Action was well brought, as for those for which no Action would lie on this Statute; and after Verdict this Exception was taken, and the Judgment thereupon arrested, *Trin.* 8. *Jac. Pain* v. *Nichols* 1 *Brownlow and Gouldsborough* 65. and what Tithes are held to be predial hath been already shew'd, *Chap.* 49.

Thirdly Note, That it hath been held, that this Statute gives remedy, as well to the Layety, as Clergy, by the Equity thereof, though not expresly; and to the Farmers of both, *Pasch.* 3. *Jac. C. B. Dag and Kent* v. *Penkeron*, 2 *Croke* 70. *Hill.* 14 *Eliz. Moor* p. 710. *Trin.* 44. *Eliz. Day* v. *Peckvell*, *Moor* 915. Note also, that this Statute obligeth every one to set forth his predial Tithes, therefore if a Parson hath appointed one to Collect his Tithes, and he doth Licence a Parishioner to carry away his Corn without setting forth the Tithe; this Licence is void, and will not serve to justifie the neglect of setting the Tithe forth, *per Curiam*, *Trin.* 7. *Jac. B. R. Brickinden* v. *Denwood*, *Noy* 134. But if several Persons have right to the Tithes of a Parish, to be divided amongst them, the Parishioners by this Statute, are only bound to set forth the Tenth as is usual, and not to divide the Tenth again, in two or more parts according to the right of the several Owners; and so it was adjudged, when five Persons joyned in an Action of Debt upon this Statute, *Stileman* v. *Cromer*, *Latch* 228. So though a Parishioner be bound *de Jure* to Reap, or Cut his Corn, Hay, *&c.* and further by this Statute to set forth the Tithes, yet having duly set them forth, he is not bound to watch, or guard them from being stoln or eaten, but the Parson is bound to carry them away in convenient time; and if through his neglect to carry them away, the Tithes be lost, or eaten with Cattle, he shall not have Tithes again, and if that he sues the Parishioners (who set them forth once duly) in the Spiritual Court, and he doth offer that matter by way

way of Plea there, and they in the ſaid Court will not allow thereof, a Prohibition lies, *Trin.* 30. *Eliz. B. R.* Bennet *and Shortwright's Caſe*, 2 *Leonard* 101. *Hill.* 15. *Jac. C. B. Bridgman's Caſe*, *Noy* 31. Note alſo, that this Statute of 2 *E.* 6. is an Act of Addition as by the words thereof appear, 2 *Inſt.* 648. Alſo theſe words (as **hath been of right yielded**) are to be intended of Tithes to be yielded in Specie within 40 years, and the ſenſe of the words (**or of right or cuſtom**) is, or by rightful cuſtom *de modo decimandi* ought to have been paid, 2 *Inſt.* 650.

By the words of this Statute, every of the King's Subjects, ſhall truly, and juſtly without Fraud, or Guile, divide, ſet out, yield, and pay, *&c.* his Tithes; ſo that the owner of the Land, not the owner of the Tithes by Law is bound to ſet the Tithes out, yet it is lawful for the Owner of the Tithes (by force of this Statute) to be preſent to ſee that his Tithes be duly ſet out.

If one ſets forth his Tithes and takes them away again after he hath ſet them forth, an Action lies againſt him for treble Damages, for ſuch fraudulent ſetting forth, is as no ſetting forth within the intent and meaning of this Statute, although that the clauſe for treble damages ſpeak nothing of Fraud, *Hill.* 7. *Jac. B. R. Ford* v. *Pomroy*, *Noy* 126. *ſame Caſe*, 2 *Brownlow and Gouldsborough* 9. *Hill.* 5 *Jac. C. B. Rocheſter* v. *Porter*, *Noy* 152. *Trin.* 30. *Eliz.* Bennet *and Shortwright's Caſe*, 2 *Leonard* 101. *Hele and Fretendon's Caſe*, Brownlow *and Gouldsborough*, 1 *part* 34. 2 *Inſt.* 649. So if he ſells his Grain on the Land, and after by command of the Vendee takes away the Corn, being ſevered, without ſetting forth the Tithe, the Parſon may ſue him upon the Statute, and ſhall not be compelled to ſue the Vendee, who may be unknown; and becauſe 'twas done to defraud, 44 *Eliz. B. R.* Baker's *Caſe*, *vouched in Rocheſter and Porter's Caſe*, *Noy* 152. *Hele and Frettendon's Caſe*, *Brownlow and Gouldsborough* 34. *and in Sprat and Heale's Caſe*, 13 *Coke* 23. 2 *Inſt.* 649.

So when a Pariſhioner ſets forth his Tithes, and hindred the Parſon from carrying them away, and the Parſon libelled for the Tithes in the Spiritual Court upon this Statute, and the Defendant ſurmiſed, that he did not hinder him from having of his Tithes, but that he did hinder him from coming for them one way (which was the uſual way) but that he might come for them another way; it was agreed, that this hindring of the Parſon to carry away his Tithes, made the ſetting of them forth fraudulent, and no good and ſufficient ſetting of them forth according to the Statute, by which it ought to be effectual; and the whole Court held, that his ſurmiſe made as to the way, was not material, 1 *Bulſtrode* 108. And if the Parſon's way in ſuch caſe be ſtopt, he may ſue thereupon in the Spiritual Court for the Tithes upon the Statute, or only for ſtopping the way, and if the queſtion be, whether the way was ſtopt or not, and the Spiritual Court will not allow the Defendant's Proof, he ought to appeal, and not to have a Prohibition thereupon, *Trin.* 43. *Eliz. C.* B. *Blackwell's Caſe*, 3 *Croke* 843. But *Quære*, as to the denying of the proofs in ſuch Caſe by the Spiritual Court, for although it is to be admitted that where the Spiritual Court hath a proper Juriſdiction of the principal matter, and another Collateral matter depending thereupon of Temporal Cognizance, is alſo neceſſary to be determined in adjudging upon ſuch principal matter, there the Spiritual Court ſhall determine ſuch incident temporal matter, as a thing without which the other cannot effectually be determined; yet in ſuch Caſe, the Spiritual Court ought to try ſuch temporal matter, according to the Rules of the Common Law to which it doth properly belong, and not by the Rules of the Canon or Civil Law, elſe they ſhall be prohibited; ſo in this Caſe, though the Spiritual Court might try whether the way was ſtopt or not, yet ſtoppage of ways being matter properly tryable at Common Law, and only allowed

lowed to the Spiritual Court in this Caſe to be tryed, as a thing depending upon, and neceſſary to the Parſons having and carrying away his Tythes, yet I conceive they ought to proceed in the tryal thereof, according to the Rules of the Common Law, and to allow of ſuch proofs, as by that Law are allowable, elſe they ſhall be prohibited; ſee for this matter, *Trin.* 4 *Jac.* B. *R. Armiger Brown* v. *Wentworth*, *Yelverton* 92. *Mich.* 16. *Jac. Wats* v. *Conisby*, *Hobard* 247. *Hill.* 27 *Car.* 2. *Richardſon* v. *Disborough*, 3 *Keble* 570. *Trin.* 2 *Willielmi & Mariæ* B. *R. Shorter* v. *Friend and Uxor*, 3 *Modern Rep.* 283. ſee more concerning this matter *cap.* 57.

If the queſtion be, which of two ways is the uſual and accuſtomary way, this ſhall be tryed in the Court Chriſtian, who have cognizance of ways for carrying of Tithes, *Hill*, 6. *Car. B. R. Halſey* v. *Halſey*, *Jones* 230. *Mich.* 14. *Jac.* B. *R. Reynold & Newbery*, *Rolls* 1 *Rep.* 420. in which Caſe both of them are to be ſued for in the ſame Action if the Tithes be not ſet forth. And when it was objected, that when the owner of the Corn divides the Tithes from the nine parts, they become lay Chattles, and that for the taking thereof an Action at the Common Law lies, by Treſpaſs or Detinue; and therefore that there is not any cauſe of Suit for them upon this Statute in the Spiritual Court, and that a Prohibition lies if there be. *Gawdy and Popham* ſaid, that a Suit is well maintainable in the ſaid Court againſt the party himſelf that ſet forth the Tithes if he detains them, although the Parſon if he would, might have his remedy at Common Law, and that the Statute of 32 *H.* 8. *cap.* 7. proves it, for the words thereof be (**if any do not ſet out, or do detain or withhold his Tithes,** (which is to be intended after they be ſet out) he ſhall be ſued in the Court Chriſtian, for otherwiſe miſchief would enſue to the Parſon, in that the Owner might ſecretly ſet forth his Tithes, ſo that the Parſon ſhould not know thereof, and afterwards carry them away, *Paſch.* 40 *Eliz. B. R. Leigh* v. *Wood.* 3 *Croke* 607. *ſame Caſe*, *Moor* 912. *Trin.* 44 *Eliz. B. R. Sprat and Heals's Caſe*, 13 *Coke* 23. *Trin.* 43 *Eliz. C. B. Blackwel's Caſe*, 3 *Croke*, 843. Not only the owner of the Corn may be ſued in the Spiritual Court if he carries away the Corn before the Tithes be ſet forth, but alſo if a Stranger carry it away before the Tithes ſevered; and that upon this Statute *Mich.* 11 *Jac. B. R. Kipping* v. *Swain.* 2 *Croke* 324. *ſame Caſe*, 1 *Brownlow* 123. and ſo was it at the Common Law before the Statute of 32 *H.* 8. For if Tithes were ſet out and after carried away by the owner of the Land, the Rector might either Sue in the Spiritual Court for the Tithes, or bring an Action of Treſpaſs at Common Law, 10 *H.* 4. 2.

But after the Tithes be duly ſet forth by the owner, *viz.* ſevered from the nine parts, if a Stranger takes them away, the Parſon (who in ſuch Caſe may not Sue the owner, may Sue the Stranger at the Common Law only, *Paſch.* 43 *Eliz. B. R. Web* v. *Pets. Noy* 44. and not in the Spiritual Court, *Mich.* 39 & 40 *Eliz. B. R. Leigh* v. *Wood. Moor* 912. *ſame Caſe*, 3 *Croke* 607. 4 *Leonord* 7. *Cliff* v. *Dudney.* 2 *Keble*, 846. And at the Common Law, in this Caſe, (tho' he may not Sue for treble damages upon the Statute) he may have his Action of Treſpaſs, for that the Tithes immediately upon the ſetting forth are in the Poſſeſſion of the Parſon, and by the Statute of the 31 *H.* 8. *c.* 7. he may have an *Ejectione firmæ*; but an Action of Account will not lie in this Caſe, *Mich.* 14 & 15 *Eliz. Totenham* v. *Bedingfield. Owen* 35. *Mich.* 14 *Car.* 2. *Berry* v. *Wheeler.* 1 *Siderfin* 92. But all this is to be underſtood in Caſe the Tithes be ſet forth by the Owner of the Corn, for if the Tithes be ſet forth by a meer Stranger, this doth not ſettle any property in the Parſon, ſo that he may have his Action of Treſpaſs, *&c.* for taking of them away, and I conceive he may Sue the Owner for the Tithe in ſuch Caſe, upon this Statute, either in the Temporal, or Spiritual Court, for that a Stranger ſetting forth the Tithe, is as

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no ſetting forth of the Tithe in Law; But if one who hath no colour of title ſows the Land and ſets forth the Tithes, by this he is a Diſſeiſor, yet this is a good ſetting forth of the Tithes for the Parſon, and puts the Parſon in poſſeſſion of them, and if ſuch perſon that ſo ſets them forth carries them away, he may be ſued for them upon the Statute, and if the true Owner of the Land or other Stranger carries them away after they are ſet out an Action of Treſpaſs lies againſt them, *Hill.* 1 *Car. Mountford* v. *Sedley*, *Jones* 89. *the ſame Caſe in* 3 *Bulſtr.* 336. And ſo it is ſaid by *Jones* Juſtice to have been adjudged, that if one cuts the Corn, and another carries it away, an Action of Treſpaſs lyeth againſt either of them, and ſo againſt a Servant, *Paſch.* 15 *Car. March* 22.

If the Tithes be ſet forth by the Owner of the Land, and another Parſon or Vicar that hath no Right to have them, carries them away, claiming them in the Right of his Church, the Parſon or Vicar that ſuppoſeth himſelf to be injured, may ſue the Parſon or Vicar who carried them away in the Spiritual Court, and no Prohibition ſhall be granted; for that, the Suit is proper there, when the Right of the Tithes comes in queſtion betwixt Spiritual perſons, by the Statute of *Circumſpecte agatis* made 13 *E.* 1. *c.* 1. and if Treſpaſs be brought in ſuch Caſe, the Defendant as is ſaid by ſome Books, may plead to the Juriſdiction of the Court, 38 *E.* 3. 6. 6 *E.* 4. 3. 23 *E.* 4. 23, 24. *Paſch.* 29 *C. B. the Parſon of Tackman's Caſe*, 1 *Leonard* 58. 35 *H.* 6. 39. *Bro. tit. Juriſd.* 3. *Mich.* 11 *Jac. B. R.* 2 *Bulſtr.* 157. *Mich.* 5 *Jac. Rolls* 2 *Abr.* 310. *nu.* 1. *Trin.* 11 *Jac. B. R. per Cur. ibid. nu.* 2. *& Mich.* 14 *Jac. Adams and Sir John Vavaſor* v. *Hubertſon ibid. nu.* 4 *Mich.* 28 *&* 29 *Eliz. between the Vicar of Pancridge and Buſſey ibid. nu.* 6. *and Godbolt. Trin.* 31 *Eliz. Botham* v. *Cooper.* 3 *Crook* 136. *Mich.* 29 *&* 30 *Eliz. B. R. Sawel* v. *Wood.* 3 *Croke* 71. *and* 1 *Leonard* 94. *Trin.* 30 *Eliz. B. R. Gatehouſe and Penn's Caſe*, 1 *Leon.* 128. *Paſch.* 2 *Jac. C. B. Randal againſt Knolls. Noy* 147. And if the Leſſee or Farmer of one Parſon takes away the Tithes being ſevered from the nine parts, ſuppoſed to belong to another Spiritual perſon, and Treſpaſs be brought, though it hath been a queſtion, whether he may juſtifie by a Leaſe of the Tithes made to him by another Parſon, and the Court ſhall be ouſted of the Juriſdiction, the Farmer being a Lay-man, 20 *H.* 6. 17. *Br. Juriſdict.* 86. *Trin. Jac. B. R. per Cur. Rolls* 2 *Abr.* 310. *nu.* 2. yet this doubt hath been reſolved in the affirmative, *Hill.* 43 *El. Benefield and Feek*, *Gouldsborough* 149. *Rolls* 2 *Abr.* 310. *nu.* 5. And the Law is the ſame, if the Tithes ſet forth be taken away by the Servant of another Parſon, by *Richardſon Mich.* 3 *Car. C. B. Comin's Caſe*, *Hetley* 60. 31 *H.* 6. 11. And the Law in this Caſe holds, not only between Parſons and Vicars that have Cure of Souls actually, but alſo to other Spiritual perſons, as between Appropriators that have it only habitually, or between an Appropriator, and one that hath a Benefice with Cure, and with their Farmers and Servants, *Hill.* 43 *Eliz. Benefield and Feek*, *Gouldsborough* 149.

And it ſeems, this holds alſo between an Impropriator, and another Parſon or Vicar, though the Tithes belonging to ſuch, are a Lay Fee, and the Impropriator a Lay-Man, for if the Bounds of a Pariſh come in queſtion in the Spiritual Court, in a Suit between the Parſon Impropriate, and the Vicar of the ſame Pariſh, as if the Vicar claims all the Tithes within the Hamlet of *D.* within a Pariſh, and the Parſon all the Tithes within the reſidue of the Pariſh, and the queſtion betwixt them is, whether certain Lands whereof the Vicar claims the Tithes, be within the Hamlet of *D.* or not, yet becauſe, this is between Spiritual perſons, *viz.* between the Parſon and Vicar, although that the Parſon be a Lay Man, and the Parſonage appropriate a Lay Fee, yet this ſhall be tried in the Spiritual Court, and no Prohibition granted, *Hill.* 15 *Car. B. R.* between *Ives and Wright*, *per*

Cur. Rolls 2 *Abr.* 312. *nu.* 7 *Hill.* 43 *Eliz. Benefield and Feek*, *Gouldsborough* 149. *Rolls* 2 *Abr.* 310. *nu.* 5. Yet an Action of Treſpaſs was brought by a Parſon againſt his Vicar, for taking of Tithes, and on the general Iſſue, the Jury gave a ſpecial Verdict, and 'twas adjudged for the Vicar, *Trin.* 36 *Eliz. C. B. Kigham* v. *Beaſt. Owen* 58.

After the Tithes are duly ſet forth, he to whom they belong is bound in convenient time to carry them away, otherwiſe the owner of the Land may have his Action of the Caſe againſt him for ſuch neglect, *Hill.* 15 *Car. C B. Dr. Bridgman's Caſe*, *Noy* 31. *Hill.* 1 *Car. Mounford* v. *Sedley.* 3 *Bulſtrode* 336. *Trin.* 21 *Jac. B. R. Wiſeman and Denham's Caſe*, *Godbolt* 329. But then the Plaintiff to maintain ſuch Action ought to give the Owner of the Tithes notice that the Tithes were ſet forth, *Mich.* 13 *Car. Chaſe* v. *Ware. Rolls* 1 *Abr.* 643. *Mich.* 1652 *B. R. Liniſton and Maurice. Stiles* 342. (Tho' only the Canon not Temporal Law obliges to give notice, *Spencer's Caſe*, *Noy* 19.) But notice of ſetting out of Tithes is needful to be given only, in ſuch caſe to intitle the party to have his Action if they be not carried away in convenient time, *Trin.* 1 *W. and M. C. B. Anonymus* 2 *Ventris* 48. If after the Tithes are ſet out, and notice thereof given to the Parſon, he ſends his Servant for them, but the Pariſhioner threatens the Servant, and will not ſuffer him to carry them away, and after that the Parſon leaves them a long time to remain upon the ground, whereby the Pariſhioners Graſs is damnified, yet no Action lies againſt the Parſon in this caſe until a new requeſt made to him to carry his Tithes away, *Trin.* 15 *Car. Lee* v. *Ruſſel*, *Rolls* 1 *Abr.* 109. But tho' the Action lies for not carrying away predial Tithes, as Corn and Hay, yet 'twas doubted whether it lay for not taking away of Tith-Cheeſe, or other mixt Tithes, *Trin.* 21. *Jac. B. R. Wiſeman and Denham's Caſe*, *Godbolt* 329. *the ſame Caſe*, *Rolls* 2 *Rep.* 128. And it ſeems to be, that if Tithes ſet forth remain too long upon the Land, *&c.* the Owner of the Soil may take them damage Feſant, but then being ſued for them, he to juſtifie, muſt ſet forth how long they had remained before he took them, and when they ſhall be ſaid to remain too long is tryable by Jury, *Hill.* 1. *Car. B. R. Mountford* v. *Sidley* 3 *Bulſtrode* 336. *Hill.* 1 *Car. B. R. Stilman* v. *Chanor*, *Latch.* 8.

Predial Tithes not being ſet forth duly and effectually, as aforeſaid, or agreed for; by the former of the before mentioned clauſes in the Statute 2 *&* 3 *E.* 6. the treble value thereof is forfeited. Concerning which treble value, two queſtions have been, *Firſt*, to whom in ſuch Caſe the ſaid penalty is given; *Secondly*, in what Court it may be recovered. As to the firſt, ſome have thought that the treble value was given to the King, it not being by expreſs words in the Statute limited to any one, *Savil* 63. But the contrary hath been adjudged, that this penalty is given to the party grieved, 2 *Inſt.* 650. *Mich.* 11. *Jac. C. B. the Dean and Canons of Winſor* v. *Web*, *Godbolt*, *Mich.* 39 *&* 40. *Eliz. B. R. Bedle and Sherman's Caſe*, 3 *Croke* 608. 13 *Coke* 48. *Coke's Entries* 162. *Moor* 710. *Paſch.* 3 *Jac. B.R. Dag and Kent* v. *Penkevon*, 2 *Croke* 70. and the reaſon of theſe Judgments ſeems to be, that tho' all forfeitures at Common Law, as alſo forfeitures given by Act of Parliament by reaſon of any offence committed againſt the publick Juſtice of the Nation, and not appointed to any particular Perſon, ſhall be to the King, as the head and fountain of Juſtice, and thereby ſuppoſed to be the Perſon offended and injured by ſuch offence; yet when a forfeiture given by Act of Parliament appears not to be intended, meerly as a puniſhment for the offence committed, but as a recompence to ſome particular perſon injured, for the damage he hath thereby ſuſtain'd, in ſuch caſe, tho' no particular perſon be by ſuch Statute expreſſed to have the penalty and forfeiture; yet the party damnified ſhall have it as a recompence

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and ſatisfaction for the damage he hath ſuſtained by the offence, and the forfeiture and penalty given by this Statute, hath been expounded to be as a ſatisfaction intended for the Tithes ſubſtracted, therefore to belong to the perſon whoſe right it is to have ſuch Tithes, *Paſch.* 29 *Eliz. Moor* 238. *Dr. Bonham's Caſe*, 8 *Co.* 119. *b. Hill.* 40 *Eliz. Moor* 710. But the Statute being prohibitory, the party not ſetting forth his Tithes, may be fined to the King, upon an information or Indictment as was ſaid, *Mich.* 40 & 41. *Eliz.* Moor 911. *Paſch.* 26 *Eliz. Savil* 62.

The next doubt hath been in what Court the treble value is recoverable; as to which, two Points have been reſolved, *Firſt*, that the Owner or Tenant of the Tithes may ſue for the treble value in the King's Temporal Courts by Action of Debt, *Paſch.* 3. *Jac. C.* B. *Dag and Kent* v. *Penkevon*, 2 *Croke* 70. *Paſch.* 39 *or Hill.* 40 *Eliz.* Bedle v. *Sherman*, 3 *Croke* 608. *Hill.* 7 *Jac. B. R. Ford* v. *Pomroy. Noy* 126. Secondly, that a ſuit for the treble value may not be brought in the Spiritual Court, *Trin.* 44 *Eliz. B. R. Sprat and Heal's Caſe*, 13 *Coke* 23. *and Beadle and Sherman's Caſe*, 13 *Coke* 47. And if the owner of the Tithes doth demand the treble value by Suit in the Spiritual Court a Prohibition Lies, *Mich.* 11 *Jac. C. B. the Dean and Canons of Windſor* v. *Web. Godbolt. Mich.* 8 *Jac. C. B. Parker's Caſe*, 2 *Brownlow and Gouldsborough* 7. And when a Sentence definitive was given in the Eccleſiaſtical Court for the treble value, and a Prohibition was thereupon prayed, tho' the Court doubted whether a general or ſpecial Prohibition ought to iſſue, and whether the Court Chriſtian after a definitive Sentence could divide their Sentence, or the Execution of it; yet at length it was reſolved, that the Prohibition ſhould be, that they ſhould not proceed to the Execution of their Sentence, as to the treble value, *Hill.* 11 *Jac. Gerey's Caſe*, *Moor* 873. And tho' in the Spiritual Court upon a Libel grounded upon this Statute, the Sentence be, that the Plaintiff ſhould recover the ſingle damages, and the ſame be ſet in certain, *& ulterius quod recuperet duplicem valorem*, which is alſo by the ſame Sentence ſet in certain, yet a Prohibition will be granted, becauſe the damages to be given in that Court are exceeded in ſuch Sentence, for tho' in ſuch Sentence it be not expreſly ſaid that treble damages ſhall be recovered, yet it doth amount to as much, if the Words of the Sentence be joyned together; wherefore in ſuch Caſe it was directed, that a ſpecial Prohibition, in which the Statute and the whole matter was to be mentioned ſhould be awarded, *Hill.* 11 *Jac. C. B. Baldwin and Gerey's Caſe*, *Godbolt* 341. And thus by the expoſion of this Clauſe giving treble damages, the Common Law Courts, have the Tryals of Cauſes of Tithes Originally, to the great grief of the Civilians, and no leſs Benefit and Advantage of the Clergy, and other Proprietors of Tithes.

However, the treble value for Tithes not duly ſet forth is not recoverable by Bill in the Exchequer Chamber, for when a Bill was exhibited there upon this Statute for the treble value, it was clearly holden by the Court, that the Bill did not lie upon the matter, for that there ſhall be no Suit or Proceedings, according to the Order of the Exchequer Chamber, in Caſes of Conſcience upon any Penal Statute; but the ſame may be Sued for in the Court of Pleas in the Exchequer, *Trin.* 30 *Eliz.* in the Exchequer. 3 *Leonard* 204. *Mich.* 33 *and* 34 *Eliz. Langley* v. *Haynes. Moor* 302. Yet it is ſaid by *Keeling* that the treble value given by this Statute is a duty trebled by the Statute, and not a bare penalty only, *Paſch.* 21 *Car.* 2 *Moreton* v. *Hopkins.* 2 *Keble* 502. And a Bill being brought in the Exchequer, and a Demurrer to it, for that the Plaintiff had not thereby demanded the ſingle value, it being a Bill of Diſcovery only to enable the Plaintiff to Sue for and recover the treble value, the Court overruled the Demurrer, for that Tithes were Suable for in this

Court before the Statute; but a *Quære* is made of this Caſe by the Reporter, becauſe as he ſays; it is contrary to the common practice and uſage of the Court, to have ſuch a Bill without alledging that the Plaintiff is contented to receive the ſingle value only, *Paſch.* 13 *Car.* 2. *in Scaccar. Driver* v. *Man. Hardres* 190. And in an Engliſh Bill in this Court, the Plaintiff need not to ſet forth particularly his Title to the Tithes, no more than in Action of Debt upon the Statute; as if a Vicar be Plaintiff, he need not ſet forth whether he claims the Tithes by Preſcription or Indowment; but eſpecially if the Defendant admit the Plaintiffs right to have the Tithes, and inſiſts upon ſome other matter, as payment, &c. that will ſupply the defects of the Bill, tho' 'tis ſaid to have been often ruled contrary, *Hil.* 14 *and* 15. *Car* 2. *in Scaccar. Stone* v. *Ludlow & al'*, *Hardres* 321. *Mich. Ando Dom.* 1658 *in Scaccar Button* v. *Honey*, *Hardres* 130. And the Plaintiff ought to make proof of the value of the Tithes, as what Cattel had been depaſtured in the place where, &c. *Trin.* 1655 *in Scaccar. the Attorney General* v. *Straite*, *Hardres* 4.

Nor may a recompence according to the ſingle value of the Tithes Subracted, be recovered in all Caſes in the Court of the Exchequer; for when the Queſtion was moved there, whether an Impropriator that is to pay an Annual Rent to the King for his Impropriation, in the name of a Tenth, *ſhall* have the Privilege of the Exchequer to Sue for Tithes there as the King's Debtor, *viz.* for the ſingle value thereof, the Barons were of opinion, that he ſhould not, for upon the ſame reaſon (ſaid they,) every one who is to pay any Tenths or Firſt Fruits, ſhould draw another who ſueth him into the Exchequer, and ſo all Controverſies concerning Tithes and Parſonages, ſhould be drawn thither, which would be a great prejudice to the Spiritual Courts. But *Egerton Solicitor* vouched *Coniers*, Caſe, where the King gave a Parſonage to a Prior in *Frankalmoign*, and the Tithes thereof being withdrawn, the Prior impleaded him who withdrew his Tithes in the Exchequer, and in that Caſe it was holden, that the Prior ſhould have the Privilege, for the King is in danger to loſe his Patronage, or rather his Founderſhip, if the Rectory be evicted. *Gent. Baron* ſaid, the Tenant of the King in Chief, or he who pays Firſt Fruits, or he who holds of the Queen in Fee Farm, ſhall not have in that reſpect privilege, *Mich.* 32 *Eliz.* in the Exchequer, the Dean and Chapter of *Windſors* Caſe, 2 *Leonard* 146.

Note that in a Clauſe in the Statute of 2 & 3 *Ed* 6. it is Enacted, That if any perſon do ſubſtract or withdraw any manner of Tithes, Obventions, Profits, Commodities, or other Duties before mentioned, or any part of them, contrary to the true meaning of this Act, or of any other Act heretofore made, that then the Party ſo ſubſtracting or withdrawing the ſame, may or ſhall be convented and ſued in the King's Eccleſiaſtical Court, by the party from whom the ſame ſhall be ſubſtracted or withdrawn, to the intent the King's Judge Eccleſiaſtical ſhall and may, then and there, hear and determine the ſame according to the King's Eccleſiaſtical Laws. And that it ſhall not be lawful unto the Parſon, Vicar, Proprietor, Owner or other their fermors or deputies, contrary to this Act, to convent or ſue ſuch witholder of Tithes, Obventions, and other duties aforeſaid, before any other Judge then Eccleſiaſtical. And if any Archbiſhop, Biſhop, Chancellor or other Judge Eccleſiaſtical, give any ſentence in the foreſaid cauſes of Tithes, Obventions, Profits, Emoluments, and other duties aforeſaid, or in any of them, (and no Appeal ne Prohibition hanging) and the party condemned do not obey the ſaid ſentence, that then it ſhall be lawful to every ſuch Judge Eccleſiaſtical to excommunicate the ſaid party ſo as afore condemned and diſobeying; in the which ſentence of Excommunication, if the ſaid party excommu-

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nicate wilfully ſtand and endure ſtill excommunicate by the ſpace of forty days next after, upon denunciation and publication thereof in the Pariſh Church, or the place of Pariſh where the party ſo excommunicate is dwelling, or moſt abiding, the ſaid Judge Eccleſiaſtical may then at his pleaſure ſignifie to the King in his Court of Chancery, of the ſtate and condition of the ſaid party ſo excomunicate, and thereupon to require Proceſs De excommunicato capiendo **to be awarded againſt every ſuch perſon as hath been ſo excommunicate.** Stat. 2 & 3 Ed. 6. cap. 13.

Yet 'tis ſaid that if a Copyholder of the King's Mannor pretends Preſcription for a *Modus Decimandi* againſt a Parſon, the Right of Tithes ſhall be tryed in the *Exchequer*, and a Prohibition was granted to the Eccleſiaſtical Court in ſuch Caſe, *Paſch. 7 Jac. in the Exchequer*, 4 *Leonard*. And when the Caſe was that *J. S.* was Parſon of a Church and *A.* Vicar, and the King Patron the Court ſaid the Debate between the Parſon and the Vicar for the Tithes ought to be in the *Exchequer*, by Engliſh Bill, or by Action in the Office of *Pleas*, *Paſch.* 29 *Eliz. in the Exchequer*, 1 *Leonard* 59. *Trin.* 30 *Eliz. in the Exchequer*, 3 *Leonard* 204. Alſo 'tis ſaid that where a Prior is the King's Debtor or ought to have Tithes of another Spiritual perſon, he may chooſe to ſue for the Subtraction of his Tithes, either in the Eccleſiaſtical Court, or in the Exchequer, and yet the Perſons and Matter alſo were Eccleſiaſtical; for ſeeing that the matter by a mean concerneth the King, he may ſue for them in the Exchequer, as well as in the Eccleſiaſtical Court, and there ſhall the Right of Tithes be determined, 38 *Aſſ. pl.* 20 *vouched by* 5 *Co. de Jure Eccleſiaſtico fol.* 16.

And in the late times of Rebellion when Eccleſiaſtical Courts were ſuppreſt, and upon that reaſon Tithes were equitably ſued for in the Exchequer, becauſe at that time there was no remedy for other than predial Tithes, and in effect none for them, when they were of ſo ſmall value that the treble value thereof being recovered would not anſwer the ſubtracting them, and reimburſe the Coſts of Suit; and ſince the Reſtoration of the Church and its Juriſdiction, the uſe of ſuing in the Exchequer before, and an ill opinion of the management of the Eccleſiaſtical Courts have cauſed perſons grieved to ſue more frequently in the Exchequer by Engliſh Bill; yet it is ſaid that before the Statute, Tithes were anciently ſued for in the Court of Exchequer, *Hardres* 190. Tithes alſo by Engliſh Bill may be ſued for in *Chancery*, but not for the forfeiture of the treble value; But an Action of Debt upon the Statute of 2 *E.* 6. lies not in the Sheriffs Court by Juſticies, *Mich.* 20 *Car.* 2. *B. R. Brown & Welmes*, 2 *Keb.* 416, 420. Yet thoſe that want to be releived for their Tithes detained, do not take Sanctuary in theſe Courts, becauſe the Law doth not ſufficiently enable the Eccleſiaſtical Courts to give remedy for all ſorts of Church Duties; for though they may not recover there the treble value by force of the firſt Clauſe of this Statute, yet by the ſecond Clauſe thereof before mentioned, they ſhall recover the double value of the Predial Tithes in the Spiritual Court, and no Prohibition will lie for that is given by the expreſs Words of the Statute, and ſo it was adjudged in *Manwood's Caſe in the Exchequer, and in the Common Pleas*, *Mich.* 11 *Jac. the Dean and Cannons of Windſor and Webb's Caſe*, *Godbolt*, *Trin.* 44 *Eliz. B. R. Sprat & Heal's Caſe*, 13 *Co.* 24. And *Coke* upon this Clauſe of the Statute ſaith, that the reaſon why the double value, *&c.* is by this branch to be recovered in the Eccleſiaſtical Court, whereas by the former Branch the Parſon at the Common Law ſhall recover the treble, is. for that in the Eccleſiaſtical Court he ſhall recover the Tithes themſelves, and therefore the value recovered in the Eccleſiaſtical Court is equivalent with the treble Forfeiture at the Common Law. And

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upon the Words **Beſides the Coſts, Charges and Expences,** &c. he addeth, that the Suit in the Eccleſiaſtical Court is more advantageous than the Suit for the treble value at the Common Law. For at the Common Law he ſhall recover no Coſts, but he ſhall recover in the Eccleſiaſtical Court Coſts and Expences, *Co. 2 Inſt.* 651.

But now whereas *Coke* ſaith to this effect, that not only the double value of the Tithes ſubtracted, *&c.* ſhall be recovered in the Eccleſiaſtical Court, but the Tithes themſelves ſhall alſo be recovered there, a doubt ariſeth, how the double value of the Tithes, and alſo the Tithes themſelves (*viz.*) a recompence for them, according to the ſimple value thereof ſhall be recovered (*viz.*) whether by one and the ſame Suit, or by an after Suit (when the double value hath been firſt recovered) according to the ordinary courſe of Proccedings in the Eccleſiaſtical Courts for Tithes ſubtracted, *&c.* before this Statute was made, and the reaſon of the doubt is, becauſe when a Parſon having grounded his Libel upon the Statute of 2 *Ed.* 6. and obtained a Sentence in the Eccleſiaſtical Court to recover the ſingle damages, which was ſet in certain, and farther the double value which was alſo ſet in certain; a Prohibition was granted *per Curiam*, becauſe the Spiritual Court in effect gave treble damages, *Hill.* 11 *Jac. C. B. Baldwin and Girrie's Caſe*, *Godbolt* 341. As to which I conceive, that *Coke*'s meaning is, that not only double damages, but alſo a recompence for the Tithes themſelves ſhould be recovered in the ſame Suit, otherwiſe he could not ſay that the value recovered in the Eccleſiaſtical Court is equivalent with the treble forfeiture at the Common Law; but then I conceive that the Libel muſt be framed accordingly (*viz.*) not to be grounded only upon the Statute, and then upon a Sentence anſwerable to ſuch a Libel, a Prohibition will not be granted although that in *Baldwin and Girries Caſe* the Libel and Sentence being only grounded upon the Statute, the Prohibition might be granted, *Quære.*

But if with double Damages and Coſts, a recompence may be recovered for the Tithes themſelves according to the ſingle value thereof in the Spiritual Court, yet beſides the treble value of them, neither the Tithes themſelves nor any other recompence for them can be recovered in the Temporal Courts, becauſe though as *Fitzherbet* holds in his *Nat. Brev. fol.* 30. that before the Stat 18 *Ed.* 3. *c.* 7. the right of Tithes were determinable in the Temporal Courts, at the Election of the party, yet now by the ſaid Statute, the Temporal Court is wholly barred of the Juriſdiction thereof. *See Coke*'s Fifth part *de Jure Eccleſiaſtico.* And therefore in all ſuits upon Stat. 2 and 3 *Ed.* 6. *c.* 13. the Tithes are never demanded, but the Action is only perſonal, grounded meerly upon a contempt againſt the Statute, for not ſetting forth the Tithes, and for that reaſon it is held, that no Action lies againſt Executors upon this Statute, the Action being grounded on a perſonal wrong, which dies with the Teſtator, but Executors may have an Action upon this Statute for Tithes not ſet forth in the time of their Teſtator, by the Equity of the Statute 4 *Ed.* 3. *c.* 7. by *Twiſden. Juſt. Mich.* 14 *Car.* 2. *B. R. in the Caſe of Holl* v. *Bradford.* 1 *Sid.* 88. *the ſame Caſe*, 1 *Keble* 344. *Raymond* 52. *Paſch.* 21 *Car.* 2. *Juſtice Morton's Caſe*, 1 *Ventris* 30, 31. Yet where a ſuit was continued againſt Executors in the Spiritual Court, for double damages, a Prohibition was denied *Mich.* 15 *&* 16 *Car.* 2. B. *R. Wilks and Ruſſell.* 1 *Keeble* 682. *Raymond* 95. *ſame Caſe*, 1 *Siderfin* 181. Where 'tis ſaid, the Judges were of opinion, that the Prohibition ſhould be granted, and that a Plaintiff ſhall only recover his Tithes in the damages, and ſhall not demand them again by any Suit after a recovery of the treble value, *Paſch.* 3 *Jac. Sir Richard Campion* v. *Hill.* 1 *Brownlow and Gouldsborough* 86. *ſame Caſe Yelverton* 63.

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As beſides the treble value of the Tithes not ſet forth, the Plaintiff ſhall not recover any thing for the Tithes themſelves in the Temporal Court, ſo ſhall he not there recover other Damages or Coſts, for that the Statute doth not give them by expreſs words, wherefore when in an Action of Debt for Tithes upon *non debet* pleaded, the Jury found *quod debet* 78 *l.* and for the reſidue *non debet*, and Damages aſſeſſed at 1 *d.* and Coſts at 40 *s.* the Plaintiff to avoid Error releaſed the Damages and Coſts, and had Judgment for the Debt, *Trin.* 44 *Eliz. Day* v. *Peckvel. Moor* 915. *Paſch.* 3 *Jac.* in the Exchequer Chamber. *Day and Kent* v. *Penkevon.* 2 *Croke* 70. *and Jenkins* 316.

And as the Plaintiff in an Action upon this Statute doth not recover Coſts, ſo neither hath the Defendant Coſts in Caſe of *non-ſuit*, or Diſcontinuance; for when a Plaintiff having brought two Actions, was *non-ſuited* in one, and diſcontinued the other; by the whole Court it was denied that the Defendant ſhould have Coſts either by Statute 8 *El.* or 4 *Jac. c.* 13. upon this reaſon, that the Plaintiff, if he had recovered, ſhould have had but the treble value without Coſts, *Mich.* 7. *Jac. B. R. Cox* v. *Small*, *Noy* 126. But now by the Statute 8 & 9 *W.* 3. *c.* 11. where the ſingle value or damages found by the Jury ſhall not exceed the Sum of twenty Nobles, the Plaintiff obtaining Judgment after Plea pleaded, or Demurrer, ſhall recover his Coſts of Suit; and if the Plaintiff ſhall become *non-ſuit*, or ſuffer a Diſcontinuance, or a Verdict ſhall paſs againſt him, the Defendant ſhall recover his Coſts.

CHAP. LV.

Small Tithes and other Church-Duties how to be recovered. Suggeſtions to obtain Prohibitions, how made and proved. Modus Decimandi *if Suable for in the Spiritual Court.*

THo' the two firſt Clauſes of the Stat. 2 & 3 *Ed.* 6. *cap.* 13. mentioned in the laſt Chapter, do give remedy only for Predial Tithes, and the latter of them only in the Spiritual Court, yet the ſaid Statute gives Aid to the Eccleſiaſtical Courts alſo, in the recovering of all other Church Duties, *viz.* by the other Clauſe of the ſaid Statute recited alſo in the foregoing Chapter, which Clauſe was but an affirmance of the Ancient Eccleſiaſtical Law, and makes no Addition thereto in any reſpect, and was Enacted, to the end, that the Temporal Judges who are the Interpreters and Judges of all Acts of Parliament, tho' they only concern things meerly Spiritual or Eccleſiaſtical, may not by the occaſion of this, or any other Statute made before it, either draw to their Courts the Cognizance of Cauſes relating to Church Duties, or take occaſion from thence by Prohibitions, to ſtop proceedings for them in Eccleſiaſtical Courts; there is alſo another Clauſe in the ſaid Statute, 2 & 3 *Ed.* 6. by which it is Enacted. **That if any party at any time hereafter, for any matter or cauſe before rehearſed, limited or appointed by this Act, to be ſued or determined in the King's Eccleſiaſtical Court, or before the Eccleſiaſtical Judge, do ſue for any Prohibition in any of the King's Courts where Prohibitions before this time have been uſed to be granted, that then in every ſuch caſe the ſame party, before any Prohibition ſhall be granted to him or them, ſhall bring and deliver to the hands of ſome of the Juſtices, or Judges of the ſame Court where ſuch party demanded Prohibition,**

tion, the very true Copy of the Libel depending in the Eccleſiaſtical Court, concerning the matter whereof the party demandeth Prohibition, ſubſcribed or marked with the hand of the ſame party; and under the Copy of the ſaid Libel ſhall be written the Suggeſtion wherefore the party ſo demandeth the ſaid Prohibition: and in caſe the ſaid Suggeſtion by two honeſt and ſufficient Witneſſes at the leaſt, be not proved true in the Court where the ſaid Prohibition ſhall be granted, within ſix months next following after the ſaid Prohibition ſhall be ſo granted and awarded, that then the party that is letted or hindred of his or their Suit in the Eccleſiaſtical Court by ſuch Prohibition, ſhall upon his or their requeſt and ſuit, without delay, have a Conſultation granted in the ſame caſe in the Court where the ſaid Prohibition was granted, and ſhall alſo recover double coſts and damages againſt the party that ſo purſued the ſaid Prohibition, the ſaid coſts and damages to be aſſigned or aſſeſſed by the Court where the ſaid conſultation ſhall be ſo granted; for which coſts and damages, the party to whom they ſhall be awarded, may have an Action of Debt by Bill, Plaint or Information in any of the King's Courts of Record, wherein the Defendant ſhall not wage his or their Law, nor have any Eſſoin or Protection allowed or admitted. Stat. 2 & 3 Ed. 6. cap. 13.

This Clauſe was Enacted, to prevent needleſs delays by Prohibitions in Suits commenced for Tithes, *&c.* in the Eccleſiaſtical Courts; and to this end, this Clauſe firſt appoints, that a Prohibition ſhall not be granted before the party ſuing for it ſhall deliver a true Copy of the Libel, and under it, the Suggeſtion written wherefore the Prohibition is demanded, that if it ſhall appear to the Judges, that no Prohibition lies upon the Suggeſtion, or if there be variance betwixt the Libel and Suggeſtion, no Prohibition ſhould be granted; for that in Caſe of variance no Prohibition lies, and therefore tho' it be granted, a Conſultation is of courſe to be awarded, that is, if the variance be a material variance; therefore when upon a Prohibition the Suggeſtion was, that the Lands were Lands diſcharged of Tithes in the hands of a Prior, and ſo ought to be diſcharged by the Statute 31 *H.* 8. and that the Parſon Sued him for Forty Fleeces of Wool, the Parſon pleaded thereto, that he Sued him for Four Hundred Fleeces, and pray'd a Conſultation, and had it: But upon a Writ of Error it was held, that ſuch variance was not material in this Caſe, becauſe the Plaintiff preſcribes in *non Decimando*, and ſo wholly outed the Eccleſiaſtical Court of all manner of Juriſdiction, for any Tithes of that Land, becauſe it is diſcharged of it ſelf without paying any thing as a *Modus*; but if the Suggeſtion had been upon a *Modus Decimandi* it had been otherwiſe, for in ſuch Caſe, the Cauſe of Tithes Originally belongs to the Spiritual Court, was it not for the *Modus*, and therefore the Suggeſtion of a *Modus Decimandi* ought to agree with the Libel, becauſe a Suggeſtion is ever grounded on the Libel, and the cauſe is to be ſtay'd by Prohibition upon one cauſe certain, wherefore to prevent ſuch variance (as was ſaid) 'twas Enacted by this Clauſe, that the Copy of the Libel with the Suggeſtion ſhould be delivered to the Judge granting the Prohibition, yet if notwithſtanding ſuch proviſion, a variance be afterwards found, tho' in that Caſe a Prohibition is to be granted, yet no double Coſts and Damages are to be Aſſeſſed by force of this Clauſe, for that by the expreſs words thereof they are to be given only upon default of not proving the Suggeſtion, *Mich.* 3 *Jac. B. R. Hutton* v. *Barnes*, *Yelverton* 79.

Note further, that he that demands a Prohibition, is obliged to bring the Copy of the Libel with his Suggeſtion underwritten, when the Suit in the Eccleſiaſtical Court is (as the words of the Statute are) **for any matter or cauſe before rehearſed, limited and appointed by this Act to be ſued or determined in**

in the King's Eccleſiaſtical Courts. Now by the ſecond Clauſe of this Statute, perſons may be Sued in the Eccleſiaſtical Court for carrying away their Corn, Hay or other Predial Tithes before the Tithes thereof be ſet forth, or for withdrawing ſuch their Tithes, or for hindring them to be carried away. And by the former of the two Clauſes laſt before mentioned, Suit may be in the Eccleſiaſtical Court, as the words thereof are. **If any perſon do ſubſtract or withdraw any manner of Tithe, profits, commodities, or other duties before mentioned, or any part of them contrary to the true meaning of this Act, or any other Act heretofore made.** And this Act doth not only mention and provide for the payment of Predial and Perſonal Tithes, and offerings by ſeveral clauſes therein, which ſee in *Cap.* 54. but alſo the firſt Clauſe thereof doth mention thoſe other Acts in this Caſe ſaid to be heretofore made, *viz.* 27 *H.* 8. *cap.* 20. which extends not only to Tithes and Offerings, but alſo to all other duties of holy Church; and 32 *H.* 8. *cap.* 7. which extends to Tithes and Offerings generally, and ſo to all things under that term comprehended, and doth alſo confirm the ſaid Statutes expreſly, and makes them to be as a part thereof, ſo that all Tithes and Church Duties which are all mentioned therein, are as particularly mentioned in this Act, and by conſequence, when any Suit is brought in Court Chriſtian for any ſort of Tithes, or any other Church Duties, the Defendant in the ſaid Court, before he may have a Prohibition, is bound by the ſecond Clauſe mentioned in this Chapter, to bring to the Temporal Judge the Copy of the Libel againſt him, *&c.* and under the ſame his Suggeſtion written.

And from hence further Note, That by the words of the Statute it ſeems, that in all Caſes in which a Defendant in the Spiritual Court is bound before he may have a Prohibition to deliver the Copy of the Libel, *&c.* with the Suggeſtion under written; he is bound alſo to prove his Suggeſtion in ſix Months, to avoid the granting of a Conſultation with double Coſts and Damages For after this Clauſe hath ſaid, **That under the Copy of the ſaid Libel ſhall be written the Suggeſtion, wherefore the party demandeth the ſaid Prohibition**; the next words are, **And in caſe the ſaid Suggeſtion be not proved to be true within ſix Months, &c.** viz. that ſame Suggeſtion that was in the foregoing words appointed to be written under the Copy of the Libel; and therefore it ſeems to be plain that the Statute intended, whatever the matter of the Suggeſtion be, double Coſts and Damages are to be given in all Caſes, if the ſame be not ſo proved, when the party as aforeſaid, before a Prohibition granted is bound to bring to the Judge the Libel againſt him, and therewith his Suggeſtion under written. And accordingly it hath been held, that this Clauſe requiring the proof of a Suggeſtion is general; therefore when one that was ſued for Tithe of Hay in the Spiritual Court, upon a Suggeſtion, that he was to pay upon an Arbitriment ſo much, *&c.* it was held, that this Suggeſtion ought to be proved, as well as one made of a *Modus Decimandi.* And ſo a Suggeſtion upon Statute 31 *H.* 8. that Lands are Tith-free, becauſe this clauſe requiring the proof of a Suggeſtion, is general, and not limited to real Compoſitions, *&c. Trin.* 12. *Jac. B. R. Reynolds and Haye's Caſe, Rolls* 1 *Rep.* 55. So if a perſon hath a Prohibition upon a Suggeſtion that he ought not to pay Tithes for ſeven years, for that the Lands were barren, he muſt prove his Suggeſtion, *Hill.* 6 *Car. B. R. Stroude* v. *Hoskins, Jones* 231. Yet 'tis ſaid that a Suggeſtion of an Agreement with the Parſon to pay a Rate for his Tithes ſued for in the Spiritual Court, is not of neceſſity to be proved in ſix Months, *viz.* to avoid for that cauſe a Conſultation, Coſts, and Damages, and that ſuch proof goes to Suggeſtions only of a *Modus Decimandi*, and not of a Leaſe or Contract, and that ſo is the practice in *B. P. Mich.* 5. *Jac. B. R. Yelverton* 104. *Trin.* 5. *Car.*

C. B. Johnſon's Caſe, Hetley 145 *Dubitat.* 12. *Jac.* B. *R. Reynolds and Haye's Caſe, Rolls* 1 *Rep.* 55 *Trin.* 30 *Eliz. B. R. Woodward and Bugg's Caſe,* 2 *Leonard* 29. *See Hill.* 5 *Jac. Cob.* v. *Hunt. Brownlow and Gouldsborough* 99. *Mich.* 18 *Car.* 2. B. *R. Eaton* v. *Naylor,* 2 *Keble* 134. And though it be granted on all hands, that when a Suggeſtion is of a *Modus Decimandi*, it ought to be proved in ſix Months, as was adjudged in Parſon *Bugg's* Caſe, *Mich.* 11 *Jac. C. B. and Hill.* 11 *Jac. C. B. Gippies Caſe, Godbolt, Paſch.* 2 *Jac. C. B. Sharpe* v. *Sharpe, Noy* 148. *Mich.* 5 *Jac. B. R. Cox.* v. *Seymour Yelverton* 104. yet when a Prohibition was had upon a Suggeſtion of a *Modus Decimandi* for part, and of a contract executed for the reſt of the Tithes ſued for, it was held by the Court, that becauſe the Prohibition is not grounded ſolely upon the *Modus Decimandi* which needs ſuch proof, but alſo upon the contract between the Parties, which as is ſaid, needs no ſuch proof; and the Suggeſtion being entire, and part of it needing no proof, they could not give Coſts, for that is only to be done where the whole matter in the Suggeſtion needs proof, therefore the mixing the Contract with the manner of Tithing, Priviledges the whole, as to the matter of Coſts; but they might grant a Conſultation as to that part of the Suggeſtion which concerns the manner of Tithing, but not for the reſt, *Hill.* 5 *Jac. Cob.* v. *Hunt, Brownlow and Gouldsborough* 99. *ſame Caſe, Yelverton* 119. And when a Prohibition was granted in a Caſe where no Prohibition did lye, and the ſix Months being lapſed without proof of the Suggeſtion, the Court ſaid, they would adviſe as to giving of double Coſts according to the Statute, becauſe *Coke* thought, that if a Conſultation be granted for not proving the Suggeſtion in ſix Months, that then Coſts ſhall be given; but if it be granted for that no Prohibition did lie of the matter, that there, no Coſts ſhall be given, and the Court did adviſe as to the Coſts (and yet the miſchief that is provided againſt by the Statute ſeems to be the ſame in both Caſes) *Trin.* 12. *Jac. B. R. Reynolds* v. *Hayes, Rolls* 1 *Rep.* 55. but a Prohibition being obtained upon a Suggeſtion, which was not proved within the ſix Months, and the Defendant in the Prohibition took Iſſue with the Plaintiff, which was found againſt the Defendant, it was reſolved by the Court, that the Defendant ſhould not have Coſts for want of the Suggeſtion being proved; for the Statute is, That he ſhall have a Conſultation and double Coſts, but in this Caſe he could not have a Conſultation, the matter and iſſue being found againſt him, but ought to have prayed a Conſultation upon the Suggeſtion not being proved, and then ſhould have had his double Coſts, *Watkinſon* v. *Sir G. Pacy, Latch.* 140.

Note alſo, that it is ſaid that the Suggeſtion muſt be proved to be true; yet it hath been adjudged, that the Suggeſtion needs not to be proved true ſtrictly, and in every part of it to avoid a Conſultation with Coſts and Damages; for when a Suggeſtion upon a Prohibition was, that the Defendant and all his Predeceſſors have had 20 Acres of Paſture, and another Cloſe containing 20 Acres of Wood in ſatisfaction of Tithes, and the Witneſſes proved that he had the 20 Acres of Paſture but not of Wood, it was adjudged, that if it appears that the Court Chriſtian ought not to hold Plea thereof, it ſufficeth; and therefore, if there be a Preſcription, that the Parſon holds an hundred Acres of Land in ſatisfaction of Tithes, and the proof be that he holds only ſixty Acres in ſatisfaction of them, it is well enough; becauſe the ſubſtance of the Suggeſtion is proved, that he holds Land in Satisfaction of Tithes, *&c.* wherefore it was agreed in this Caſe, that the Plaintiff ſhould declare, and that the Defendant ſhould plead to iſſue, *Hill.* 42 *Eliz. B. R. Auſten* v. *Piggot,* 3 *Croke* 736. *ſame Caſe, Moor* 911. So if a *Modus* be alledged to be, that one ſhall pay 20 Shillings in ſatisfaction for Tithes, and the proof be, that the *Modus* is, that he

ſhall

ſhall pay 40 Shillings, it is a good proof, becauſe thereby the Court is entitled to the Juriſdiction, *Trin.* 4 *Car. C. B. Goddard and Tiler's Caſe*, *Hetley* 100. and when a Suggeſtion was of a *Modus* to pay 2 *s.* 6 *d.* for Tithes, and the Witneſſes prov'd the *Modus* to be to pay 3 *s.* the proof was held good, by *Fenner and Yelverton* againſt *Popham*, becauſe it ouſted the Eccleſiaſtical Court of the Juriſdiction, *Paſch.* 43 *Eliz.* B. *R. Web.* v. *Pets*, *Noy* 44. *and Trin.* 4 *Car. C. B. Norton's Caſe*, *Hetley* 110. And when a Suggeſtion was, that for time whereof, *&c.* 2 *d.* had been paid for the Tithes of Wool and Lambs, and the Witneſſes proved nothing as to the Wool, but that 2 *d.* had been paid only for the Tithes of the Lambs, a Conſultation being prayed, the Court ſaid, that there was a difference between a Suggeſtion to have a Prohibition upon a Preſcription comprized in it, and a Preſcription made in defence or by way of Plea in an Original Action; for in the laſt Caſe, if a joint Preſcription be made for two things, and it fail in one, the whole is deſtroyed, becauſe it is by way of Title; but otherwiſe in this Caſe it is, becauſe this Prohibition is but to give Juriſdiction to the King's Court, and here becauſe the Preſcription is proved, though but in part, *viz.* as to the Lambs, there ſhall be no Conſultation, *Mich.* 2 *Jac. B. R. Anonymus*, *Yelverton*, p. 55. So a Prohibition being prayed on Suggeſtion of a *Modus* to pay 3 *s.* for every Calf, which on proof appeared to be for Cow and Calf, yet a Prohibition was granted, *Mich.* 20 *Car.* 2 *Mathew's Caſe*, 2 *Keble* 407. Yet where the Suggeſtion was, that the Occupiers of ſuch a Farm paid 20 Shillings yearly in diſcharge of Tithes of that and another Farm, and the proof was, that the Tenants of thoſe Farms paid 40 Shillings in lieu of Tithes of one Farm only, the Court would have granted a Conſultation upon this variance, but that the parties agreed to amend the Suggeſtion and make the *Modus* 40 Shillings, *Trin.* 18 *Car.* 2. *B. R. Luſh* v. *Web*, 2 *Keble* 57. and if the Witneſſes make ſuch proof, which doth neither prove the *Modus* laid, nor any other *Modus* for the Tithes in queſtion, the Suggeſtion by producing of the Witneſſes is not ſaid to be proved; therefore when the Tithes of Milk and Calves were ſued for in the Spiritual Court, and a Probibition was had upon a Surmiſe, that every Inhabitant ſhould pay 4 *d.* for every Cow, and 2 *d.* for every Calf, and the Witneſſes proved that Tithes had not there been paid in Specie, but that every Inhabitant ſhould pay 6 *d.* and ſome 7 *d.* &c. it was agreed, that no *Modus* was proved, for that it is meer incertainty, and ſo Conſultation, *&c.* was Awarded, *Trin.* 4 *Car. C. B. Goddard and Tiler's Caſe*, *Hetley* 100.

Note alſo, that by this Clauſe the Witneſſes muſt be honeſt and ſufficient; therefore when a Suggeſtion was proved by two Witneſſes that had been attainted of Felony, it was held, that the Teſtimony of ſuch Witneſſes was in all Caſes to be rejected, and the like of Excommunicated Perſons, and Recuſants Convict, which are ſuch by Statute, 3 *Jac. c.* 5. and a Conſultation was granted, *Mich.* 11 *Jac. B. R.* Brown v. *Craſhaw*, *Bulſtrode* 2 *p.* 154. But if the Witneſſes be honeſt and ſufficient, and they affirm before one of the Judges, that they have known the contents of the ſurmiſe to be true, or that the common Fame is ſo, or that they have heard that it was ſo, this proof is good enough, *Mich.* 15 *Jac. C. B. Noy* 28. *Paſch.* 43. *Eliz. B. R. Web.* v. *Petts*, *Noy* 44. *Paſch.* 33 *Eliz. Stranſham* v. *Cullington*, 3 *Croke* 228. for ſlight proof will ſerve, *viz.* (as he thinketh, or believeth it to be ſo) *Trin.* 4. *Car. Sir Nicholas Stiddar* v. *Tilar*, *Littleton Rep.* 155. Or if one ſurmiſe that the Inhabitants of B. (of which he is one) have paid a *Modus Decimandi*, and the proof be, that he himſelf had paid it, this is ſufficient, becauſe it ouſts the Eccleſiaſtical Court of their Conuſance, *Mich.* 15 *Jac. C. B. Noy* 28.

Note further, that the Suggeſtion by the ſaid Clauſe is to be proved within ſix Months next following after the Prohibition ſhall be granted; yet the Judges are ſaid to have held, that the time of ſix Months given by this Statute for the proving of a Suggeſtion, ought to be intended ſix Months in Term-time, and that the Vacation ſhall not be part of the time, *Mich.* 41 & 42 *Eliz. B. R. Moor* 573. Alſo the ſix Months ſhall be accounted by the Kalendar, and not by 28 days to the Month, *Mich.* 4 *Jac. Copley* v. *Collins*, *Hob.* 179. And yet this Statute was made to prevent delaies: And 'tis ſaid that if proof be made in time of Vacation, it is well enough, *Paſch.* 43 *Eliz. B. R. Pottinger and Johnſon's Caſe quoted in Skinner's Caſe*, *Hill.* 15 *Jac. C. B. Noy* 30. and if the ſurmiſe be proved before one of the Judges within the ſix Months, although that it be not Recorded till after the ſix Months by the Court, it is well enough, *Hill.* 15 *Jac. C. B. Skinner's Caſe*, *Noy* 30. and proof which is not ſufficient, may be ſupplied, by better proof within the ſix Months, but not after the ſix Months, *Trin.* 4 *Car. Sir Nicholas Steddar* v. *Tylar*, *Litton Rep.* 155.

If the Suggeſtion be not proved within ſix Months according to the Statute, the party, as hath been ſaid, ſhall have double Coſts and Damages, and may maintain an Action of Debt for the recovery of them, and in that Action he ſhall alſo recover his Coſts and Damages, *Hill.* 22 *Jac. Cockram* v. *Davy*, *Bendloes*, 143.

Note alſo, That if a Conſultation hath been Awarded, for that the Suggeſtion of a *Modus* was not proved in ſix Months, yet a Prohibition may be granted upon a Suggeſtion of the ſame *Modus* for the ſame Land, if the Tithes before in queſtion, *viz.* of the ſame Land ariſing in another year be ſued for in the Spiritual Court, and ſo every year after, though ſeveral Conſultations have been granted upon ſuch Prohibitions for that the Suggeſtions were not proved in ſix Months; and not upon the right, or tryal of the Cuſtom, for the Statute of 50 *Ed.* 3. *cap.* 4. goes to the Suggeſtion made upon the ſame Libel, and to a Conſultation duly granted, and not to the Caſe of not having Witneſſes ready to prove the Suggeſtion through negligence, *Mich.* 5 *Jac. B. R.* And accordingly hath it been agreed, that where a Conſultation is granted for not proving the Suggeſtion in ſix Months, the party may have a new Prohibition upon the ſame Libel; for that the Statute 50 *Ed.* 3. doth not extend to a Conſultation upon not proving the Suggeſtion in ſix Months, but only where the Conſultation is granted upon the matter and ſubſtance of the Suggeſtion, *Hill.* 6 *Car. B. R. Stroud* v. *Hoskins*, *Jones* 231. 1 *Croke* 208. *See Trin.* 9 *Jac. Dorwood* v. *Brickinden*, 2 *Brownlow* 26. and the ſame Book 247. But in *Bowry and Wallington's Caſe*, *Latch.* 7. 'tis ſaid by the Court, that they will be ſparing in granting Prohibitions in ſuch Caſes; but if upon the tryal of a Suggeſtion the Plaintiff be Nonſuit, no new Prohibition ſhall be granted, although that the Nonſuit was occaſioned for want of ſome of the Plaintiffs Witneſſes, who were to prove the truth of the Suggeſtion, and who were neceſſarily obliged to be abſent, *Paſch.* 14 *Car.* 2 *Tradeham* v. ----- 1 *Keble* 286. if the Defendant in a Prohibition die, his Executors may proceed in the Spiritual Court, and the Judges of the Court out of which the Prohibition was granted will alſo in ſuch caſe make a rule to the Spiritual Court to proceed; but the Plaintiff may if he pleaſe have a new Prohibition againſt the Executors, *Trin.* 4 *Car. B. R. Walſingham* v. *Stone*, *Littleton Rep.* 155.

The Statute 50 Ed. 3. cap. 4. doth Enact, **That whereas a Conſultation is once duly granted upon a Prohibition made to the Judge of Holy Church, that the ſame Judge may proceed in the cauſe by vertue of the ſame Conſultation, notwithſtanding any other Prohibition thereupon to him delivered, provided always that the matter in the Libel of the ſaid cauſe be not ingroſſed, enlarged**

ed or otherwiſe changed. Now whereas this Statute according to the printed Statutes (ſays the ſame Judge) that is different from the Parliament Roll which is *liceatque Judici Eccleſiæ*, *Latch.* 6. 76. and therefore where a Parſon libelled in the Spiritual Court for Tithes and a Prohibition granted, and after a Conſultation was Awarded, and Sentence given in the Spiritual Court for the Parſon, upon which the Defendant there appealed to the Court of the Arches, and then moved for a new Prohibition, which was granted, but afterwards a Conſultation being moved for, it was agreed by the Court, that where a Conſultation is Awarded, no new Prohibition ſhall be granted upon the ſame Libel; but if there be an Appeal, a Prohibition may be granted, but with theſe differences, 1. If he that Appeals prays the Prohibition, he ſhall not have it, for then Suits ſhall be deferred in *infinitum* in the Eccleſiaſtical Courts, 2. If the Prohibition and Conſultation were upon the ſubſtance of the matter, elſe one ſhall be put to try the ſame point many times, which would be full of vexation, *Paſch.* 1 *Car. B. R. Bowry* v. *Wallington*, *Popham* 159. *ſame Caſe*, *Latch* 6. 76. *Bendlows* 148, 150. *Paſch.* 14 *Jac. Moor* 917. *ſame Caſe* 3 *Bulſtrode* 182.

But if when the ſix Months are lapſed, the Defendant in the Prohibition will not pray a Conſultation and coſts and damages at that time, but will take Iſſue with the Plaintiff, and thereupon it ſhall be found againſt him, he ſhall never have his double Coſts and Damages, becauſe he cannot have a Conſultation, for that the matter is paſſed againſt him, *Watkinſon* v. *Sir Geo. Pacy*, *Latch* 140 *Hill.* 22 *Jac. B. R. Watkinſon* v. *Perry*, *Noy* 81. but it ſeems he may in ſuch Caſe have his Coſts and Damages if it go for him, for that then he is to have a Conſultation; and therefore 'tis beſt for every Defendant in a Prohibition, (when the Suggeſtion is not prov'd in ſix Months) to get his Conſultation with Coſts and Damages, and not to plead to the matter of the Suggeſtion.

Note, that the party that has the Conſultation upon this clauſe, is to have double Coſts and Damages to be Aſſeſſed by the Court, and the uſe is, to ſet Coſts and Damages ſingly, and then by the Statute they ſhall be doubled. And though it be ſaid, that the Coſts and Damages ſhall be Aſſigned or Aſſeſſed by the Court, for which the party ſhall have his Action of debt by Bill, *&c.* in any of the King's Courts of Record, *&c.* without more, yet the caſe was, that upon not proving of a Suggeſtion, Coſts were Aſſeſſed by the Court at Fifty Shillings, and Damages at Fifty Shillings, to be doubled, and no formal Judgment was given to recover them, becauſe theſe words *Ideo conſideratum fuit quod recuperet*, &c. were omitted, and the Parſon who ſo recovered the Coſts and Damages brought his Action of Debt for them, and declared upon all the matter above, and that Damages were Aſſeſſed, *&c.* and that the Coſts were not paid, *per quod actio*, &c. and adjudged, that he ſhould recover, and had a Judgment in this Action of Debt by *non jum informatus*, whereupon a Writ of Error being brought as well upon the Record and Proceſs, *&c.* of the Prohibition, as of the Record and Proceſs in the Action of Debt for the Coſts, this Error in ſpecial was Aſſigned, that there was no Judgment in the Prohibition for the recovery of the Coſts, but only an Aſſeſſment of the Coſts without any more, which is but matter of Office, but no Judgment in Court to bind, which was confeſſed by the whole Court, and the Judgment was reverſed, *Hill.* 5 *Jac. C. B. Cob.* v. *Hunt*, *Brownlow and Gouldsborough*, 1 *part* 99.

Though by the former of the two Branches of this Statute laſt before mentioned, it be generally provided, that all Church Duties ſhall be recovered in the Eccleſiaſtical Court, yet it is before ſpecially as to perſonal Tithes Enacted thus: **And be it alſo enacted by the authority aforeſaid, That if any perſon refuſe to pay his perſonal Tithes in form aforeſaid, that then it ſhall be lawful to the**

the Ordinary of the same Dioces where the party that so ought to pay the said Tithes is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other then by the parties own corporal Oath, concerning the true payment of the said personal Tithes, Stat. 2 & 3 Ed. 6. cap. 13. This Clause hath relation to a Clause foregoing it, which see in *Chap.* 54.

It hath also been enacted, For the more easie and effectual Recovery of small Tithes, and the value of them, where the same shall be unduly subtracted and detained, where the same do not amount to above the yearly value of forty shillings from any one person; Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, that all and every person and persons shall hencefoth well and truly set out and pay all and singular the Tithes, commonly called small Tithes, and compositions and agreements for thesame, with all Offerings, Oblations and Obventions to the several Rectors, Vicars and other persons to whom they are or shall be due in their several Parishes within this Kingdom of England, and Dominion of Wales, and Town of Berwick upon Tweed, according to the Rights, Customs and Prescriptions commonly used within the said Parishes respectively. And if any person or persons shall hereafter subtract or withdraw, or any ways fail in the true payment of such small Tithes, Offerings, Oblations, Obventions or Compositions as aforesaid, by the space of twenty days at most after demand thereof, then it shall and may be lawful for the person or persons, to whom the same shall be due, to make his or their complaint in writing unto two or more of his Majesty's Justices of the Peace within that County, Riding, City, Town Corporate, Place or Division where the same shall grow due (neither of which Justices of Peace is to be Patron of the Church or Chapel whence the said Tithes do or shall arise, nor any ways interessed in such Tithes, Offerings, Oblations, Obventions or Compositions aforesaid.)

And be it farther enacted by the authority aforesaid, that if hereafter any Suit or Complaint shall be brought to two or more Justices of the Peace, as aforesaid concerning small Tithes, Offerings, Oblations, Obventions or Compositions as aforesaid, the said Justices are hereby authorized and required to summon in writing, under their hands and seals by reasonable warning, every such person or persons against whom any Complaint shall be made, as aforesaid; and after his or their appearance, or upon default of their appearance, the said warning or summons being proved before them upon Oath, the said Justices of Peace, or any two or more of them shall proceed to hear and determine the said complaint, and upon the proofs, evidences and testimonies produced before them, shall in writing under their hands and seals adjudge the case and give such reasonable allowance and compensation for such Tithes, Oblations and Compositions so subtracted or withheld, as they shall judge to be just and reasonable, and also such costs and charges not exceeding ten shillings, as upon the merits of the cause shall appear just.

And be it farther enacted, That if any person or persons shall refuse or neglect by the space of ten days after notice given, to pay or satisfie any such sum of Mony, as upon such complaint and proceeding, shall by two or more Justices of the Peace be adjudged as aforesaid, in every such case the Constables and Churchwardens of the said Parish, or one of them, shall by warrant under the hands and seals of the said Justices to them directed, distrain the Goods and Chattels of the party so refusing or neglecting as aforesaid, and after detaining them by the space of three days, in case the said Sum so adjudged

judged to be paid, together with reasonable Charges for making and detaining the said Distresses, be not tendred or paid by the said party in the mean time, shall and may make publick sale of the same, and pay to the party complaining so much of the Mony arising by such sale, as may satisfie the said Sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress, as the said Justice shall think fit, and shall render the Overplus (if any be) to the Owner.

Provided always and be it Enacted, That it shall and may be lawful for all Justices of Peace in the examination of all matters offered to them by this Act, to administer an Oath or Oaths to any witness or witnesses, where the same shall be necessary for their Information, and for the better discovery of the truth.

Provided also and be Enacted, That this Act, or any thing herein contained shall not extend to any Tithes, Oblations, Payments or Obventions within the City of London or Liberties thereof, nor to any other City or Town Corporate where the same are settled by any Act of Parliament, in that case particularly made and provided.

Provided always, and be it enacted, That no complaint for, or concerning any small Tithes, Offerings, Oblations, Obventions or Compositions hereafter due, shall be heard and determined by any Justices of the Peace by virtue of this Act, unless the complaint shall be made within the space of two years next after the times that the same Tithes, Oblations, Obventions and Compositions did become due or payable, any thing in this Act contained to the contrary notwithstanding.

Provided also and be it enacted, That any person finding him, her, or themselves agrieved by any Judgment to be given by any two Justices of the Peace, shall and may appeal to the next General Quarter Sessions to be held for that County, Riding, City, Town-Corporate or Division, and the Justices of the Peace there present, or the major part of them shall proceed, finally to hear and determine the matter, and to reverse the said Judgment, if they shall see cause; and if the Justices then present, or the major part of them shall find cause to confirm the Judgment given by the first two Justices of the Peace, they shall then decree the same by Order of Sessions, and shall also proceed to give such costs against the Appellant, to be levied by Distress and Sale of the Goods and Chattels of the said Appellant, as to them shall seem just and reasonable; and no Proceedings or Judgment had, or to be had by virtue of this Act, shall be removed or superseded by virtue of any Writ of Certiorari, or other Writ out of his Majesty's Courts at Westminster, or any other Court whatsoever, unless the title of such Tithes, Oblations or Obventions shall be in question, any Law, Statute, Custom or Usage to the contrary notwithstanding.

Provided always and be it Enacted, That where any person or persons complained of for subtracting or with holding any small Tithes, or other Duties aforesaid, shall before the Justices of the Peace to whom such Complaint is made, insist upon any Prescription, Composition, or Modus decimandi, Agreement or Title whereby he or she is or ought to be freed from payment of the said Tithes, or other dues in question, and deliver the same in writing to the said Justices of the Peace, subscribed by him or her, and shall then give to the party complaining reasonable and sufficient Security to the satisfaction of the said Justices, to pay all such costs and damages, as upon a Tryal at Law to be had for that purpose, in any of his Majesty's Courts, having Cognizance of that matter, shall be given against him, her or them, in case the said Prescription, Composition or Modus decimandi, shall not upon the said

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tryal be allowed, that in that case the said Justices of the Peace, shall forbear to give any Judgment in the matter; and that then and in such case the person or persons so complaining, shall and may be at liberty to prosecute such person or persons for their said Substraction in any other Court or Courts whatsoever, where he, she or they might have sued before the making of this Act, any thing in this Act to the contrary notwithstanding.

And be it further enacted by the authority aforesaid, that every person and persons, who shall by vertue of this Act obtain any Judgment, or against whom any Judgment shall be obtained before any Justices of the Peace out of Sessions, for small Tithes, Oblations, Obventions or Compositions shall cause or procure the said Judgment to be inrolled at the next General Quarter Session, to be holden for the said County, City, Riding or Division; and the Clerk of the Peace for the said County, City, Riding or Division is hereby required upon tender thereof, to enrol the same; and that he shall not ask or receive for the Inrolment of any one Judgment, any Fee or Reward exceding one shilling; and that the Judgment so enrolled, and satisfaction made by paying the same sum so adjudged, shall be a good bar to conclude the said Rectors, Vicars, and other persons, from any other remedy for the said small Tithes, Oblations, Obventions or Compositions, for which the said Judgment was obtained.

And be it further enacted by the authority aforesaid, that if any person or persons against whom any such Judgment or Judgments shall be had, as aforesaid, shall remove out of the County, Riding, City or Corporation after Judgment had as aforesaid, and before the levying the Sum or Sums thereby adjudged to be levied, the Justices of the Peace who made the said Judgment, or one of them, shall certifie the same under his or their hands and seals to any Justice of Peace of such other County, City or Place wherein the said person or persons shall be Inhabitants; which said Justice is hereby authorized and required by Warrant under his hand and seal, to be directed to the Constables or Churchwardens of the place, or one of them, to levy the Sum or Sums so adjudged to be levied as aforesaid, upon the Goods and Chattels of such person or persons, as fully as the said other Justices might have done, if he, she or they had not removed, as aforesaid, which shall be paid according to the said Judgment.

Provided always and be it enacted, that no Vicar or other person shall have remedy to recover small Tithes, or other Dues aforesaid, which became or were due before the making of this Act, unless complaint be made to the Justices of the Peace in form aforesaid, before the first day of October, which shall be in the year of our Lord, 1696.

And it is hereby declared and enacted, that the said Justices of the Peace who shall hear and determine any of the matters aforesaid, shall have power to give Costs, not exceeding ten shillings, to the party prosecuted, if they shall find the complaint to be false and vexatious; which Costs shall be levied in manner and form aforesaid.

Provided also and be it further enacted, that if any person or persons shall be sued for any thing done in execution of this Act, and the Plaintiff in such Suit shall discontinue his Action or be Nonsuit, or a Verdict pass against him, that then in any of the said Cases, such person or persons shall recover double Costs.

Provided always, that any Clerk, or other person or persons, who shall begin any Suit for Recovery of small Tithes, Oblations or Obventions, not exceeding the value of forty shillings, in his Majesty's Court of Exchequer, or in any the Ecclesiastical Courts, shall have no benefit by this Act, or any Clause in it for the same matter for which he or they have so sued.

Provided

Provided always and be is farther enacted, that this Act shall continue for the space of three years, and from thence to the end of the next Session of Parliament and no longer. Stat. 7 & 8 W. 3. cap. 6.

And by the Statute of 10 & 11 *W.* 3. It is Enacted, Whereas an Act made in the seventh and eighth years of his present Majesty's Reign, Intituled, An Act for the more easie Recovery of small Tithes, has been by experience found very useful and necessary. And whereas the said Act was to continue but three years, and to the end of the next Session of Parliament, and is now near expiring; be it therefore enacted by the King's most excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled and by the authority of the same, that the said recited Act with all the Clauses and Powers contained, shall continue and be in force for the space of seven years from and after the Expiration thereof, as aforesaid, and from thence to the end of the next Session of Parliament and no longer. Stat. 10 & 11 W. 3. cap. 15.

It hath also been Enacted concerning divers Dissenters commonly called *Quakers*, That whereas by reason of a pretended scruple of Conscience Quakers do refuse to pay Tithes and Church-Rates, Be it enacted by the authority aforesaid, that where any Quaker shall refuse to pay or compound for his great or small Tithes, or to pay any Church Rates, it shall and may be lawful to and for the two next Justices of Peace of the same County (other than such Justice of the Peace as is Patron of the Church or Chapel, whence the said Tithes do or shall arise, or any ways interessed in the said Tithes) upon the complaint of any Parson, Vicar, Farmer or Proprietor of Tithes, Churchwarden or Churchwardens who ought to have, receive or collect the same by Warrant under their hands and seals to convene before them such Quaker or Quakers neglecting or refusing to pay or compound for the same, and to examine upon Oath, which Oath the said Justices are hereby impowred to administer, or in such manner as by this Act is provided, the Truth and Justice of the said complaint, and to ascertain and state what is due and payable by such Quaker or Quakers to the party or parties complaining, and by Order under their hands and seals to direct and appoint the payment thereof, so as the sum ordered, as aforesaid, do not exceed ten pounds; and upon refusal by such Quaker or Quakers to pay according to such Order, it shall and may be lawful, to and for any one of the said Justices, by Warrant under his hand and seal to levy the Mony thereby ordered to be paid, by distress and sale of the Goods of such Offender, his Executors or Administrators, rendring only the Overplus to him, her or them, necessary charges of distraining being thereout first deducted and allowed by the said Justice; and any person finding him, her or themselves agrieved by any Judgment given by such two Justices of the Peace shall and may appeal to the next general Quarter Sessions to be held for the County, Riding, City, Liberty or Town Corporate; and the Justices of the Peace there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said Judgment, if they shall see cause; and if the Justices then present or the major part of them shall find cause to continue the Judgment given by the first two Justices of the Peace, they shall then decree the same by Order of Sessions, and shall also proceed to give such Costs against the Appellant, to be levied by distress and sale of the Goods and Chattels of the said Appellant as to them shall seem just and reasonable; and no Proceedings or Judgment had or to be had by vertue of this Act, shall be removed or superseded by any Writ of Certiorari or other Writ, out of his Majesty's Courts at Westminster, or any other Court whatsoever, unless the title of such Tithes shall be in question.

Provided always, that in case any such Appeal be made as aforesaid, no Warrant of distress shall be granted until after such Appeal be determined.

Provided that this Act shall continue in force for the space of seven years, and from thence to the end of the next Session of Parliament and no longer. Stat. 7 & 8 W. 3. cap. 34.

Note lastly, that this Statute of 2 & 3 *Ed.* 6. and the two others before mentioned made for the due payment of Tithes and other Church Duties, *viz.* of 27 *H.* 8. and of 32 *H.* 8. do not only extend to Tithes due in kind, but also to all accustomary Payments that ought to be made in lieu of Tithes or other things not in themselves tithable, as Houses, Rabits, Fish, *&c.* For by the aforesaid Statute of 27 *H.* 8. *cap.* 20. It is provided and enacted, **That every of his Subjects of this Realm of** England, Ireland, Wales **and** Caleis, **and Marches of the same, according to the Ecclesiastical Laws and Ordinances of his Church of** England, **and after the laudable usages and customs of their Parish, or other place where he dwelleth, or occupieth shall yield** and **pay his Tithes and Offerings, and other Duties of holy Church, and that for such subtractions of any of the said Tithes, Offerings or other Duties, the Parson, Vicar, Curate, or other party in that behalf grieved may by due process of the King's Ecclesiastical Laws of the Church of** England, **convent the person or persons so offending, before his Ordinary or other competent Judge of this Realm, having authority to hear and determine the right of Tithes, and also to compel the same person or persons offending, to do and yield their said duties in that behalf**; that is, as well *Modus Decimandi* by laudable Usage and Customs of the Parish as Tithes in kind. And with that in effect agrees the Statute of 32 *H.* 8. *cap.* 7. And by the Statute of 2 & 3 Ed. 6. cap. 13. it is enacted, **That every of the King's Subjects shall from henceforth truly and justly, without fraud or guile, divide, set out, yield and pay, all manner of their predial Tithes, in their proper kind, as they rise and happen in such manner and form as hath been of right yielded and paid within forty years next before the making of this Act, or of right or custom ought to have been paid.** And after there is another Branch in the said Act, **And be it further enacted, that if any person do subtract, or withdraw any manner of Tithes, Obventions, Profits, Commodities, or other Duties** before mentioned, **or any part of them, contrary to the true meaning of this Act, or of any other Act heretofore made,** (which extends to the Custom of Tithing, that is, *Modus Decimandi* mentioned before in this Act, *&c.*) **that then the party so subtracting or withdrawing the same, may or shall be convented and sued in the King's Ecclesiastical Court,** &c And this was said and agreed by *Coke* and the other Judges concerned in the Case *de Modo Decimandi* debated before King *Jac.* 1. *Trin.* 7 *Jac.* 13 *Co.* 41. So that it plainly appears, these customary Payments, may as other Tithes and Church Duties be recovered in the Ecclesiastical Court, by force of the said Statutes, and therefore that all Suits there for such Payments shall partake of the Priviledges granted by these Statutes, as if the Suit were for the Tithes in kind.

And it seems that if any person inhabiting within one Dioces doth subtract and withhold his Tithes within another Dioces, that a Suit may be commenced and prosecuted in the Court of the Bishop, *&c.* in whose Dioces the Tithes are so subtracted, and the party so subtracting his Tithes may be there cited and summoned (although inhabiting within another Dioces) to appear and answer to the said Suit, notwithstanding the Statute of 23 *H.* 8. *c.* 9. which prohibits, **That no manner of person shall be from henceforth cited or summoned, or otherwise called to appear by himself or herself, or by any procurator before any Ordinary, Archdeacon, Commissary, Official, or any other Judge**

Judge ſpiritual, out of the Dioceſs or peculiar Juriſdiction where the perſon which ſhall be cited, ſummoned, or otherwiſe (as is aforeſaid) called, ſhall be inhabiting and dwelling, at the time of awarding, or going forth of the ſame citation or ſummons, (except in Caſes mentioned in the ſame Statute:) And this by the ſaid Statute of 32 *H.*8. *cap* 7. whereby it is enacted, That in caſe it ſhall happen any perſon or perſons of his or their ungodly and perverſe will and mind, to detain and withhold any of the ſaid Tithes or Offerings, or any part or parcel thereof, then the perſon or party being Eccleſiaſtical or lay perſon, having cauſe to demand or have the ſaid Tithes or Offerings, being thereby wronged or grieved, ſhall and may convent the perſon or perſons ſo offending before the Ordinary, his Commiſſary, or other competent Miniſter or lawful Judge of the place where ſuch wrong ſhall be done, according to the eccleſiaſtical Laws: And in every ſuch caſe or matter of ſuit, the ſame Ordinary, Commiſſary, or other competent Miniſter or lawful Judge, having the parties or their lawful procurators before him or them, ſhall and may by virtue of this Act proceed to the examination, hearing and determination of every ſuch cauſe or matter ordinarily or ſummarily, according to the courſe and proceſs of the ſaid eccleſiaſtical Laws, and thereupon may give ſentence accordingly. So that this Clauſe of the Statute 32 *H.* 8. *cap.* 7. ſeems to repeal the Stat. 23 *H.* 8. *cap* 9. as to this particular Caſe: See *Rogers and Harding's Caſe*, 1 *Keble* 481.

And that a *Modus Decimandi* may be ſued for in the Spiritual Court, alſo further appears; for the Act *Circumſpecte agatis* giveth power to the Eccleſiaſtical Judge to ſue for Tithes due in kind, or by Cuſtom, (that is a *Modus Decimandi*); ſo as by authority of that Act, (altho' that the yearly Sum ſoundeth in the Temporalty which was paid by Cuſtom in diſcharge of Tithes,) yet becauſe the ſame cometh in the place of Tithes, and by Conſtitution the Tithes are chang'd into Money, and the Parſon hath no remedy for the ſame (which is the *Modus Decimandi*) at the Common Law, this Act makes the *Modus* recoverable in the Eccleſiaſtical Court, as was agreed in the Caſe *de Modo Decimandi, Trin.* 7 *Jac.* 13 *Coke* 41. And whereas it had been urged by the Civilians, that the Cuſtom *de Modo Decimandi* is of Eccleſiaſtical Juriſdiction and Conuſance; for it is a manner of Tithing, and all manner of Tithing is of Eccleſiaſtical Juriſdiction, and therefore as they ſaid, the Judges in their Anſwer to certain Objections made by the Archbiſhop of *Canterbury*, have confeſſed that Suits may be had in Spiritual Courts *pro Modo Decimandi*, &c. It was anſwered thereunto, and reſolved by the Temporal Judges, That *Satisfactio pecuniaria* of it ſelf is Temporal: But for as much as the Parſon hath not remedy *pro Modo Decimandi* at the Common Law, the Parſon by force of the Acts cited before, might ſue *pro Modo Decimandi* in the Eccleſiaſtical Court: Caſe *de Modo Decimandi* 13 *Coke*, *fol.* 44. ſee *Dr. Grant's Caſe*, 11 *Coke* 16. *and* 2 *Rolls Abridgment* 305. Accordingly, when a Prohibition was pray'd to ſtay Proceedings in the Spiritual Court upon a Suit there for a *Modus Decimandi*, becauſe the Defendants there ſuggeſted another *Modus Decimandi*, and that they refuſed to receive it; *Dodderidge* Juſtice ſaid, the *Modus Decimandi* is as well due to the Parſon, as Tithe is at the Common Law; and if the Parſon doth Libel in the Spiritual Court for a *Modus Decimandi*, (as he may do) and another *Modus* is there ſuggeſted, and this refuſed, they may there try and determine this matter touching this *Modus*, and no cauſe to grant a Prohibition for this refuſal: But if they do there refuſe the Suggeſtion for the *Modus*, upon a matter wherein their Law and our Law do differ, as in the point of proof, for default of two Witneſſes, whereof one being allowable in our Law, but not with them. In this Caſe a Prohibition is to be granted, but otherwiſe they may as well try the *Modus Decimandi* as the Right of Tithes. To which

Haughton Juſtice replied, That they were not to be ſuffered by the Common Law to try a *Modus Decimandi* there, but that they were to be prohibited. But *Dodaeridge* ſaid as before, That if there were a difference in their Proceedings, betwixt their Law and the Common Law, and this be the ground of the refuſal of the Allegation, they are to be prohibited. But being moved at another time, *Dodderidge* held as before; but granted, that if the difference be touching the matter of the proof wherein their Law and the Common Law differs in the manner of the proof by Witneſſes, and they will not allow of the proof allowable by the Common Law, (*viz.*) of one Witneſs as ſufficient, they are to be prohibited; and ſo ſaid he is 1 *R.* 3. *and* 10 *H.* 7. Alſo he ſaid if a Parſon doth Libel there for a *Modus*, whereas in verity there was no *Modus*, but only a Compoſition of late time between the Parſon and Pariſhioners to pay ſo much yearly for Tithes, and not otherwiſe; in this caſe, becauſe that their Law and our Law do differ in point of Preſcription, for with them 10 years continuance (as he ſaid) being a good Preſcription, but not ſo by our Law, they are to be prohibited. But *Haughton* held as before, That a *Modus Decimandi* is properly to be tried and determined at the Common Law, and not by them in the Spiritual Court; for that their Law and the Common Law differ in point of Proof of a *Modus*, and in the point of Preſcription. Yet *Croke* held with *Dodderidge*, ſaying, A Special *Modus* being libelled for there, is there to be tried; but if they differ there in a Temporal Matter, they are then to be prohibited, this being triable by the Common Law. So the Court declared they would ſee the Suggeſtion; and by the Rule of the Court they were to make their Suggeſtion, and to ſhew the ſame to the Court as they would ſtand by it; and in the mean time the Suit in the Spiritual Court to be ſtaid, *Mich.* 14. *B. R. Harding & al' againſt Goſling*, 3 *Bulſt.* 241.

But this Caſe is reported differently by *Rolls*, who ſaith, that the whole Court agreed, that a Parſon may Libel in the Spiritual Court upon a Special *Modus*, and that no Prohibition lies; but becauſe the Spiritual Court had rejected the proof of another *Modus* which was alledged, a Prohibition was granted, and alſo becauſe the Parſon had miſtaken his *Modus*: And further that it was agreed, that the Spiritual Court ſhall not try the *Modus* for the reaſon mentioned by *Haughton*, (*viz.*) That if one Libel upon a different *Modus*, and the Defendant pleads there is another *Modus* that is triable at the Common Law, becauſe otherwiſe the Temporal Court will be defeated of all Juriſdiction; for the Parſon may ſuggeſt one falſe *Modus* to a great value on purpoſe to take away the Temporal Juriſdiction, *Mich.* 14 *Jac. B. R. Goſling* v. *Harding*, 1 *Rolls Rep.* 419. To which Reaſon given by *Haughton* it may be anſwered, That if a Parſon Libel for a *Modus* which he cannot prove, he will fail of his purpoſe, and be condemned in Coſts, otherwiſe an Appeal may be had; and if the Defendants there ſuggeſt, and prove another *Modus*, 'tis fit it ſhould be allowed, and if thereby the Temporal Juriſdiction loſe the Trial of the true *Modus*, they have no wrong, for that the Trial of ſuch a *Modus* by four Acts of Parliament, (as was confeſſed by the Judges when before the King and Council) doth belong to the Eccleſiaſtical Juriſdiction, as is before ſhewed; but if the Suggeſtion of a different *Modus* from what is ſet forth in the Libel, ſhall ouſt the Eccleſiaſtical Courts of the Juriſdiction, this may be done by every Defendant that is ſued for any *Modus* there; and ſo no Special *Modus*, how true and notorius ſoever it be, may with effect be ſued for there, unleſs the Defendant pleaſe; which may be more prejudicial to the Eccleſiaſtical Courts than the other practice can be to the Temporal; becauſe (as is ſaid) the Right of hearing and determining Suits for a *Modus* doth belong to the Spiritual Courts, and ſo the Temporal Courts loſe nothing which they originally had.

CHAP.

CHAP. LVI.

Cuſtom or Preſcription, if tryable in Spiritual Court. Prohibitions, if to be granted to prevent ſuch Trials.

ALthough the Eccleſiaſtical Courts be confirmed and aided by the aforeſaid Statutes as to their Authority of holding Plea of Tithes of all ſorts, and of all other Church-Duties; yet theſe Statutes do provide that the ſaid Courts ſhould keep within the bounds of Juſtice and due limits of their Juriſdictions; and accordingly by the Statute of 27 *H.* 8. *cap.* 20. it is provided, **That every perſon and perſons, being party or parties to any ſuch ſuit, ſhall and may make and have his and their lawful action, demand or proſecution, appeals, prohibitions and all other their lawful defences and remedies in every ſuch ſuit, according to the ſaid Eccleſiaſtical Laws, and Laws and Statutes of this Realm, in as ample and liberal manner and form as they or any of them might have had, if this Act had never been made: Any thing in this Act above witten notwithſtanding.** And alſo by the Statute of 2 & 3 *Ed.* 6. *cap.* 13. by which the former Statute is confirmed, 'tis provided and enacted, **That this Act, or any thing therein contained, ſhall not extend to give any Miniſter or Judge Eccleſiaſtical, any juriſdiction to hold plea of any matter, cauſe or thing, being contrary or repugnant to or againſt the effect, intent or meaning of the Statute of** Weſtminſter **ſecond, the fifth Chapter, the Statutes of** Articuli cleri, circumſpecte agatis, Silva ſedua, **the Treatiſe,** De regia prohibitione, **ne againſt the Statute of** Anno primo Edwardi tertii, **the tenth Chapter, or any of them, ne yet hold plea in any matter whereof the Kings Court of right ought to have juriſdiction; any thing therein contained to the contrary in any wiſe notwithſtanding.**

In the 16th *Jac.* a *Modus* being ſued for in the Eccleſiaſtical Court, a Prohibition was granted, becauſe the Defendant there denied the *Modus:* And the Court ſaid, that the *Modus Decimandi* muſt be ſued for in the Eccleſiaſtical Court as well as the very Tithe, 2 *R.* 3. 3. *a.* and if it be allowed between the Parties they ſhall proceed there, but if the Cuſtom be denied it muſt be tried at the Common Law; and if it be found for the Cuſtom, then a Conſultation muſt go, otherwiſe the Prohibition ſtandeth, *Trin* 16 *Jac. Rot.* 3110. *Scot* v. *Wall*, *Hobart* 245. and the like was reſolved by the Court upon a Suit for a *Modus* by the Shock and not by Sheaff, *Hill.* 22 *Jac. B. R. Steward's Caſe*, *Nov.* 81. *Hill.* 4 *Car. C. B. Hetley* 133. And in the 3 *Car.* when one libelled in the Eccleſiaſtical Court for Tithe of Fiſh, (which is due mearly by Cuſtom) and the Defendant pleaded that time out of mind they had paid no Tithe of Fiſh; and a Prohibition being prayed, *Richardſon* replied, that it is mearly an accuſtomary Tithe, as Rabbits, *&c.* whereof no Tithes are due by the Law of the Land, ſee 1 *Keble* 602. and that a Prohibition ſhall not be granted; yet the other Juſtices ſaid, a Prohibition ſhall be granted, becauſe the Cuſtom ought to be tried by the Common Law; and they made a difference between *Modus Decimandi*, which is alſo cuſtomary where the Cuſtom only makes the Duty, and where there is a Tithe precedent due, and that *Modus* converts it into another Duty, there no Prohibition ſhall be granted, but it ſhall be tried in the Eccleſiaſtical

ſtical Court whether there be ſuch a *Modus Decimandi* or not, which difference was agreed by *Twiſden*, *Juſt. Hill.* 20 & 21 *Car.* 2. in the Caſe of *Philips* v. *Clever*, 3 *Keble* 452. But if a Parſon libel for a *Modus* to pay 3 *d.* and it be alledged that the *Modus* is but for 2 *d.* this ſhall be tried by the Common Law; but when the Cuſtom is tried, then they in the Eccleſiaſtical Court may proceed upon it, *Paſ.* 3 *Car. C.B. Anonymus*, *Hetley*, *pa.* 13. And about the 3 *Car.* when a *Modus* to have two Shillings in the Pound for every Houſe and Shop in the Town was ſued for in the Spiritual Court, a Prohibition being prayed, the Court ſaid, that a Parſon may ſue for a *Modus Decimandi* in the Eccleſiaſtical Court; but if it be denied, ſaid the Chief Juſtice and *Jones*, they cannot proceed, becauſe they cannot try the matter of the Preſcription there, and if they proceed a Prohibition lies: But in this Caſe no Prohibition was granted, becauſe the Defendant had only anſwered to the Cuſtom, *quod non Credit eſſe veram.* And (as *Dodderidge* ſaid) this is no denial of the Preſcription for that, that ought to be done by way of Allegation; and *Noy* ſaid that their Form of Anſwering to Articles, is (as before) *non Credit*, *&c.* but if the Defendant there will deny the Preſcription, he ought to come by way of Allegation, and *Jones* accorded, *Clark* v. *Prowſe*, *B. R. Latch* 210. So when the Parſon of *B.* in *London* libelled in the Spiritual Court upon a Cuſtom, that if a Pariſhioner of *B.* dies in *B.* and is carried and buried in another Pariſh in *London*, there ought to be given to the Parſon thereof a Gown, Pulpit-Cloth, and a Pair of Gloves, 'twas held that a Prohibition lies to try this Cuſtom if it be denied, becauſe a Cuſtom may be made in a ſhorter time according to the Spiritual Law than at the Common Law, *Trin.* 15 *Car. B. R. Cooker* Parſon of *St. Thomas Apoſtles*, *and Goale*, 2 *Rolls Abr.* 307. *nu.* So that by theſe laſt Caſes, a Parſon may only begin a Suit in the Eccleſiaſtical Court for a *Modus*, but not purſue it, or recover any thing there, unleſs his Adverſary conſent to it; for that a Cuſtom *de modo Decimandi* is not of Eccleſiaſtical Juriſdiction, or Cognizance; that is, though a *Modus* may be ſued for there, yet they may not try it there: And if the Caſe be ſo, no one that claims a *Modus* has any ſufficient reaſon to begin in the Spiritual Court for it, becauſe (as is declared in the aforeſaid Caſes) when the Defendant ſhall by way of Allegation, either deny the *Modus* ſued for, or ſuggeſt another *Modus*, the Eccleſiaſtical Judge is bound to ceaſe his Proceedings; and if he do this, (as they ſay by their Law he ought to do to avoid a Contempt) as no Inhibition lies upon an Appeal for the Plaintiff for this Cauſe, ſo no Prohibition lies for the Defendant; or if there did, he has no reaſon to ſue for one, ſeeing the Plaintiffs Suit is at an end, and he has no means to recover any thing of him.

But it is to be obſerved that the firſt of theſe Caſes, in which a power to try ſuch *Modus* is denied to Eccleſiaſtical Courts in the 14 *Jac.* at the latter end of *Mich. Term*, and at the beginning of the ſaid Term it was otherwiſe held in the ſame Court in *Reynolds and Newberry's Caſe*, 1 *Rolls Rep.* 420. when *Mountague* was made Lord Chief Juſtice in the room of *Coke*, (*viz.*) about Seven years after the debate was before the King and Council betwixt the Spiritual and Temporal Judges, and above Sixty years after the laſt of the Statutes before mentioned was made in favour of the Eccleſiaſtical Courts in this point. And when the Debate was betwixt the Judges Spiritual and Temporal upon this queſtion, Whether when a Suit is begun in the Spiritual Court for Tithes in kind, and a *Modus Decimandi* is ſuggeſted, by which the Lands are diſcharged, a Prohibition lies to try the ſame at Common Law, it ſeems the Civilians had never known or heard of Prohibitions, when a Suit is begun for a *Modus*; for if otherwiſe, they would not have ſaid (as they did) that the *Cuſtom de Modo Decimandi* is of Eccleſiaſtical Juriſdiction and Conuzance, and

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ſhall be tryed before the Eccleſiaſtical Judges, and argued from thence as from an unqueſtioned and granted ground or Principle. And the Temporal Judges, if they had held and adjudged the contrary before, would not have anſwered by way of Conceſſion (as *Coke* reports they did) *viz.* that a Parſon by force of the Acts cited before, might ſue *pro Modo Decimandi* and compel the Defendant to yield as well the *Modus Decimandi*, as if the Suit were for the Tithes in kind, and only denyed the conſequence the Civilians would draw from thence, ſaying, that this did not prove that if a Suit be for Tithes in kind, which are extinct, and the Land diſcharged that upon a Suggeſtion *de modo decimandi* a Prohibition ſhould not lie; but rather they would have replied (as the late Caſes ſpeak) that a Cuſtom *de Modo Decimandi* is not of Eccleſiaſtical Cognizance, and that if they did try a *Modus* when denied, a Prohibition did lie. And what the Judges did declare upon ſo ſolemn an occaſion is much to be depended upon in judging what the Law then was eſpecially when ſome of the Judges who being eminent for their Learning in the Law, and knowledge of the Practice of the Courts, if Prohibitions had been uſually granted, and ought to be, could not in ſo common a Caſe but know thereof, have gainſaid againſt the intereſt of their Courts, and againſt the Opinion of others that did grant them, as *Dodderidge and Croke in Harding and Goſlins Caſe*, 3 *Bulſtr.* 241. *and Richardſon in the Anonymus Caſe*, *Hetley p.* 13.

Nor may it be ſaid that theſe Judges by their Conceſſions did only intend that a Parſon by force of the ſaid Acts might ſue *pro Modo Decimandi*, but not, that the Judge ſhould proceed in the Suit in caſe the *Modus* be denied; for firſt, 'tis granted by them that the Statutes before cited in the Clauſes declaring that all manner of Tithes and other Church-Duties ſhall be ſued for in the Eccleſiaſtical Courts, do extend as well to a *Modus Decimandi* as to Tithes in kind. And the Statute of 27 *H.* 8. ſaith, **That Tithes ſhall be paid according to the laudable Uſages and Cuſtoms of the Pariſh, and that for ſubſtracting any of the ſaid Tithes, Offerings or other Duties, the Parſon may not only convent the Offender before the Ordinary, but alſo compel him to yield the ſaid Duties,** (that is, as the ſaid Judges expounded the ſaid Words,) as well *Modus Decimandi*, as the Tithes in kind, and with that in effect agrees the Statute of 32 *H.* 8. *cap.* 7. So that what is enacted thereby in their Judgments extends alſo to a *Modus Decimandi*, as well as to Tithes in kind, and 'tis plain that it doth ſo, for the Words thereof are, **That all and ſingular the Tithes ſhall be paid according to the lawful Cuſtoms and Uſages of the Pariſhes and places where ſuch Tithes or Duties ſhall grow, ariſe, come or be due, and that the party grieved may convent the perſon offending before the Ordinary, and alſo** (which come cloſe to this doubt) **that in every ſuch Caſe or matter or ſuit the ſame Ordinary**, &c. (as the Words are) **ſhall or may by vertue of this Act proceed to the examination, hearing and determination of every ſuch cauſe or matter ordinarily or ſummarily according to the Courſe and Proceſs of the ſaid Eccleſiaſtical Laws, and thereupon may give ſentence accordingly.** And by the Statute of 2 *&* 3 *Ed.* 6. 'tis ſaid as to all manner of Predial Tithes, **That they ſhall be paid in ſuch manner**, &c. **as of Cuſtom and of Right they ought to have been paid.**) And after in another Branch thereof 'tis Enacted, **That if any perſon do ſubſtract or withdraw any manner of Tithes, Obventions, Profits, Commodities or other Duties before mentioned or any part of them,** which (ſay the aforeſaid Judges) extends to Cuſtom of Tithing, that is *Modus Decimandi* mentioned in this Act, *&c.* **contrary to the true meaning of this Act or any other Act heretofore made,** viz. 27 & 32 H. 8. **that then the party ſo ſubſtracting ſhall be convented and ſued in the Eccleſiaſtical Court,** &c. **to the intent the**

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King's Judge Eccleſiaſtical ſhall and may then and there hear and determine the ſame according to the King's Eccleſiaſtical Laws, (*viz.*) the ſame Suit, and well for a *Modus* as Tithes in kind, for by the ſaid Judges theſe Clauſes in theſe Statutes entirely extend as much to the one as to the other.

When a Parſon libelled in the Spiritual Court for a Way, and it was ſuggeſted that the Libel ſet forth that by the Cuſtom of the County of *Devon*, when the Graſs is cut and put into Graſs Cocks, the tenth Cock ought to be aſſigned to the Parſon for his Tithe, and that he might by the Cuſtom make it into Hay upon the Land of the Party, and that he was hindred by the Defendant the Owner of the Land, of his Way to come to make it into Hay; the Court adjudged that no Prohibition did lie, for that it is an acceſſary to the thing that is Spiritual, and *Fitz. Nat. Br.* is, that the Parſon may have his Action upon the Caſe for the diſturbance. But in this caſe it was alledged further for a Prohibition, that the Cuſtom of the County is, that the Parſon ſhall not make his Tithe Hay upon the Land, but carry it away preſently, and by this Libel in the Spiritual Court they would alter the Cuſtom, which is to be tryed at the Common Law; but notwithſtanding the Court would not grant a Prohibition, *Mich.* 14 *Jac. B. R. Reynolds* v. *Newberry*, *Rolls* 1 *Rep.* 420. Now this Caſe ſeems to prove that when the Eccleſiaſtical Court hath Juriſdiction of the Principal, the Acceſſory, though it be a Preſcription, may be there ſued for, and if denied ſhall be tried there, it being granted in the Books, that not only Suits for ſtopping of Ways to carry Tithes, may be in Court Chriſtian, *Trin.* 43 *Eliz. Blackwel's Caſe*, 3 *Cro.* 843. *Mich.* 14 *Jac. B. R. Reynold's* v. *Newberry*, *Rolls* 1 *Rep.* 420. But alſo if the Queſtion be which of two Ways is the uſual and accuſtomary Way, that ſhall be tried there, *Hill.* 6 *Car. B.R. Halſey* v. *Halſey*, *Jones* 230. Which alſo proves that a Preſcription upon which a Libel may be grounded in the Eccleſiaſtical Court, may alſo be tryed there, for to try whether the Defendant hath ſtopt the right Way, or which of two Ways is the accuſtomary Way, is to try the Cuſtom or Preſcription, for they can go upon nothing but the Examination and Proof of long uſage, which makes the Preſcription that gives the Right, and accordingly is the Sentence to be given, See *Chap.* 57.

Beſides in the Statute of *Circumſpecte Agatis* made 13 *Ed.* 1. where it is determined that ſeveral things are meerly Spiritual, and are to be demanded in the Spiritual Court, and the Spiritual Judge ſhall have power to take knowledge thereof notwithſtanding the King's Prohibition: One Article is, **If a Parſon demand Mortuaries in a place where a Mortuary hath been uſed to be given by force of this Article,** and before the Statute of 21 *H.* 8. *cap.* 6. was made) if doubt did ariſe whether there was a Cuſtom in a place to have ſuch things for a Mortuary, this Cuſtom was tryable in the Spiritual Court, *Fitz. Nat. Br.* 51, & 53. 10 *H.* 4. 2. 13 *R.* 1. 2. *Juriſdiction* 20. & *Kelway fol.* 110. *b.* and that this was the Law before the ſaid Statute of 21 *H.* 8. was granted on all Hands, and by *Jones* and *Whitlock* held to be ſo now notwithſtanding the ſaid Statute, *Mich.* 7 *Car. B. R. Margaret Hind* v. *Epiſcopum Ceſtriæ* 1 *Cro.* 237. *See Articuli Cleri* 9 *Ed.* 2. *cap.* 1. *Trin.* 17 *Car.* 2. *Mark* v. *Guilbert*, 1 *Sid.* 263. *the ſame Caſe*, 1 *Keb.* 919. & *Mich.* 24 *Car.* 2. *John* v. *Lloid*, 3 *Keb.* 75. 2 *Keb.* 835, 867.

Another Article in the ſaid Statute of *Circumſpecte Agatis* is, **That if a Prelate of a Church or a Patron demands a Penſion due to him, all ſuch Demands are to be made in the Spiritual Court,** and accordingly it hath been held, that though the Libel ſhews, that *tam per realem compoſitionem quam per antiquam & laudabilem conſuetudinem ipſe & Predeceſſores ſui habuerunt & habere conſueverunt annualem penſionem, &c.* And ſo as was urged the Penſion was

was demanded upon Temporal Grounds, *viz.* Preſcription, and real Compoſion, yet *Coke* and the reſt of the Juſtices held, that a Prohibition ought not to be granted, *Trin.* 10 *Jac. C. B. Sprat* v. *Nicolſon*, *Godbolt*, *Trin.* 41 *Eliz. B. R. Collier's Caſe*, 3 *Cro.* 675. *See* 11 *H.* 4. 85. *Fitz. Nat. Br.* 51. *Paſch.* 35 *Eliz. Croker and York* v. *Dormer*, *Popham's Rep.* 23. *Goodwin* v. *the Dean and Chapter of Wells*, *Noy* 16. *Bulbrook* v. *Brigs*, 2 *Cro.* 217. And a Prohibition was denied, for that a Penſion is a Spiritual thing recoverable in the Spiritual Court; and yet a Title to a Penſion, if ſuable at all in the Spiritual Court, muſt depend upon Preſcription, and if denyed, the Preſcription muſt be tried there before the Penſion can be recovered. And ſo upon a Motion for a Prohibition to the Spiritual Court in a Suit there for a Penſion, it was held by the Court, that the Law is according to *Fitz. Nat. Br.* 51. *b.* that if the Penſion be by Preſcription, 'tis in the Election of the Party to ſue for it in the Spiritual Court as for a Penſion, or at the Common Law as for an Annuity. And it was further ſaid, that the Opinion of the Lord *Coke*, 2 *Inſt.* 491, 492. is not warranted by the Books by him there cited; but *Windham* and *Twiſden* Juſtices ſaid, that in the time of King *James* it was adjudged that for a Penſion by Preſcription, remedy ſhall be only at the Common Law, therefore the Reporter makes a *Quære* of it, *Trin.* 15 *Car.* 2. 1 *Sid.* 146. But afterwards it was reſolved by *Keeling* and *Twiſden* Juſtices, that Penſions by Preſcription may be ſued for in the Spiritual Court at the Election of the Party, and although in the Caſe then before them the Preſcription was denied, yet would they grant no Prohibition, *Mich.* 20 *Car.* 2. *Smith* v. *Biſhop of Lincoln*, 2 *Keb.* 439, 802. *and* 1 *Ventris* 3. But afterwards it was held that although a Suit may be in the Spiritual Court for a Penſion, yet if it be denied to be time out of mind *&c.* a Prohibition ſhall go, for that the Preſcription ſhall be tryed by the Temporal Courts, *Mich.* 26 *Car.* 2. 1 *Ventris* 265. *See the ſame Book* 120. *and* 3 *Keb.* 562. See before *Chap.* 53.

By all which it appears that Preſcriptions in all Caſes are not to be tryed in the Temporal Courts, in regard that by the ſaid Statute of *Circumſpecte Agatis* Preſcriptions for the payment of Mortuaries and Penſions, are triable and determinable in the Spiritual Court, and this hath been owned, and allowed by ſeveral Judgments in the Temporal Courts, and Opinions of the Judges; it will be difficult therefore to apprehend the reaſon why a *Modus Decimandi* may not be tried alſo in the Spiritual Court, eſpecially there being this Article in the ſaid Statute of *Circumſpecte Agatis*, **That if a Parſon demand of his Pariſhioners Oblations or Tithes due and accuſtomed the Spiritual Judg ſhall have power to take knowledge notwithſtanding the King's Prohibition.** And by *Coke* and the other Juſtices, *Mich.* 7 *Jac.* in the Caſe *de Modo Decimandi* this Stature is acknowledged and expounded to give authority to ſue for a *Modus Decimandi* in the Eccleſiaſtical Courts, and by the ſaid Act their Proceedings are not to be ſtopt by a Prohibition to bring the Trial of the *Modus* to the Common Law. And *Keeling and Twiſden* Juſtices would not grant a Prohibition in a Suit for a *Modus* where the *Modus* was denied, *Smith* v. *Biſhop of Lincoln*, 2 *Keb.* 439, 802. 1 *Ventris* 3. Yet afterwards we find the Court of Opinion, that where ever the Cuſtom is denyed, a Prohibition ſhall go, 3 *Keb.* 523, 527. *ſame Caſe*, 1 *Ventris* 274. *See* 1 *Ventris* 120, 265. 2 *Keb.* 41. *and* 3 *Keb.* 562.

And it is further to be obſerved, that in the ſame Article concerning Tithes in the ſaid Statute of *Circumſpecte Agatis*, it is ordained and eſtabliſhed, **That if any perſon doth ſue againſt another Parſon for Tithes greater or ſmaller, ſo that the fourth part of the value of the Benefice be not demanded, the**

Spiritual Judge ſhall have power to take knowledge notwithſtanding the Kings prohibition; and with this agreeth the 38 *Ed.* 3. 6. where it is ſaid, that where the Right of Tithes comes in debate between two Spiritual Perſons, the one claiming the Tithes as of common Right within his Pariſh, and the other claiming to be diſcharged by real Compoſition, the Eccleſiaſtical Court ſhall have Juriſdiction of it: Which Caſe was vouched by *Bacon*, and agreed by *Coke*, *Mich.* 7 *Jac.* in the Caſe *de Modo Decimandi*, *Coke* 13 *Rep.* 39. And in an Action of Treſpaſs by one Parſon againſt another Parſon, if the Defendant claim as Tithes appertaining to his Parſonage, the Court ſhall be ouſted of Juriſdiction; for the Debate being between two Parſons, it ſhall be intended that it is for the Right of Tithes, 38 *Ed.* 3. 5. *b.* 2 *Rolls Abr.* 308. *nu.* 2. And *Richardſon* ſaid the Books make a doubt where the Suit is between the Servant of the Vicar and the Parſon, but it ſeem'd to him to be all one, *Mich.* 3 *Car. C. B. Comin's Caſe*, *Hetley* 60. So when a Vicar ſued for Tithes againſt a Parſon appropriate (who was a Lay-man) in the Eccleſiaſtical Court, for the Tithes of Saffron, and alledged that time out of memory, *&c.* the Vicars have had Tithes of Saffron within that Pariſh: And the Parſon pleaded that he and his Predeceſſors had uſed to have Tithes of Hay and Corn of this Land till within 40 years the laſt paſt, when it was ſowed with Saffron; it was ſaid that no Prohibition ſhall be granted to try this Cuſtom, but it ſhall be tried in the Eccleſiaſtical Court; for that it is between the Parſon and the Vicar, although the Farmer was made party, for they may well judge of it, and of the Compoſition, and this very Point was adjudged between *Hunt* and *Buſh*, 30 *Eliz.* and that the Party ſhould have a Conſultation, *Hill.* 43 *Eliz. Beneſield* v. *Feek*, *Gouldsborough* 149. 2 *Rolls Abr.* 310. *nu.* 5. So when the Parſon of *Great Fakenham* brought an Action of Treſpaſs againſt the Parſon of *Harmington*; and the queſtion was, if the Parſon of one Pariſh claim by Preſcription a Portion of Tithes out of the Pariſh of another, if the Spiritual Court ſhall have Juriſdiction for the Trial of it; and the opinion of the whole Court was, that it ſhould, becauſe, that the matter is betwixt two Spiritual Perſons, and concerning the Right of Tithes, *Paſch.* 29 *Eliz. C. B.* the Parſon of *Fakenham's Caſe*, 1 *Leonard* 59. *Trin.* 11 *Jac. B. R.* and *per Cur'* 2 *Rolls Abr.* 310. *nu.* 2. *vide* 35 *H.* 6. 39. *and Br. Juriſdict.* 3. Where in Treſpaſs for taking of Tithes, the Defendant claimed them as Parſon and within his Pariſh, and the Plaintiff preſcribed that he and his Predeceſſors, Vicars there, have had the Tithes of that place time out of mind, *&c.* And the Opinion of the Court was, that the Debate being between the Vicar and the Parſon, who are Spiritual Perſons that may try the Right of Tithes, therefore the Temporal Court ſhall be ouſted of the Juriſdiction. See alſo 6 *Ed.* 4. 3. 22 *Ed.* 4. 23, 24. 31 *H.* 6. 11. betwixt a Parſon and the Servant of another Parſon, *&* 7 *H.* 7. 35. 35 *H.* 6. 39. *b.* between a Parſon and a Parſon's Tenant in Treſpaſs, where the Layman ſet forth his Title as Tenant, and pleaded to the Juriſdiction of the Court: And by *Gaſcoign*, the Suit ſhall be in the Spiritual Court, becauſe that the Right of Tithes ſhall be tried only in the Spiritual Court betwixt Spiriual Perſons, ſee *Mich.* 11 *Jac. B. R.* 2 *Bulſtrode* 157. *Mich.* 5 *Jac. Rolls* 2 *Abr.* 310. *nu.* 1. *Trin.* 11 *Jac. B. R. per Cur' ibidem nu.* 2. and *Mich.* 14 *Jac.* between *Adams* and Sir *Thomas Vavaſour* v. *Hubertſon*, *ibid. nu.* 4. *Mich.* 28 *&* 29 *Eliz.* between the Vicar of *Pankridge* and *Buſſey*, *ibid. nu.* 6. and *Godbolt Trin.* 31 *Eliz. Botham* v. *Cooper*, 3 *Cro.* 136. *Mich.* 29 *&* 30 *Eliz. B. R. Savell* v. *Wood*, 3 *Cro.* 71. and 1 *Leonard* 94. *Trin.* 30 *Eliz. B. R. Gatehouſe and Penn's Caſe*, 1 *Leonard* 128. *Paſch.* 2 *Jac. C. B. Randall* v. *Knowles*, *Noy* 147. *Mich.* 35 *&* 36 *Eliz. B. R. Sherborn's Caſe*, 3 *Cro* 306.

Now

Now in regard that the words of the ſaid Statute of *Circumſpecte agatis* as to this point only are, **If any Parſon doth ſue againſt another Parſon for Tithes greater or ſmaller, ſo that the fourth part of the value of the benefice be not demanded, the ſpiritual Judge ſhall have power, &c.** and ſo only gives the Spiritual Court the Cognizance of the Right of Tithes betwixt Spiritual Perſons, not of Preſcriptions expreſly; and yet by the Judgments relating to this matter both antient and modern, the Spiritual Courts have been allowed to try, and finally to determine the Right of Tithes between Spiritual Perſons, though they ground their Titles upon Preſcription (as for the moſt part they muſt) and ſo to try the Preſcription; but it is ſaid by *Coke*, that the reaſon why Prohibitions are not granted in Suits between Spiritual Perſons, as Parſon and Vicar, is, becauſe the *Modus* ſuggeſted to be paid comes not in queſtion, but only the Right of Tithes to which of the Spiritual Perſons they do belong, *Drayton and Cotterel* v. *Smith*, 2 *Bulſtrode* 158. But other words in the ſame Statute are, **If a Parſon demands of his Pariſhioner oblations or tithes due and accuſtomed,** (that is due in Kind or by Cuſtom, as the Judges I have ſhewed expounded them) **the ſpiritual Judge ſhall have power to take knowledge, &c.** and ſo ſeems more expreſly to give Trial of a Cuſtom or Preſcription for Tithes, *viz.* a *Modus Decimandi* to the Eccleſiaſtical Judges, than the former words do, which give the Trial of the Right of Tithes to that Court betwixt Spiritual Men: Yet notwithſtanding all that has been before ſaid, and the Caſes cited to the contrary, I conceive that the Law and Practice is ſetled in this point, that if a *Modus Decimandi* be ſued for in the Eccleſiaſtical Courts, a Prohibition lies to ſtop the Trial of it, if the *Modus* be denied. The reaſon given is, not upon the account that the Spiritual Court wants Juriſdiction, but in regard of the Notion their Law has of Cuſtom different from ours: And being that every *Modus* is due by Cuſtom, 'tis the Common Law only that can determine what Time and Uſage with us ſhall be ſufficient to create ſuch Cuſtom; that is, time beyond all memory to the contrary; whereas by their Law ſometimes 10 years, ſometimes 20, they will adjudge ſufficient to create a Cuſtom, as is ſaid 3 *Keble* 527. in the Caſe of *Andrews* v. *Simſon*; and Prohibitions in ſuch Caſes are not granted, for that the Spiritual Court hath not a Juriſdiction of the matter, but in reſpect of the Trial which is to be by our Law only; and if upon the Trial it be found for the *Modus*, the Proceedings ſhall go on in the Spiritual Court; if againſt the *Modus*, the Prohibition ſhall ſtand. See the aforeſaid Caſe of *Andrews* v. *Simſon*, 3 *Keble* 523, 527.

CHAP. LVII.

Where, and by what Plea the Spiritual Court ſhall be ouſted of Juriſdiction, and upon what Suggeſtions Prohibitions are granted.

ALthough it may be granted, that a Parſon may ſue in the Eccleſiaſtical Court for a *Modus Decimandi* originally, or for Money or other thing due and payable by Cuſtom in lieu of Tithes, or otherwiſe for things not in their nature Tithable; and alſo if it be admitted that a *Modus* may be proved and examined there, when the Libel is grounded thereupon; yet if the Proprietor of the Tithes of a Pariſh, doth ſue in the Spiritual Court for Tithes in kind of Lands diſcharged thereof by Preſcription, *&c.* and the Defendant doth alledge the Cuſtom or Preſcription *de Modo Decimandi* in Bar, that Cuſtom or Preſcription ſhall not be tried and determined before the Judge Eccleſiaſtical, but a Prohibition lieth to try the ſame at the Common Law, for that the Suit is not originally for the *Modus* (as it might be,) but for the Tithes in kind of Lands, by a *Modus* or Preſcription diſcharged of the payment of Tithes; and in ſuch caſe to ſue for Tithes in their kind is prohibited by this Proviſo in the Statute of 2 & 3 of *Ed.* 6. *cap.* 13. **Provided always, and be it enacted by the authority aforeſaid, That no perſon ſhall be ſued, or otherwiſe compelled, to yield, give or pay any manner of Tithes, for any mannors, lands, tenements or hereditaments, which by the Laws and Statutes of this Realm, or by any priviledge or preſcription, are not chargeable with the payment of any ſuch Tithes, or that be diſcharged by any compoſition real.**

And always when an Act of Parliament commands or prohibits any Court, be it Temporal or Spiritual, if the Statute be not obey'd, a Prohibition lieth, of which the Judges gave ſeveral Inſtances, *Trin.* 7 *Jac.* in the Caſe *de Modo Decimandi*, 13 *Coke's Rep.* 12 & 37. and by *Dodderidge* in *Harding* and *Goſling's Caſe*, 3 *Bulſt.* 241. So if a Biſhop or his Farmer (who ſhall alſo have the Priviledge) doth ſuggeſt, that a Suit is in the Eccleſiaſtical Court for Tithes in kind, where the Lands are diſcharged by a Preſcription *de non Decimando*, a Prohibition lies by the ſaid Prohibitory Clauſe, *Paſch.* 38 *Eliz. the Biſhop of Wincheſter's Caſe*, 2 *Coke* 44.

But though it be ſaid, that where the original Suit is for Tithes in kind of ſuch Lands, which by Act of Parliament, Preſcription, or Compoſition real, are diſcharged of Tithes abſolutely, a Prohibition lies by force of the ſaid Prohibitory Clauſe in the *Stat.* 2 *Ed.* 6. yet from thence it ſeems not to follow, that if the Tithes in kind be ſued for of Lands which be not diſcharged of Tithes by any of the aforeſaid means, and the Defendant doth alledge a *Modus Decimandi*, which relates to the Manner or Circumſtances of paying ſome particular Tithes of ſuch Lands only, that a Prohibition lies to try ſuch *Modus* at the Common Law; for in the firſt Caſe the Lands themſelves are diſcharged of the payment of Tithes, and ſo the original Suit is prohibited by the Clauſe of the ſaid Statute, 2 *Ed.* 6. but in the latter, the Lands are Tithable, and therefore the original Suit for the Tithes in kind is warranted (as hath been ſhewed) by the before mentioned Statutes: And alſo in the former Caſe, the Plea of a *Modus Decimandi* cannot be ſaid Acceſſory to the Right of Tithes upon the Reaſons given by the Judges in the Caſe *de Modo Decimandi*, *viz.* becauſe the

the Tithes are extinct, and the *Modus* is the only thing with which the Land is chargeable; and therefore by the ſaid Clauſe, in the Statute which is in the Negative, the Principal, *viz.* the Tithes, are not to be ſued for there; and the Rule, That when the Eccleſiaſtical Court hath Juriſdiction of the Principal, *&c.* cannot hold place in ſuch Caſe: But in the latter Caſe, the *Modus* is but acceſſary to the Right of Tithes, and the Reaſons given by the Judges in the Caſe *de Modo Decimandi* are not applicable to it; for here, the Tithes in kind of the Land are not abſolutely extinct; for we ſuppoſe the Caſe to be, that when the Lands are ſown, Tithes of Corn are to be paid in kind, when mowed, of Hay, when depaſtured of the Stock; yet for ſome of theſe Tithes a *Modus* as to the Manner of Tithing is ſuggeſted, not for the reſt, as that the eighth Sheaff-Shock or Cock, ſhall be paid inſtead of the Tenth; that the Tenth of the Cheeſe made betwixt certain days, ſhall be paid for the Milk of Cows; 2 *d.* for a Lamb, Pigg, *&c.* In theſe Caſes the Lands are not diſcharged of Tithes in kind, but only a Recompence comes in the place of a particular Tithe by Preſcription, or a Preſcription doth direct the Circumſtances or Manner of paying the Tithe in kind, as that the Tithe of young Beaſts ſhall be paid at a certain Age, though uncapable of living then without a Damm, *&c.* Now in theſe Caſes, when the Tithes of Land are not extinct, but the Lands are chargeable therewith, the Caſe ſeems to be out of the Prohibitory Clauſe in the Statute, and the Principal, (*viz.*) the Right of Tithes remains of Eccleſiaſtical Cognizance, and that by force of the ſame Statute; and ſo the *Modus* that comes in by Allegation, and is dependant thereupon, is acceſſory thereunto; and being ſo acceſſory, is alſo of the ſame Juriſdiction: And this was not denied to be the Rule of Law by the Temporal Judges, when 'twas argued by the Civilians in the Caſe of Lands abſolutely diſcharged of Tithes in kind, and endeavoured to be proved by *Bacon* Sollicitor General, (who was on the part of the Clergy) from ſeveral Authorities, but only it did not come up to the Caſe then under debate; in which by reaſon of the ſaid Clauſe, they had not Cognizance of the Right of Tithes in kind, but only of the *Modus Decimandi.* And the Authorities vouched by *Bacon* to prove the ſaid Rule were theſe, 1 *Ric.* 3. 4. the Opinion of *Huſſey*, that when the Original ought to begin in the Spiritual Court, and afterwards a thing cometh in Iſſue which is triable in our Law, yet it ſhall be tried by their Law: As if a Man ſueth for a Horſe deviſed to him, and the Defendant ſaith, that the Deviſor gave to him the ſaid Horſe, the ſame ſhall be tried there: And the *Regiſter* 57 & 58. If a Man be condemned in Expences in the Spiritual Court for laying violent hands upon a Clerk, and afterwards the Defendant pays the Coſts, and gets an Acquittance, and yet the Plaintiff ſueth him againſt the Acquittance for the Coſts, and he obtains a Prohibition; for that Acquittances and Deeds are to be determined by our Law; yet he ſhall have a Conſultation, becauſe the Principal belongeth to them, (but they muſt proceed according to the Rules of the Common Law;) 38 *Ed.* 3. 5. Right of Tithes between two Spiritual Perſons ſhall be determined in the Eccleſiaſtical Court; and 38 *Ed.* 3. 6. where the Right of Tithes comes in debate between two Spiritual Perſons, the one claiming the Tithes as of Common Right within his Pariſh, and the other claiming to be diſcharged by Real Compoſition, the Eccleſiaſtical Court ſhall have Juriſdiction of it; to which may be added ſome Modern Caſes, as if a Suit be in the Spiritual Court for a *Modus Decimandi*, and the Defendant plead payment, this ſhall be tried there, (they allowing ſuch proof of the payment as is ſufficient at Common Law) for that the Original Suit was well commenced there, *Mich.* 14 *Jac. B.R. Goſling and Harding, per Cur' Hobart* 314. 2 *Rolls Abr.* 305. So if a Man ſue for a Legacy in the Spiritual Court, and the Defendant pleads a Releaſe in Bar,

and

and the Plaintiff denies it, this ſhall be tryed there, and no Prohibition ſhall be granted, for that this is a Matter ariſing from an original cauſe of which they have the Juriſdiction, *Mich.* 15 *Jac. C. B. between Percher and Wheeble, Per Curiam, Hob.* 255. *Anonymus' Rolls* 2 *Abr.* 307. *nu.* 14. So it is if payment be pleaded in a Suit in the Eccleſiaſtical Court whereof they have original Cognizance, 12 *Jac. B. R. Rolls* 1 *Rep.* 12. *&* 2 *Abr.* 305, 306. So if an Adminiſtrator ſue for a Legacy due to the Teſtator in the Spiritual Court, and the Defendant pleads the Releaſe of the Teſtator in Barr, and the Plaintiff will avoid it, for that his Teſtator was an Ideot, this Ideocy ſhall be tryed there, and no Prohibition ſhall be granted, for that they have Juriſdiction of the Original Matter, *Mich.* 15 *Jac. Percher* v. *Wheeble, Rolls* 2 *Abr.* 307. *nu.* 15.

Or if a Parſon ſues in the Eccleſiaſtical Court and the Defendant there pleads that the Plaintiff was preſented upon a Symoniacal Contract againſt the Statute of 31 *Eliz.* this ſhall be tried there, for that they have Juriſdiction of the original Matter, *Mich.* 8 *Jac. C. B. Penn's Caſe, Rolls* 2 *Abr.* 307. *nu.* 16.

To all which I will add two other Judgments reported by *Coke*, which ſeem to favour this Opinion, that the Spiritual Court having Juriſdiction of the Principal ought not to be prohibited in judging the Acceſſory, though the Acceſſory is of it ſelf beyond queſtion of Temporal Cognizance.

The former of which is *Robert's Caſe, Mich.* 8 *Jac.* which is as followeth: A Prohibition had been granted in a Caſe of Subſtraction of Tithes, upon Surmiſe, that the Plaintiff (being Defendant in the Spiritual Court) had but one Witneſs to prove in that Court his Demiſe, which that Court would not allow for Proof, for that *ſingularis Teſtis* is not allowable by their Law. And upon conſideration and ſight of a Prohibition granted in the ſame Cauſe, in *Hill.* 3 *Eliz. in Banco Regis* it was reſolved by *Coke Chief Juſtice & totam Curiam* that a Conſultation ſhould be granted and that for divers Cauſes. *Firſt*, it appeareth by the *Regiſter fol.* 15. that it is a Rule, *Quod non eſt conſonum rationi quod Cognitio Acceſſoris in Curia Chriſtianitatis impediatur ubi cognitio cauſæ Principalis ad forum Eccleſiaſticum noſcitur pertinere*, and with this agrees 1 *R.* 1. 3,4. *Secondly*, If ſuch ſurmiſe ſhall be allowed, then in every Caſe for mear delay ſuch a Surmiſe may be made, for when the Defendant in the Spiritual Court ſhall ſurmiſe that he hath but one Witneſs, the Plaintiff there cannot deny it and ſay, that he hath two or more, for then he affirms matter againſt himſelf, and when the Spiritual Court hath Juriſdiction of the Principal cauſe they determine the acceſſory. But it was objected, that if *A.* claiming by a Leaſe from *B.* of a Rectory, libels for Subſtraction of Tithes, and the Defendant pleads a former Leaſe made by *B.* to *C.* and the Defendant hath but one Witneſs in the Caſe to prove the former Leaſe, if no Prohibition ſhall be granted, the Defendant ſhall be charged, and if *C.* ſue him upon the Statute of 2 *Ed.* 6. at the Common Law, the Teſtimony of one Witneſs only will there be ſufficient, and ſo he ſhall be twice charged. To which it was anſwered, that firſt the fault was the Defendants, that he would not ſet forth his Tithes, for then he ſhall not be charged who ever takes them But in ſuch a caſe, thoſe in the Eccleſiaſtical Court will upon one good Witneſs and any concurrent vehement preſumpſition, as Poſſeſſion or the like, allow of ſuch a Proof; and the Teſtimony of one Witneſs in our Law is no concluſive Evidence, but ought to be left to the Conſcience of the Jury, and ſo the validity or invalidity of proof of matters of Fact ſhall be left to them. But if a queſtion at the Common Law ariſe from the party upon the conſtruction of a Statute, or the like, and thoſe of the Eccleſiaſtical Court will take upon them to judge of it againſt the Rule of Law, there upon ſpecial ſurmiſe of it, and upon the ſhewing of the

Anſwer

Anſwer or other Pleadings of the Parties, by which it appears to the Court that ſuch Surmiſe is a good ground for a Prohibition, it ſhall be granted; for matter in Law ariſing upon Eſtates or Intereſts created by the Common Law, and Conſtruction of Statutes ought to be made according to the Rules of Common Law, *& non debet trahi ad aliud examen.*

The other Judgment that proves that the Acceſſory is to be tryed in the Eccleſiaſtical Court when it hath Jurisdiction of the Principal, was avouched by *Coke*, and Reported by him in the ſaid Caſe of *Roberts*, which is this, *Paſch. 35 Eliz. in B. R. Fuller* brought a Prohibition againſt *Clements* and *Wiskard*, and *Fuller* counted that he himſelf was Owner of the Rectory of *A.* and libelled in the Spiritual Court againſt *Clements* for Subſtraction of Tithes, pendant which Suit the ſaid *Wiskard* intervening *pro intereſſe ſuo* made theſe Allegations againſt the ſaid *Fuller*, That the ſaid Rectory was impropriate to the Monaſtry of *Wendling*, and granted by Queen *Elizabeth* to *M.* and *Hall*, who enfeoffed *Bozome*, who let it to *Wiſcard* for forty years, and proved theſe Allegations by Witneſſes, and had Sentence againſt *Fuller*, who was condemned in Coſts Eight Pounds and Ten Shillings to *Clements*, and Thirteen Pounds and Six Shillings to *Wiskard*; and after *Fuller* did appeal to the Court of the *Arches*, and there *Fuller* claimed the ſaid Rectory by reaſon that *Hall* was ſeiſed of it, and by his Deed did give and grant the ſaid Rectory and all Lands and Tithes to it appertaining to Sir *Edward Cleve* before the Feoffment ſuppoſed to be made to *Bozome*, and that Sir *Edward Cleve* by his Deed did enfeoff *Fuller*, and although that he offered to prove the delivery of the Deed of the ſaid Feoffment made to Sir *Edward Cleve* by one ſole Witneſs, the Eccleſiaſtical Court would not allow it, without producing another Witneſs. And *Fuller* further ſaid, that although he had alſo alledged there, that theſe were Matters determinable at Common Law, notwithſtanding they gave Sentence. The Defendants for to have a Conſultation pleaded, that *Fuller* in the ſaid Court of the Arches proved the delivery of the Deed aforeſaid by Sir *Edward Cleve* and *Mouſe*, but could not prove Livery and Seiſin according to the Deed, and for this cauſe Sentence was given, without that, the Judges of the Arches would not admit of the ſaid proof, unleſs he proved the Deed by other Witneſſes, upon which *Fuller* demurred in Law; and it was objected by the Councel of *Fuller*, 1. That *Wiſcard* (who is a meer Stranger to the Suit, and who comes in *pro intereſſe ſuo* in the ſaid Rectory) pleads Matter meerly determinable at the Common Law, *ſcilicet*, Letters Patents, Feoffment and Leaſe for years; and on the other part *Fuller* claims an Eſtate in the ſaid Rectory by Conveyance at the Common Law. And now the Queſtion in the Eccleſiaſtical Court, being only who hath the beſt Eſtate in the ſaid Rectory by the Common Law, this ought to be tryed by the Common Law, and not in the Eccleſiaſtical Court; for this is the Birthright of the Subject to have his Inheritance and Freehold tried and determined by the Common Law, for the Civil Law differs much in the tryal of Inheritances. 2. It was objected, that all Matters in Law ought to be determined by the Judges of the Law, and in this Caſe Matter of Law ariſing (*ſcil.*) If a Man hath a Rectory Impropriate which conſiſts in Glebe and Tithes, and by his Deed gives and grants the ſaid Rectory and all Lands and Tithes any ways belonging or appertaining to it, to another and his Heirs, and no Livery is made, in this Caſe whether the Tithes ſhall paſs or no, (for the Tithes may paſs without any Livery) this Queſtion is not fit to be determined by the Eccleſiaſtical Judges, but by the Judges of the Common Law, *Quod quiſque novit in hoc ſe exerceat.* 3. It was objected, that *Wiskard* was a meer Stranger to the Suit, and all his Allega-

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tion is Temporal, and for that, it is a ſtronger Caſe to maintain a Prohibition, for as much as betwixt him and *Fuller* nothing is in queſtion, but to whom the Inheritance of the Rectory belongs; but *Clement*, who is ſued for Subſtraction of Tithes hath greater colour in his defence, being lawfully ſued in the Eccleſiaſtical Court, but all his Allegation as hath been ſaid is Temporal. 4. It was objected, that *Fuller* had but one Witneſs to prove the delivery of the Deed, and in the Eccleſiaſtical Law *unus Teſtis eſt nullus Teſtis*, for all which Cauſes it was prayed that the Prohibition may ſtand, and that no Conſultation may be granted.

To which it was anſwered and reſolved by Sir *Chriſtopher Wray* Chief Juſtice and *per totam Curiam*.

As to the firſt Objection, that foraſmuch as the Original belongs to the Eccleſiaſtical Court, the determination of all that which depends upon it belongs to the Judges of the ſame Court, although that the Matter be tryable by the Common Law; but where the original Matter belongs to the Common Law, and there commenced, and Iſſue be taken upon Matter tryable by the Eccleſiaſtical Law, there the Judges of our Law ſhall write to the Judges of the Eccleſiaſtical Court to try it, and to certifie, *&c.* And the reaſon of this diverſity, is that our Judges having Authority to write and command them by the King's Writ to certifie them of their Law, but they cannot write to the Judges of our Law to try any thing and to certifie them, for that they have no ſuch Authority to command by Writ, *&c.* And at the end of this Anſwer to the firſt Objection it is further ſaid, that if in the Eccleſiaſtical Court the Suit is for a Legacy, and the Defendant pleads a Releaſe, if in the admitting or rejecting of Proofs concerning this Releaſe, which is Matter determinable at Common Law, they do wrong to the Plaintiff or Defendant they have no remedy but by way of Appeal. But *Quære* as to this, for I take the contrary to be Law, and ſo adjudged in *the Caſe of Armiger Brown* v. *Wentworth*, *Yelverton* 92. before mentioned *Chap.* 54. *fol.* 480. 2. To the ſecond it was anſwered and reſolved, that if upon Conference with Men learned in the Law they give Sentence according to Law, this is well done and no Prohibition ought to be granted; but if they take upon them to draw the intereſt of any Man *ad alium examen*, and to judge againſt the Rule of Law concerning the Inheritance or Intereſt of any, there a Prohibition lies. And in the Caſe at the Bar, they well reſolved the Law; for by the ſaid Livery of the Charter, the Tithes did not paſs as in groſs, for that the intention of the Parties was to paſs the entire Rectory by Feoffment, and not to paſs the Tithes only ſeparate from it, for that would be to diſmember the Rectory into Fractions by a Conſtruction of Law contrary to the intention of the Parties. 3. As to the third Objection it was anſwered and reſolved, that by the Eccleſiaſtical Law a Stranger may come in *pro intereſſe ſuo*, and when they have Juriſdiction of the original cauſe of Suit, we ought not to draw in queſtion their Order or Proceeding; but if they proceed *inverſo ordine*, not obſerving form, this ought to be redreſt by Appeal, and although that the Matter depending upon the original cauſe be determinable by the Common Law, yet it ſhall be determined as hath been ſaid in the Eccleſiaſtical Court. 4. As to the fourth Objection it was anſwered and reſolved, that ſuch a Surmiſe that he hath but one Witneſs, is not ſufficient to have a Prohibition, for that the Eccleſiaſtical Court hath Juriſdiction of the Principal; and if ſuch a Surmiſe ſhall be ſufficient all Suits in the Eccleſiaſtical Court ſhall be either delayed or quite taken away, for ſuch a Sumiſe may be made in every Caſe, and the Plaintiff in the Eccleſiaſtical Court cannot have any good anſwer to it, to have a Conſultation which agrees, ſaith

ſaith *Coke*, with the Reſolution in the Principal Caſe, *viz. Robert's Caſe* before mentioned, which is reported 2 *Cro.* 269. *and* 12 *Co.* 65. So it hath alſo been held, that if a Parſon ſued upon the Statute of 2 *Ed.* 6. in the Spiritual Court for the double value for not ſetting forth of Tithes, and the Defendant to have a Prohibition ſurmiſed, that he ſet them forth, and that they would not admit the Proof thereof by one Witneſs, that no Prohibition lies, for that they have Cognizance of the Matter, *Hill.* 9 *Car. B. R. Yolle and Sir Edward Powel*, 2 *Rolls Abr.* 299. Nor is it material to ſay, that a Preſcription by the Common Law is to be tried at the Common Law, See 9 *H.* 6. 46. For when one preſcribed (being ſued in the Spiritual Court for not paying towards the Repair of a Mother Church) that there was a Chappel within the ſaid Village, in which they had at all times *Sacramenta & Sacramentalia*, and that he nor the Inhabitants that uſed to reſort to the ſaid Chapel have ever uſed to repair the ſaid Church, it was held that a Preſcription which is incident to Eccleſiaſtical things ſhall be tryed in the Eccleſiaſtical Court, *Mich.* 20 *Jac. B. R. Rolls* 2 *Rep.* 265. And when a Prohibition was prayed upon the like Suggeſtion, by the Opinion of the whole Court, a Prohibition lieth not, in regard that this Preſcription is meerly Spiritual, ſo the Prohibition was denyed, *Hill.* 7 *Jac. B. R.* 1 *Bulſtr.* 17. *Hill.* 12 *Jac. B. R. betwixt the Churchwardens of Aſhton and Bromage*, 2 *Rolls Abr.* 311.

Now one might have thought, that the Law as to the Points determined in theſe Caſes was fully ſetled, *viz.* that the Court which hath Juriſdiction of the Principal hath the Juriſdiction of the Acceſſory, and that a Surmiſe of but one Witneſs is no ground of a Prohibition, yet in a Prohibition obtained upon a Surmiſe, that whereas a Parſon had ſued in the Spiritual Court for the Tithe of Pigeons; the Defendant there had paid the ſaid Tithe, and proved it by one Witneſs, and the Court Chriſtian would not allow the Proof without two Witneſſes, the Prohibition was affirmed, *Paſch.* 41 *Eliz. Moor* 909. And ſo a Prohibition was granted for the ſame cauſe upon a Suit for the Tithes of Lambs, *Warner* v. *Barret*, *Hetley* 87. and ſo *Dodderidge* held in 14 *Jac. B. R. in Harding, &c. and Goſlin's Caſe*, 3 *Bulſtr.* 241.

And when a Suggeſtion was that the Defendant in the Spiritual Court claimed the Tithes by a Leaſe from the Parſon, of an elder date than that the Plaintiff had that ſued him for them there by force of a later Leaſe by the ſame Parſon, ſo that the Queſtion was, which of the two Leaſes ſhould be preferred, a Prohibition was awarded, and though *Crook* held that a Conſultation ſhould be granted upon 1 *R.* 3 4. that where the Spiritual Court hath Juriſdiction of the Principal, there if an Acceſſory come triable at the Common Law, that alſo ſhall be tryed there; yet *Coke* ſaid that in one *Futter's Caſe*, there was a Suit in the Spiritual Court for Tithes, and Title made by the Grant of the Rectory, and the other made Title by a former Grant, and a Prohibition was granted, yet he agreed, 1 *R* 3.4. unleſs the Spiritual Law differs from our Law, as their Law is, that a Gift of Goods is not good without Tradition, but otherwiſe it is at our Law; and *Dodderidge* ſaid, that the principal matter here, which is the Leaſe, is Temporal not Spiritual, therefore is not within the Rule, 1 *R.* 3. but true it is, that if the Original be Spiritual, then the Acceſſory ſhall be tryed there alſo, otherwiſe not; all which was granted by *Coke*, who alſo ſaid, that if a Man make Title in the Spiritual Court by force of a Leaſe of the Proprietor, and the Defendant deny the Leaſe, a Prohibition ſhall be granted, and in the Caſe then before the Court a Prohibition was granted, *Per Curiam Mich.* 12 *Jac. B. R. Worts* v. *Clifton*, *Rolls* 1 *Rep.* 61.

I will here alſo cite ſome Caſes mentioned by *Rolls* in his *Abridgment*, where Prohibitions have been denied to the Spiritual Court upon Trial of Temporal incident Matters, the Principal being proper to their Juriſdiction. As firſt

If a Parſon compounds with a Pariſhioner for his Tithes and grants them by Deed to him for a certain Sum by the year according to the Agreement, and afterwards he ſhall ſue the Pariſhioner in the Eccleſiaſtical Court for the Tithes in kind, no Prohibition ſhall be granted upon this diſcharge by Deed, for they may well try it having Conuſance of the Principal, 8 *Ed.* 4. 14. *Paſch.* 16 *Jac. B. R.* reſolved betwixt *Griffin and Bulſuſt*, and a Prohibition denied, although that once before it was reſolved *e contra* for the Church of *Wakerly*.

So if a Parſon leaſe all the Tithes of his Benefits to one Pariſhioner, and after ſues him for his own Tithes, no Prohibition ſhall be granted, for that this Leaſe is a good diſcharge there, 8 *Ed.* 4. 14. *per Choke.*

So if a Parſon leaſe by Deed the Tithes of his Pariſh, and after ſues for the Tithes in the Spiritual Court, and there this Leaſe is pleaded, where the Queſtion betwixt them is, whether the Tithes of all the Pariſh, or only of ſome particular things are let, yet no Prohibition lies, for that they have Cognizance of the Original, and they ought to take advice of them that be learned in the Common Law for their direction, as the Judges of the Common Law take advice of them, but if they judge contrary to the Common Law, a Prohibition lies after Sentence, *Mich.* 13 *Car. B. R. betwixt Dr. Pocklington and Sir St. John*, *Rolls* 2 *Abr.* 306, 307.

So if *A.* the Parſon of *B.* ſues for Tithes in the Spiritual Court againſt *B.* who pleads a Leaſe for years made to him by the Parſon, and the Parſon replies, that he was Non-Reſident and abſent by the ſpace of eighty days and more, in ſuch a year, *&c.* from his Benefice, by which the Leaſe became void; no Prohibition lies upon this Plea, although that it be grounded upon the Statute of 13 *Eliz.* and although it was objected, that the Judges of the Spiritual Court ſhall not have the Expoſition of a Statute, yet becauſe they have Juriſdiction of the Original Cauſe, they ſhall have power to try that which is the Acceſſory ariſing thereupon, *Hill.* 14 *Car. B. R. Sir Thomas Lucy* v. *Doctor Lucy*, *per Curiam*, *Rolls* 2 *Abr.* 308. *nu.* 22.

Theſe Caſes ſerve to prove, that if upon a Suit for Tithes in kind, a Leaſe be pleaded and denied, the validity thereof is to be tryed in the Eccleſiaſtical Court, which alſo are in proof of the Rule of Law, that when the Eccleſiaſtical Court hath Juriſdiction of the Principal, it hath alſo Juriſdiction of the Acceſſory, though the Acceſſory be otherwiſe of Temporal Cogniſance.

From all which we may conclude, that the Law formerly was taken to be, or at leaſt no Judgments or Reſolutions were to the contrary, that if a Suit be for Tithes in kind not extinct by Preſcription, or of Lands not Tithe free, and a Preſcription as to the manner of rendring ſuch Tithes be ſuggeſted and ſo comes in as an Acceſſory upon the Suit for the Tithes, though it be to be granted, that the tryal of a Preſcription is otherwiſe temporal, and to be tryed at Common Law; yet when it comes in as an Acceſſory only to the Principal matter of which the Spiritual Court hath Juriſdiction, it may be tryed there, and no Prohibition lies. And it hath been before ſhewed to have been held, that a Suit for a *Modus Decimandi* may be well commenced in the Spiritual Court, and that the *Modus* may be tryed there, as being purely of Spiritual Cogniſance, and no Suit can be brought for a *Modus* in the Temporal Court, therefore if a Temporal Matter coming in as an Acceſſory ſhall be tryed in the Spiritual Court, much more as, it might be urged ſhall a *Modus Decimandi* which is of Eccleſiaſtical Cogniſance, originally be tryed there, when that comes in as an Acceſſory only. Yet when a Parſon libelled in the Spiritual Court

Court for the Tithe of Lambs, and the Defendant to have a Prohibition ſuggeſted a Cuſtom to be, that if one hath Lambs under the number of ſeven, he ought to pay an Half-penny for every Lamb under that number in lieu of all Tithes of Lambs; and if he had but ſeven, the Parſon ſhould have the ſeventh Lamb, and ſhould pay three Pence; and if he had eight, he ſhould pay two pence; and if he had ten, the Parſon ſhould have the tenth Lamb without paying any thing. *Berkley* and *Jones* held, that the Canon Law is ſo, and ſo received in the Spiritual Court, and it is ſurmiſed that the Spiritual Court allows of it, and therefore there needs not any Prohibition. But becauſe it was alledged that it was a Cuſtom, and that the Parſon would ſtay until the Tenth did ariſe, and would refuſe to accept according to the Cuſtom, and that in the Spiritual Court this Surmiſe was not allowed, *Bramſton* and *Croke* conceived that a Prohibition was grantable, and ſo *Jones* and *Berkley* agreed that it ſhould be granted, and that the Party might demur if he would, *Paſch.* 11 *Car. B. R. Anonymus*, 1 *Cro.* 403. But whether an Appeal or Prohibition lies, if ſuch Plea be refuſed, yet a *Modus Decimandi* may be, and frequently hath been allowed to be tryed in the Eccleſiaſtical Court; and the Civilians when the Debate was before King *James* 1. ſaid, that they would allow of a *Modus* it being duly proved, for though it be ſaid in *Lindwood* in his Title *de Decimis cap. Quoniam propter fol* 139. *b Quod Decimæ ſolvantur, &c. abſque ulla diminutione*, and in the Gloſs it is ſaid, *Quod conſuetudo de non Decimando aut de non bene Decimando non valet*, yet this being againſt the Law and Cuſtoms of the Realm is void by the Statute of 25 *H.* 8. *c.* 19. and the Spiritual Judges ought not to have reſpect thereunto, but judge for a *Modus* proved, whether originally ſued for, or if coming in by way of Plea upon a Suit for the Tithes, to allow of the Plea. From all theſe ſeveral Caſes and different Opinions of the Judges one may conclude, that the Law was very much unſettled in the time of *Jac.* 1. and before, about, granting Prohibitions to the Spiritual Courts in caſe they took upon them to try any Temporal Matter, or refuſed Evidence allowable at Common Law, as by one Witneſs or the like; but ſince the time of *Car.* 1. the Spiritual Courts have been allowed to try all Temporal collateral Matters incident to the principal thing there ſued for, and proper to the Juriſdiction of the Spiritual Courts without being prohibited; but ſo, as they try ſuch Temporal incident Matter according to the Rules of the Common Law to which it belongs, elſe a Prohibition ſhall go, as if they refuſe proof by one Witneſs, *&c.* See *Chap.* 54.

If one be ſued for Tithes of Lands not Tithe free, and pleads a Preſcription for a ſpecial manner of Tithing, which is not refuſed, or if ſued for a *Modus Decimandi* originally, pleading another *Modus*, and his Plea is *bona fide* allowed, ſhall ſurmiſe falſly a refuſal of his Plea, and for that cauſe only a Prohibition ſhall be granted; the Queſtion is, whether ſuch Surmiſe of a refuſal may be traverſed, that is, when the matter or ground of the Prohibition is only the Refuſal. And it is ſaid, though the Temporal Courts will take notice that no *Modus* is allowed in the Spiritual Courts, yet a *Modus* muſt be ſuggeſted to have been pleaded there in time, *Mich.* 22 *Car.* 2. *Meſſenger* v. *Jennings*, 2 *Keb.* 721. And generally, where a Suit is properly commenced in the Spiritual Court, Prohibitions are not granted till after Plea there pleaded, *Mich.* 14 *Car.* 2. *B. R.* 1 *Keb.* 387. *Hill.* 14 & 15 *Car.* 2. *Parker* v. *Williams*, 1 *Siderfin* 100. 1 *Keble* 433. *Paſch.* 16 *Car.* 2. *Batty* v. *Smith*, 1 *Keble* 721.

As to the Refuſal of a Plea being traverſable, if the Suggeſtion for a Prohibition doth contain other Matter upon which a Prohibition may be duly granted, as that upon a Suit for Tithes in kind, that the Lands are Tithe free by Preſcription, *&c.* though it be alſo ſuggeſted, that this was pleaded in the Eccleſiaſtical Courr and refuſed; yet whether the Plea was refuſed or not is not traverſable, for the Party may have a Prohibition before any ſuch Plea pleaded by him in diſcharge of Tithes, therefore in ſuch Caſes the Allegation of the Refuſal of the Eccleſiaſtical Judge are Words more of courſe than effect or ſubſtance, *Paſch.* 38 *Eliz. the Biſhop of Wincheſter's Caſe*, 2 *Co.* 44. *the ſame called Wright's Caſe*, *Moor* 525. and is no part of the Matter iſſuable or material in the Plea, but put in only to aggravate the contempt, and many times falſely, and therefore the *Modus Decimandi* is proved by two Witneſſes according to the Statute of 2 *Ed.* 6. *cap.* 13. and not the Refuſal, *Mich.* 7 *Jac. in the Caſe de Modo Decimandi.* Yet it is granted that in ſome Caſes the Refuſal is traverſable, as it was adjudged, *Mich.* 30 *&* 31 *Eliz. B. R. between Morris and Eaton vouched in the Biſhop of Wincheſter's Caſe*, 2 *Co.* 45. where the Caſe was, that *Morris* was ſued by *Eaton* in the Spiritual Court for Tithes, and *Morris* did alledge that *Eaton* did not read the Nine and thirty Articles according to the Statute, and that the Eccleſiaſtical Judge did refuſe to allow the ſame, and this Refuſal was traverſable by the Judgment of the Court, for otherwiſe upon ſuch Surmiſe all Matters might be prohibited in the Spiritual Court, although that the Spiritual Judge did all that belongeth to Law and Juſtice; and in the ſame Caſe the party grieved may have his remedy by way of Appeal.

From all which it may be collected that if the Suggeſtion contains no other Matter upon which a Prohibition ought to be granted to the Spiritual Court, beſides the Refuſal of a Plea there, which by the Common Law is a good Plea and ought to have been allowed, that in ſuch caſe the Refuſal is traverſable, See *Trin.* 26 *Car.* 2. *B. R. Peters* v. *Prideux*, 3 *Keb.* 332. Therefore ſuppoſing that a *Modus Decimandi*, or a Preſcription fo a manner of Tithing is tryable in the Spiritual Court, if in a Suit there for a *Modus Decimandi*, another *Modus* be pleaded, or that there is no ſuch *Modus*, and that Plea is refuſed; or if in a Suit for Tithes of Lands not Tithe free, a Preſcription is pleaded as to the manner of Tithing, and that Plea is refuſed, and a Prohibition being moved for upon Suggeſtion of ſuch Refuſal, the Refuſal being the principal Matter of the Suggeſtion, is therefore traverſable; and in all Caſes where the principal Matter is proper to the Spiritual Court there no Prohibition ſhall be granted till Plea refuſed. The Courts of Common Law alſo upon Suggeſtion of ſuch Refuſal do oblige the Party to make Oath of the truth of ſuch his Suggeſtion, and will not grant any Prohibition without ſuch Oath, *Mich.* 25 *Car.* 2. *B. R. Kendal* v. *Pearm*, 3 *Keb.* 217.

CHAP.

CHAP. LVIII.

Actions upon the Statute of 2 & 3 Ed. 6. cap. 13. *for not ſetting forth of Tithes, by whom, and againſt whom to be brought. Of Declarations, Pleas, Evidences, Verdicts, and Judgments in ſuch Actions.*

HAving ſhewed what remedy the Law gives the owner of Tithes for the recovery of them, or ſatisfaction for them being detained, and in what Courts ſuch remedy is to be had. I will here ſubjoin in what manner Actions are to be brought in the Common-Law-Courts upon the Statute of 2 *E.*6. c.13. to recover Damages for the ſubſtraction of Tithes; and by whom, and againſt whom ſuch Actions are to be brought, how the Declarations in ſuch Action are to be framed, what Pleas the Defendants may make for their Defence, and what Evidence is proper, and may and ought to be given both by Plaintiffs and Defendants in ſuch Actions.

Firſt, if an Husband be ſeiſed, or poſſeſſed of Tithes in the right of his Wife, or jointly with his Wife, the Husband and Wife muſt join in bringing the Action upon this Statute for the ſubſtraction of ſuch Tithes, *Hill.* 34 *Eliz. Wentworth* v. *Criſpe*, *Moor* 912. *Mich.* 39 & 40 *Eliz. Bedel* v. *Sherman*, 2 *Inſt.* 650. 13 *Coke* 48. *Hill.* 7 *Jac. Forde* v. *Pomroy*, *Noy* 136. *ſame Caſe*, 2 *Brownl.* 9. *but Paſch.* 12 *Jac. in Babington's Caſe*, *Rolls* 1 *Rep.*13. It ſeems to be admitted, that the Action may be brought by the Husband alone without joyning the Wife with him.

If the Husband dies, the Wife, and not the Executors of the Husband ſhall bring the Action, *Foord* v. *Pomroy*, *Noy* 136. But if the Tithes be once ſet out and ſevered from the nine parts, they then become a Chattel veſted in the Huſband, *Ley* 70. therefore if after ſuch Severance they be taken away by a Stranger, the Husband alone may bring an Action of Treſpaſs for ſuch taking away of his Tithes, without joyning his Wife with him, *Mich.* 9 *Car. Anonymus*, *Jones* 325. *Foord* v. *Pomroy*, *Noy* 136. 2 *Brownl.* 9. But an Action of Treſpaſs in ſuch Caſe lies not againſt the Owner, who ſet out the Tithes, *Webb* v. *Pits*, *Noy* 44. *Leigh* v. *Wood*, *Moor* 912. 3 *Cro.* 607. but if after Severance the Owner of the Corn himſelf, or any other by his Command takes the Tithes away, the Husband and Wife in ſuch caſe, may join in an Action upon the Statute of 2 *Ed.* 6. againſt the Owner for not ſetting out his Tithes, notwithſtanding that they were once ſevered by him from the nine parts, for that ſuch Severance is to be looked upon as fraudulent only to evade the Law, *Noy* 126. But it ſeems to me, that the Husband in this Caſe hath an Election either to charge the Owner of the Corn in an Action of Treſpaſs at Common Law to be brought by himſelf alone for taking away his Tithes after they were ſevered, or in an Action upon the Statute to be brought by himſelf and his Wife for taking away the Corn the Tithes not ſet out, even as before the Statute, in ſuch caſe the party grieved might either have brought an Action of Treſpaſs at Common Law, or have commenced a Suit for the Tithes in the Eccleſiaſtical Court; But *Quære* if there be not a difference, when the Tithes are immediately taken away by the Owner of the Corn after they are ſevered, and when they are ſuffered to continue for ſome time upon the Land after ſuch Severance.

If

If one be poſſeſſed of Tithes by ſeveral Titles, as where part of them belong to the Parſon, and part to the Vicar, who ſeverally make Leaſes of their parts to one perſon, ſuch Leſſee may bring one Action for the Subſtraction of theſe Tithes, *Paſch.* 3 *Jac. Sir Richard Champernon* v. *Hill*, 2 *Cro.* 68. *ſame Caſe*, *Noy* 3. *Yelverton* 63. *and* 1 *Brownl.* 86. So if the Land out of which Tithes are demanded lie in ſeveral Pariſhes, yet one Action may be brought for the Subſtraction of them, *Paſch.* 23 *Car.* 2. *Pellow* v. *Kingsford*, 1 *Ventris* 126. But two ſeveral perſons who have right to Tithes by ſeveral Titles cannot join in one Action for the Subſtraction of them, as the Parſon and Vicar in the Caſe aforeſaid cannot join in bringing an Action, *Sir Richard Champernoon* v. *Hill.* 1 *Brownloe* 86. Yet it is ſaid, that Jointenants or Tenants in Common of Tithes muſt join in an Action for the Subſtraction of them, *Clayton's Rep. Caſe* 48. But *Qu re* as to Tenants in Common, for that it ſeems contrary to the Reſolution of *Sir Richard Champernoon's Caſe* laſt before cited.

If the Action be brough by a Parſon by Plaint, he need not name himſelf Parſon in the *Queritur*, for if it appear by the Declaration, that he is Parſon 'tis ſufficient, but it is ſaid by *Fleming* Juſtice, that if the Action be brought by Writ, he muſt name himſelf Parſon, although he need not where it is by Plaint, *Mich.* 9 *Jac. Willot* v. *Spencer*, 1 *Brownlow* 98. If the Action be brought *tam pro Domino Rege quam pro ſeipſo*, it is not good, *Mich.* 40 *Eliz. Jones* v. *Carr*, 3 *Cro.* 621. *ſame Caſe*, *Moor* 911. Yet it is agreed *Mich.* 4 *Car. Luvered and Owen's Caſe*, *Hetley* 121, 122. That an Action upon this Statute may be brought *tam pro Domino Rege quam pro ſeipſo*; the reaſon there given is, becauſe the King ſhall have a Fine, and the *Parſon's Counſellor* 404. takes this Caſe in *Hetley* to be Law rather than the Caſe in 3 *Cro.* 621. *Moor* 911. Upon that account only, becauſe the King is to have a Fine if Judgment be given againſt the Defendant, and mentions Actions brought upon the Statute of *Hue and Cry*, *&c.* to be within the ſame reaſon, upon which Statutes Actions are ſo brought: But the reaſon that the King is to have a Fine, ſeems to be no reaſon at all to bring the Action in the King's Name. for in many Actions the King hath a Fine, and yet the Action not brought in his Name. And I take both the Preſidents and Practice to be generally againſt the *Parſon's Counſellor*, and according to *Jones and Carn's Caſe*, *viz.* to bring the Action in the Name of the party injured only; and not, *tam pro Domino Rege*, *&c.* for a certain Duty being given by the Statute which may be ſued for by Action of Debt, I ſee no reaſon why the Action ſhould not be brought in the Name of the Party only injured by ſubſtraction of the Tithes, and unto whom the Duty is given in recompence and ſatisfaction of ſuch his Injury; and the Caſe ſeems to differ from Actions upon the Statute of *Hue and Cry*, *&c.* which demand Damages only, but not any certain Duty veſted in the injured Party by the Statute. But it is admitted in *Jones and Carn's Caſe*, *Moor* 911. That an Information may be brought in the King's Name grounded upon this Statute againſt any perſon for not ſetting out his Tithes; and *Paſch.* 26 *Eliz. Savil* 62. we find ſuch an Information brought.

If two be Jointenants, or Tenants in Common of Land the Action muſt be brought againſt them both; but if one of them only doth occupy the Land, the Action is to be brought againſt him; or if one Jointenant, or Tenant in Common ſets forth the Tithes, and the other takes them away, the Action is to be brought againſt the wrong doer only, *Mich.* 8 *Car. Cole* v. *Wilks*, *Hutton* 121, 122. *Sir Richard Champernoon's Caſe*, 2 *Cro.* 86. *Mich.* 12 *Jac. Moyl* v. *Ewer*, 2 *Cro.* 362. *Hughes Abr.* 687. But if the Owner of Land ſells

ſells by the Corn thereon growing, and the Vendor the command of the Vendee reaps it and carries it away without ſetting out the Tithes, the Action lies againſt the Owner of the Land, *Hill.* 5 *Jac. Rocheſter* v. *Porter*, *Noy* 152. *Hele* v. *Fretenden*, 1 *Brownloe* 34. And I ſuppoſe the Action may alſo be brought againſt the Vendee, at the Election of the Plaintiff.

It is not neceſſary for the Plaintiff in his Declaration to make any ſpecial Title to the Tithes, or to ſhew any Deed to maintain his Right to them; for the Action is but in the nature of Treſpaſs to recover Damages, and to puniſh the wrong and injury the Plaintiff hath ſuſtained by taking away his Tithes contrary to the Statute, and the Plaintiffs Title only as an Inducement and Conveyance to the Action; but it is ſufficient to purſue the Words of the Statute, and to ſet forth in the Declaration, that the Plaintiff is the Owner or Proprietor of the Tithes, *&c.* 12 *Jac. Babbington's Caſe*, *Rolls* 1 *Rep.* 13. *Pellow and Kingsford's Caſe*, 1 *Ventris* 126.

It is not neceſſary to ſet forth in the Declaration by whom the Corn was ſown the Action being brought againſt him who is Owner of the Corn at the time of the Reapingthereof; but the time and place where and when the Corn was carried away muſt be alledged, *Moly* v. *Ewer.* 2 *Croke* 362. And altho' the ſeverance of the Corn be ſhewed to be before the Sowing thereof, yet becauſe the mentioning of the time when the Corn was Sown is ſuperfluous and unneceſſary, the Declaration is good notwithſtanding, *Parſon's Counſellor* 404. So if the taking away the Corn is alledged to be after the Defendants intereſt in the Land determined, yet 'tis good, for the Defendant continues to be owner of the Corn notwithſtanding that his intereſt in the Land be ended before it be ſevered, *Trin.* 11 *Jac.* 2 *Croke* 325. *ſame Caſe*, 1 *Brownlow* 123. Neither is it neceſſary for the Plaintiff to ſet forth what Eſtate the Defendant hath in the Land, or by what Right or Title he occupies it; but to ſay generally, that the Defendant is occupier, is ſufficient, *March* 21, 22. Nor need the Plaintiff expreſs in the Declaration, the quantities or loads of Corn, *&c.* carried away, 1 *Brownlow* 72. nor the ſeveral kinds of it, 2 *Inſtitutes* 650. 13 *Coke* 47. *Townſend* v. *Clerk.* 3 *Keble* 307. But in an *Ejectione firme* brought for Tithes, there the ſeveral kinds ought to be ſet forth, *Henry Harper's Caſe*, 11 *Coke* 55. *b.* and where, in a Declaration the Plaintiff ſet forth, that he was *Proprietarius Decimarum Garbarum & fœni*, *&c.* And that the Defendant did Sow certain Land containing ſo many Acres in that Pariſh with Grain, and carried the ſame away not ſetting out the Tithes, after Verdict for the Plaintiff, it was moved in arreſt of Judgment, that *Proprietarius decimarum Garbarum* was incertain, and no Grain in particular was demanded by the Declaration, therefore the Declaration was not good; but it was reſolved, that *Garba* in its proper Signification is intended of Corn, and *Roll* ſaid, that it had been ſo reſolved in one *Baxter's* Caſe, upon Conſultation had with the Civilians, where upon a Grant of *decimas Garbarum*, the party claimed to have Tithe Hay; but agreed, that altho' the word *Garba* in its Latitude did comprehend any thing that uſeth to be bundled, as Wood, *&c.* yet after Verdict it is to be intended of Corn only; and tho' the demand was of ſo many Acres of Grain generally, it was held to be certain enough, it being mentioned to be Sown on a certain number of Acres, this Action upon the Statute, not being brought to recover the Tithes themſelves, but damages for them only, *Mich* 24 *Car.* 2. *Southcote* v. *Southcote*, *Aleyn* 80. and it is ſaid, to be the beſt way in Actions brought upon this Statute to declare generally, that the Plaintiff is Parſon, *&c.* of ſuch a Pariſh, and that the Defendant had ſuch Tithes within that Pariſh, the ſingle value whereof is

ſo

ſo much, by which the Action accrues to the Plaintiff, to demand the treble value according to the form of the Statute; it is alſo ſaid that the Plaintiff need not ſet forth, that he, or the Defendant is *Subditus domini regis* (altho' the words of the Statute extend only to Subjects,) for that ſhall be intended 1 *Siderfin* 265. 1 *Keble* 922. nor need the Plaintiff ſhew, that the Tithes were not compounded for before the Corn carried away, for this lies on the Defendants part to be made out, *Paſch.* 18 *Car.* 2. *Owen* v. *Evans.* 2 *Keble* 34. But where the Plaintiff in an Action upon this Statute for not ſetting out the Tithe of Wood, Declared that the Defendant had cut down Wood to the value of Two Hundred Pounds, and Demanded Six Hundred Pound, as the treble value of the Tithes of the ſaid Wood, this declaration was held not to be good, the Plaintiff of his own ſhewing demanding more for Tithe then the whole Wood was worth, *Paſch.* 5 *Jac. Man* v. *Somerton.* 1 *Brownlow* 94.

Note, that an Action grounded on this Statute 2 *E.* 6. for not ſetting out of Tithes, is held not to be within the Statute 21 *Jac. c.* 16. of Limitations, that Statute not extending to Actions grounded on Acts of Parliament, therefore the Plaintiff is not by Law confined to ſix years, or to any other time certain within which to bring his Action, *Mich.* 14 *Car. Talory* v. *Jackſon*, 1 *Croke* 513. *Mich.* 18 *Car.* 2. *Jones* v. *Pope*, 1 *Sanders* 38. 1 *Siderfin* 305. 1 *Keble* 93. *Paſch.* 21 *Car* 2. *Hodsden* v. *Harridge.* 1 *Siderfin* 415. 2 *Keble* 462. 497. 2 *Sanders* 66.

The next thing to be conſidered is, what Plea the Defendant ought, or may plead in an Action brought againſt him grounded on the Statute 2 *E.* 6. As to this, the Declaration being a demand of a Debt or Duty due to the Plaintiff from the Defendant, and veſted in him by the Statute, in Satisfaction of, or recompence for the Tithes Subſtracted; the moſt common and uſual Plea is, *Nil Debet*, which is a direct anſwer to, and denial of the Plaintiffs demand; but Not Guilty is alſo held to be a good Plea in this Action, that being a denial of the offence, and breach of the Law charged upon the Defendant in not ſetting out the Tithes according to the Statute, which offence is the ground and foundation of the Plaintiffs demand, ſee the Caſe of *Bowtry* v. *Iſted*, *Hobard* 218. *Trin.* 42 *Eliz. Wortley* v. *Herpingham.* 3 *Cro.* 766. *Mich.* 40 *Eliz. Johns* v. *Carne.* 3 *Croke* 621. *Mich.* 33 & 34 *Eliz. Langley* v. *Haynes*, *Moor* 302. *Hill.* 2 *Jac. Sir Rich. Champernon* v. *Hill. Moor* 914. and both theſe Pleas are the general Iſſue in this Action, but we find alſo that Defendants have pleaded ſpecal Pleas, as a *Modus*, or other diſcharge, and the ſame held good as in *Southcote* and *Southcots* Caſe *Aleyn* 80 *and Bernerd and Evans's Caſe*, *Raymond* 14. *ſame Caſe*, 1. *Keble* 5. where a Parol diſcharge of Tithes for years was pleaded, but it ſeems not uſual to plead ſuch ſpecial matter, neither is it ſo ſafe as the general Iſſue, wherein any diſcharge of Tithes may be given in Evidence, and it may alſo admit of ſome queſtion, whether upon a ſpecial Demurrer for that Cauſe, ſuch ſpecial Pleas are good, as accounting only to the general Iſſue.

The Cauſe being at Iſſue and brought to Tryal, it is alſo neceſſary to be ſhewed, what Evidence is requiſite and material to be given by the Plaintiff to maintain his Action, ſo as to obtain a Verdict, and alſo what Evidence the Defendant may or ought to give to excuſe, or juſtify himſelf from the Penalty given by the Statute.

Firſt, if the Plaintiff be Parſon, Vicar or other Eccleſiaſtical perſon, and claims the Tithes in the right of the Church, or Benefice whereof he is Incumbent, he is in ſtrictneſs bound to prove his Inſtitution and Induction, and all

all things elſe required by Law to qualifie himſelf to be Incumbent of that Church whereunto the Tithes do belong; but if the Plaintiff hath been for ſeveral years in poſſeſſion of his Living, he is not ordinarily put to prove theſe Matters, unleſs the Defendant in his Defence ſhew ſome Reaſons why theſe things ought to be proved and made out, but the Law doth not determine how many years the Plaintiff ought to be in poſſeſſion of his Benefice to excuſe him from being put to prove theſe things, but that ſeems to be left to the diſcretion of the Judge who tries the Cauſe. We find it reported, that in a Suit for Tithes brought in the Spiritual Court, the Defendant pleaded, that the Plaintiff being Parſon had not read the Nine and thirty Articles; and the Court put the Defendant to prove that Matter, although it was a negative; whereupon the Defendant moved for a Prohibition, which was denied; for by *Coke* and *Dodderidge*, the Law doth preſume that a Parſon hath read the Articles, becauſe otherwiſe he is to loſe his Benefice, and where the Law preſumes the affirmative, there the negative ſhall be proved, *Mich.* 12 *Jac. Monk* v. *Butler*, *Rolls* 1 *Rep.* 83. So is it ſaid to have been ruled upon Evidence at the Aſſiſes, that all things requiſite to make the Plaintiff complete Incumbent ſhall be preſumed, unleſs the Defendant by ſome Evidence to the contrary, give occaſion to the Plaintiff to prove thoſe Matters, *Clayton's Rep.* 83. Yet in an *Ejectione firmæ* for a Rectory, it was inſiſted on by the Defendant's Counſel (after the Plaintiff had made proof of his Admiſſion, Inſtitution and Induction) that the Plaintiff ought to prove his reading and ſubſcribing the Articles, and the Declaration of his Aſſent to all things contained in the Book of Common Prayer, and that ſuch Declaration of his Aſſent was made within the time appointed by the Statute; and by the Report of the Caſe one may collect, that the Opinion of the Court ſeemed to be, that all theſe things ought to be proved; but it is there ſaid, that Admiſſion, Inſtitution and Induction upon the Preſentation of an Eſtranger is ſufficient Evidence to bar the Plaintiff in an *Ejectione Firmæ*, and to put him to his *Quare Impedit*, *Mich.* 16 *Car.* 2. *Snow Leſſee of Dr. Crawley* v. *Philips*, 1 *Sid.* 220. But according to the Opinions of *Coke* and *Dodderidge* before mentioned, for that the Plaintiff having once a legal Title by Inſtitution and Induction, the other Matters appointed by the Statute to be after performed by him, the Omiſſion of any of which, although it make the Living void, yet being as a Condition ſubſequent to the Plaintiffs Title, ſhall be preſumed to be performed by him, and therefore the Non-performance ought to be made out and proved by the Defendant.

The Plaintiff muſt alſo prove that the Lands lie within his Pariſh, and that the Corn, *&c.* growing thereupon was carried away, and he muſt alſo prove the value of the Corn, *&c.* and if the Plaintiff be a Leſſee he muſt prove his Leaſe, but after a long poſſeſſion he need not, nor need he prove what Eſtate his Leſſor had at the time of the Leaſe made, 1 *Sid.* 220.

The Plaintiff having made out his Caſe and proved his Title to the Tithes; it is then incumbent on the Defendant to juſtifie or excuſe himſelf. In order to which, the Defendant muſt prove that the Tithes were juſtly ſet out according to Law and the Cuſtom of Tithing uſed within that Pariſh; and if the Tithes be once ſo duly ſet out, and after that taken away by a Stranger, the Defendant Owner of the Land ſhall not be chargeable. So the Defendant may prove an Agreement or Compoſition made with the Plaintiff for the Tithes, and though it be a Parol Agreement only which by Law is not ſufficient to grant the Intereſt of the Tithes, eſpecially for more years than one, yet ſuch a Parol Agreement is ſaid to be good to excuſe the Defendant

from the Forfeiture given by the Statute, *Paſch.* 13 *Car.* 2. *Barnard* v. *Ewers*; *Raymond* 14. *ſame Caſe*, 1 *Keb.* 21. *Paſch.* 24. *Car.* 2. *Knight & al'* v. *Peepes*, 3 *Keb.* 24. and if there be two Plaintiffs who bring the Action, an Agreement with one of them only is ſufficient, and ſhall bind his Companion, *Moor* 915. The Defendant may alſo prove that another perſon hath the Right to the Tithes, to whom he has paid them, or compounded for them.

The Defendant may alſo prove, that the Plaintiff obtained his Living by Simony, or did not read the Articles, or is guilty of ſome other Act or Omiſſion which makes his Benefice void, or he may prove a Leaſe, Grant or other Title from the Plaintiff, or from ſome other perſon under whom the Plaintiff claims, who had Right to leaſe or grant ſuch Tithes. So may the Defendant prove a *Modus Decimandi*, or any other Diſcharge of the Tithes, or the payment of them, by Preſcription, Privilege, Unity, *&c.* and a Non-payment of Tithes time out of Memory is good Evidence of ſuch Diſcharge, *Hobart* 300, 311. *Savil* 62. 3 *Keb.* 217. *Dyer* 349. *b. Parſon's Counſellor* 338. But if the Diſcharge be by Popes Bull or Compoſition, a Copy of ſuch Bull, or Compoſition is not Evidence without ſhewing the Bull or Compoſition it ſelf, *Bret* v. *Ward*, *Winch* 70. So Depoſitions taken in the Eccleſiaſtical Court in a Suit there for Tithes, (although the Witneſſes be dead) are not Evidence in an Action brought at Common Law; but a Sentence given in the Eccleſiaſtical Court in a Suit for Tithes, (it being a judicial Act) may be given in Evidence in an Action brought in the Temporal Courts, *Mich.* 13 *Car. the Earl of Sarum* v. *Sir Brocket Spencer*. *Rolls* 2 *Abr.* 679. *March* 120.

If the Jury give a Verdict for the Plaintiff, they muſt find the real value of the Tithes, which ſhall be trebled by the Court; as if the Jury find the real and ſingle value to be twenty Pounds, *&c.* they ought to give the Plaintiff only ſo much, and the Court ſhall treble it, and make that Sum given by the Jury to be ſixty Pounds, which is the treble value, ſo was it done, *Hill.* 11 *Jac. Baldwin* v. *Gerreys*, *Godbolt* 341. But if the Iſſue be upon the Cuſtom of Tithing, or any other collateral Point, the Jury then need not find any value of the Tithes, for that in ſuch Caſe the Defendant ſhall pay the value expreſſed by the Plaintiff in his Declaration, becauſe by the collateral Matter pleaded in Bar, the value of the Tithes ſet forth in the Declaration is confeſſed, as was reſolved in *Coſterdam's Caſe*, *cited in Oliver and Collin's Caſe*, *Paſch.* 6 *Jac.* 1 *Brownloe* 100. *ſame Caſe*, *Yelverton* 127. Therefore in all Actions brought upon this Statute, if the Defendant plead any collateral Matter in Bar of the Action, he muſt take the value of the Tithes mentioned in the Declaration by Proteſtation, *viz.* he muſt by the form of a Proteſtation aver, that the Tithes were not of that value as is declared, otherwiſe he will be charged with the value the Plaintiff hath by his Declaration ſet upon them, *Mich.* 24 *Car.* 2. *Dame Bowles* v. *Broadhead*, *Allein* 88. *Paſch.* 16 *Car.* 2. *Williams* v. *Inhabitants of Uwpood &c.* 1 *Keb.* 706. And by *Jones* Juſtice the ſame Law it is, if Judgment be given for the Plaintiff by *Nihil dicit*, *non ſum informatus*, or upon Demurrer, for in thoſe Caſes the Plaintiff ſhall have Judgment for the whole value by him demanded, *Parſons Counſellor* 410.

If the Action be brought againſt two or more Defendants, and the Verdict finds for the Plaintiff againſt one of the Defendants only, and acquits the reſt, the Plaintiff ſhall have Judgment againſt him, againſt whom the Verdict paſſeth, the Action being grounded upon a Statute, although it be otherwiſe in Actions grounded upon joint Contracts at Common Law, by *Rolls* Chief Juſtice in *Brown and Nelſon's Caſe*, *Stiles* 317, 318. But if the Action be brought for

for Predial Tithes for which an Action lies upon the Statute, and alſo for ſmall, or other Tithes for which no Action lies upon the Statute, and the Plaintiff obtains a Verdict for the whole, yet he ſhall not have Judgment, upon ſhewing this Matter to the Court, for that the Plaintiff ought not to recover in an Action upon the Statute for any other Tithes but for Predial Tithes only, *Trin.* 8 *Jac. Pain* v. *Nichols*, 1 *Brownl.* 65. *Hill.* 9 *Jac. Mortimer* v. *Freeman*, 1 *Brownloe* 70.

In Actions grounded on the Statute of 2 *E.* 6. if Judgment be given for the Plaintiff, the Judgment ſhall be *Quod Defendens ſit in miſericordia*, and not *quod capiatur*, becauſe the Action is to recover a Debt given by the Statute as a recompence for the Tithes, *Rolls* 1 *Abr.* 223. And a Recovery by the Plaintiff in an Action upon this Statute of 2 & 3 *E.* 6. is a good Plea in Bar to any other Suit brought after for the ſame Tithes, *Paſch.* 3 *Jac. Sir Richard Champion* v. *Hill*, 1 *Brownlow* 87. *ſame Caſe*, *Yelverton* 63.

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A TABLE OF THE Principal Matters Contained in this BOOK.

Abatement.

WHO may plead in Abatement, 185

Matter in Abatement, how to be pleaded, *ibid.*

One of the Plaintiffs in *Quare Impedit* dies, the Writ ſhall not abate, 193

One Defendant in *Quare Impedit* dies, the Writ ſhall not abate; Writ of Right, *contra*, 193

Appears one of the Defendant was dead before the Writ brought, the Writ ſhall abate, 211

Appears by the Declaration Plaintiff and Defendant are Tenants in Common, if the Writ ſhall abate, 212, 213

Patron dies pending a *Quare Impedit* the Writ ſhall not abate, 184, 193, 194

Writ will not abate for Matter found by Verdict, 185

Falſe Latin or want of Form, if it ſhall abate the Writ, 211

Miſnaming Plaintiff or Defendant, if it ſhall abate the Writ, *ibid.*

Quare Impedit brought by ſeveral jointly, who vary in making their Title, if the Writ ſhall abate, 183

Darrein Preſentment brought, pending a *Quare Impedit*, or *e contra*, the *Darrein Preſentment* ſhall abate, 174

Two *Quare Impedits* brought againſt the ſame perſon for the ſame Avoidance, the ſecond ſhall abate, 175

Plaintiff made a Knight, his Writ ſhall abate Honour by diſcent, 193, 211

Quare Impedit brought after the Church full of the Plaintiffs Clerk, the Writ ſhall abate, 194, 211, 216, 217

The Plaintiffs Clerk preſented, *&c.* pending a *Quare Impedit* ſhall not abate the Writ, 211

Where a *Quare Impedit* abating ſhall be peremptory to the Plaintiff or not, 211, 212

Quare Impedit not brought againſt proper perſons ſhall abate, 183

Quare Impedit againſt the Incumbent without the Patron, when the Writ ſhall abate, 184, 185

Where a Writ may be abated by the Court *ex Officio*, or not, *ibid.*

Writ abated by Surmiſe to have a Prohibition, 194

If bringing a *Duplex Querela* will not abate a *Quare Impedit*, 166

Abbies.

Catalogue of Abbies above 200 *l. per annum* value, 417

What Abbies diſſolved by Statute 27 *H.*8.*c.*27. 413, 423

Abeyance.

Freehold or Feeſimple of a Church in Abeyance, 122, 128, 292

Acceptance.

Where Acceptance of Rent will make a voidable Leaſe good, or not, 380, 381, 382

Action.

The Law allows not of many Actions for the ſame matter, 254
Action on Statute 2 & 3 *E.* 6. for not ſetting forth Tithes, how to be brought, by and againſt whom, 517, *&c.*
Action for not ſetting forth Tithes, if it may be brought *tam pro Domino Rege, &c.* 518
Action on the Caſe on a Parol Agreement for Tithes, 338
Action lies not for ſuing for Tithes contrary to a *Modus*, 400
No Action lies for ſuing unjuſtly for Tithes in a proper Court, *ibid.*
Action for not taking away Tithes after they are ſet forth, where it lies, 482
Action for hindring to order Tithes after they are ſet forth, 436, 441
Action againſt the Ordinary for placing one in a Seat in an Iſle, in which another hath property, 296
Action for taking away winding Sheets, who may have it, 304
Where an Action lies for a diſturbance to a Seat in the Church, 295, *&c.*
What Action for breaking down Seats in a Church, and for whom, 295.296,300
No Action upon a Promiſe againſt a Corporation, 346
Action againſt the Biſhop for admitting a Clerk contrary to Verdict in a *Jure Patronatus*, 167
No Action of the Caſe againſt a Biſhop for refuſing Admiſſion, *&c.* 171
Action of the Caſe for Dilapidations, 311
Action againſt a Parſon for not keeping a common Bull, and Boar, 450
Action for taking or demanding more for a Mortuary than is allowed by Law, 462, 475
What Actions Eccleſiaſtical Perſons may have to recover the Inheritance, 385, 386
Action upon the Statute 2 & 3 *E.* 6. *cap.* 13. for not ſetting forth Tithes is perſonal grounded on the contempt, 486, 518, 519
Matter prohibited by Statute, Action lies for doing it, although no Action be given by the ſame Statute, 261
Action upon the Statute 21 *H.* 8. *cap.* 13. againſt a Clergy-man for taking of Farms, *&c.* 279
Action by the Heir for pulling down, *&c.* a Monument, Graveſtone, *&c.* 302
Action by the Parſon for breaking the Windows of the Church, 295, 302
Action againſt a Parſon for neglecting to ſay Divine Service, 254
Action for refuſing to admit one to the Sacrament, 238, 254
Action for Mony due for a Mortuary, 475

Acceſſary.

No Acceſſary in Simony, 29

Admiſſion Vide Preſentation and Biſhop.

Advowſon Vide Appendant.

Advowſon or Right of Patronage what, 39
The ſeveral ſorts of Advowſons, *ibid.*
Advowſons not accounted as things gainful, 57
Advowſons Aſſets in the hands of Heirs and Executors, *ibid.*
Advowſons how transferred from one to another, and by what words, 47, 57, 175
How many Writs to recover an Advowſon, 171
Advowſons by what Names known, 57
Two Advowſons of one Church, 4, 180, 181
Advocatio Medietatis & Medietas Advocationis, 181, 182, 197
Advowſon appendant what, 39, 40
Advowſons in groſs what, 39, 41
Advowſons held by Tenure, 47, 56
Biſhop nothing to do with Patronage of Churches, 164, 165
Advowſons paſs by the words *Tenements* or *Hereditaments*, 57
Advowſons if extendible upon Statutes Merchant, *&c.* 62
Advowſon may be yielded in value upon warranties, 57

Aid.

Who may pray in Aid, of whom, and when, 385, 386

Alien.

Alien, if he may be refuſed Admiſſion to a Benefice, 147, 148
Aliens excepted out of the Statute of 14 *Car.* 2. *cap.* 4. 103

Amendment.

Writs in *Quare Impedit*, when amendable, 180

Amerciament.

How much a Biſhop ſhall be amerced in a *Quare Impedit*, and upon what Plea, 200,219

Annuity.

Annuity out of a Church united, how diſcharged, 129
Arrears of an Annuity, how to be recovered after Judgment in a Writ of Annuity, 386

Appeal.

What Judgments may be avoided by Appeal, 2
Appeal ſuſpends Sentence of Deprivation, 36
No Appeal from the Court of Delegates, *ibid.*
Difference between Appeal, and Commiſſion of Review, *ibid.*

Appendant Vide Advowſon.

Advowſons to what they may be appendant, 40, 41, *&c.*
Advowſon appendant to a Meſſuage, 41
Advowſon appendant to two Mannors, 40
Tow Advowſons appendant to one Mannor, *ibid.*
Moiety of an Advowſon appendant, *ibid.*
Advowſon appendant to an Acre of Land parcel of a Mannor, 40, 41
Advowſon in one County appendant to a Mannor in another County, 40
Rectory appropriate appendant to a Mannor, 41
Mannor to which an Advowſon is appendant Eſcheats, 40, 47, 139
Corporation to which an Advowſon is appropriated is diſſolved, to whom the Advowſon of the Church ſhall go, 139
Advowſon of one Church appendant to the Advowſon of another Church, 41
Advowſon appendant ſevered if it may become again appendant, 43.44,
Where an Advowſon ſhall become in Groſs by Partition, 43
Advowſons appendant how made to be in groſs, 42, 43, 44
Advowſons part appendant, and part in groſs, 39, 40
Advowſon appendant how to be pleaded, 40
Evidence that the Advowſon of a Vicarage is appendant. 41

Appropriation and Impropriation.

What words moſt apt to make an Appropriation, 133
What perſons capable of an Appropriation, 130
The Form of an Appropriation, 133
The Effect of an Appropriation, 130,132 304
If Vicarage may be appropriate, 135, 136
By whoſe Licence and Conſent, *&c.* Appropriations are to be made, 130, 131, 371
Licence of Appropriation by the King how to be made, 131, 132, 134
Aſſent of the Patron to an Appropriation, how it may be declared, 131
Appropriation without Licence, what forfeited thereby, *ibid.*
Corporation miſnamed in Licence of Appropriation, 133
Appropriation of a Church full, 128,132
Appropriation by the King, where good, 130, 131
Appropriation *in futuro* gives no Interſt till executed, 323
Yearly Reſervation to the Poor, *&c.* to be upon every Appropriation, 133
Appropriations not grantable over, 140
Impropriations when Lay Fee, 302,362
Impropriator to repair the Chancel, and what remedy to compel him to do it, 302,304
What Eſtate they ought to have to whom Appropriations are made, 130, 139
By what Acts a Church may be diſappropriate, 137,138,139,140
Appropriation in Lay hands called Impropriation, 138
Impropriations by Preſentment reſtored to the Church, 362
Preſentation by a Stranger to a Church appropriate is void, 8
Appropriation by a Biſhop to an Hoſpital made void by the Succeſſor, 139
Vicar to be endowed in every Appropriation, 133, 134
Vicarage united to a Parſonage appropriate, doth not diſappropriate the Parſonage, 139
Appropriation to a Corporation after diſſolved, who ſhall have the Advowſon of the Church, *ibid.*
Appropriation of the Church of *Hadenham* to the Archdeacon of *Ely* confirmed by Parliament, 134

Archdeacon.

Archdeaconries, by whom given, and how, 121
Archdeacon the Biſhop's Miniſter, 156
Archdeacons to be in Holy Orders, 121
Archdeacon not a meet Function, 172
Archdeacons have *locum in Choro*, *ibid.*
Archdeacons are Dignitaries, 4

Arch-

Archdeaconry, if Benefice with Cure, 5, 121
Archdeacon, if bound to read the Articles, ſubſcribe the Declaration, *&c.* 121

Arreſts.

Arreſts, and ſerving Proceſs on the Lord's-Day, prohibited, 261, 262
Arreſts not to be made in Churches, or places dedicated, 261, *&c.*
Miniſters performing Divine Service, not to be arreſted, unleſs where the King is Party, 260, *&c.*
Perſons not to be arreſted *eundo vel redeundo* from, or to Divine Service, 261

Articles.

The 39 Articles, 112
39 Articles how to be read, and aſſented to, within what time, and by whom, 112, 121
Subſcription to the 39 Articles how to be made when, before and by whom, 7, 31, 32, 100, 106, 107, 144
39 Articles not ſubſcribed, makes Admiſſion, Inſtitution, *&c.* void, 6, 7, 30, 106
Subſcribing the 39 Articles, how to be underſtood, 106

Aſſent Vide **Articles.**

Aſſent to the Book of Common Prayer, and the 39 Articles how to be declared, 33, 111, 112
Aſſent to an Appropriation how it may be declared, 131

Aſſets Vide **Executors.**

Aſſignee.

Where an Aſſignee ſhall have advantage of a Covenant to celebrate Divine Service, 253

Aſſiſe Vide **Darrein Preſentment.**

No Aſſiſe for Rent on Leaſe for years, 382
Aſſiſe lies only to recover a Freehold, *ibid.*

Attachment.

Attachment for offending againſt a Rule of Court, but not againſt private Agreements, 27

Attainder.

Nobility loſt by Attainder for Treaſon or Felony, 11
One attainted, ſeiſed of an Advowſon for anothers Life, all Avoidances which ſhall happen during the Eſtate are forfeited, 7

Bailiff.

WHAT Acts done by Bailiff ſhall bind the Maſter, 382, 383

Baptiſm.

The Miniſters Duty in Baptiſing, 240
Midwives uſed to baptiſe, *ibid.*
When an Infant, *&c.* ſhall be ſaid to be ſufficiently baptiſed, *ibid.*
Neceſſity of Baptiſm too rigorouſly taught, *ibid.*

Baſtard.

Baſtard not to be ordained without diſpenſation, and by whom ſuch diſpenſation is to be granted, 102

Benefice.

Benefice with Cure of Souls, what, and how to be obtained, 5
What Benefices with Cure are intended by the Statute of 13 *Eliz. cap.* 12. to read, and ſubſcribe the 39 Articles, 121
Benefices without Cure incompatible, by what Law, 5
Prebendary no Benefice with Cure, 5, 121
Archdeaconry, if Benefice with Cure, *ibid.*
Deanry, if Benefice with Cure, 5
What is required to make a perſon capable of a Benefice, 99, 146
At what age a perſon is capable of a Benefice, 99
What Benefices, and Dignities are incompatible, 4, 5
The ways by which a legal Title to a Benefice is had, 104
Value of Livings in *London*, 392
Value of Benefices, how to be accounted, 3
Benefices of 300 *l.* yearly value, who capable of them, 19
Benefices of perſons not taking the Oaths, and Recuſants, veſted in the Univerſities, 64, 67

Biſhop See **Ordinary** and **Inſtitution.**

Biſhopricks all founded by the King, and he their Patron, 326
No Man to be accounted a lawful Biſhop, Prieſt, or Deacon ſuffered to execute any of the ſaid Functions, except called, examined and admitted according to the Form preſcribed in the Book of Common Prayer, 100
Biſhops nothing to do with the Patronage of Churches, 200

Temporalties of Biſhops, when to be ſeiſed, or not, 172, 227, 322
The King hath the Profits of Biſhops Lands in time of Vacation of Biſhopricks, 321
The King not to commit waſte in Biſhops Lands in time of Vacation, *ibid.*
What Profits the King ſhall have by Biſhop's Temporalties being in his hands, 321,322
Biſhops when inſtituted to their Temporalties. 322
Biſhops, not till Conſecration, 15
Biſhops, uſed to take Profits of Churches in time of Vacation, 312
Biſhops not to receive the Fruits of the Church, 200,312
What time allowed Biſhops to examine Clerks, 106,147,160
Biſhop may refuſe the true Patron's Clerk the Church being full of a diſturber, 150,157
Biſhop acts as a Judge in Admiſſion of Clerks, 146,167
Biſhop to ſhew the particular cauſe of refuſal of a Clerk preſented, 141
Biſhop, if to refuſe a Clerk for not ſhewing his Orders, 146, 147
Biſhop not bound by Teſtimonial of a Clerk's ability, but may examine him, *&c.* 147
Biſhop's power to increaſe the Vicar's maintenance, 140, 305
Biſhop's authority in puniſhing Offenders againſt the Statutes of Uniformity ſaved, 246,253,254
Archbiſhop of *Canterbury*'s Letter concerning the Prayer uſed by the Clergy before their Sermons, 243
Archbiſhop's Recommendation of the reading of the Act againſt prophane ſwearing, *&c.* 270
Uſurpation upon a Biſhop, the effect of it, 87
What Eſtates Biſhops may grant, and by what Laws reſtrained, 52, 53, 326,327,328
Biſhops Lands to be leaſed to the Dean and Chapter in time of Vacation, 421
What Offices Biſhops may grant, 350, 351, 352
Biſhop cannot grant the next Avoidance to bind his Succeſſor though confirmed, 52, 350
What Acts void by Biſhop's death, and not by his Tranſlation, or Reſignation, 372
Biſhop hath the Cure of all Souls within his Dioceſs, 25
Biſhops not to ſuffer Clerks to live a Lay Converſation, *ibid.*
Fine, and Non-claim ſuffered by a Biſhop binds not his Succeſſor, 87
Recovery againſt Biſhop without Title, binds not his Succeſſor, *ibid.*
Biſhops to anſwer for the Acts, and Offences of their Commiſſaries, 351
Biſhops power to unite Churches, 124, *&c.*
Biſhop holding Benefice in *Commendam* is Parſon as to that Benefice, and muſt be ſued as ſuch, 142, 186
A Church in the Dioceſs of *B.* united to a Prebend in the Dioceſs of *D.* the Juriſdiction of the Biſhop of *B.* is thereby taken away, 129,372
Archbiſhop of *Canterbury* to preſent to the beſt Living of every new Biſhop, *&c* 50,51
Levari Fac. to the Archbiſhop to levy damages recovered in a *Quare Impedit* upon the Ordinary, and Incumbent, 229

Bonds.

Bonds of Reſignation, 23,24,364
General Bonds averred to be given to a particular purpoſe, 364
Bond to a Corporation and their Succeſſors, 288
Bond that the Grantee of the next Avoidance ſhall preſent, *&c.* how forfeited, 60

Canons.

CAnon of the Church a general Sentence, 2, 82, 315,429
Canon Law one and the ſame throughout the whole Church, 15
Canons which provide for the regular Adminiſtration of the Lord's Supper, 238
Which preſcribe the duty and qualification of Curates, 235
For the Celebration of Sundays and Holy-days, and the Form of Divine Service to be uſed in them, 236
Which preſcribes the Form of Prayer to be uſed by Preachers before their Sermons, 24
Which regulate the Exerciſe of Preaching, 259
Which reſtrain all irreverence and moleſtation within the Church, 267

Caveat.

The uſe of a Caveat, 161
Caveat, how long it continues in force, *ibid.*
Caveat entred before the Church void, *ibid.*

Certificate.

Certificate for Non-payment of Tenths, how to be made, and if peremptory, or may be traverſed, 34
The King certifies the Judges that he was deceived in his Preſentation, 157

Chancery.

Bonds, *&c.* for enjoying Leaſes contrary to the Statute of 13 *Eliz.* made void in *Chancery*, 330
A Bill in *Chancery* to diſcover who is Patron of a Church, 186
Leaſe for 40 years made good againſt the Maſter of an Hoſpital, 347
Agreement to incloſe made good againſt a Parſon who had Common there, 334
A Decree that a Parſon ſhould have Meadow, *&c.* in lieu of Tithes, *ibid.*
Leaſes void in Law by miſnaming a Corporation, made good, 378
Corporation decreed to make a new Leaſe according to their Promiſe, 346
Injunction to continue poſſeſſion upon a voidable Leaſe, 341
One Joint-tenant, *&c.* compelled to join in Plea with his Companion where he would plead Covenouſly, 183
One compelled to reſign according to a Bond of Reſignation, 24
Ill uſe of Reſignation Bonds reſtrained in *Chancery*, 24
Decree that a Vicar ſhould enjoy according to a long poſſeſſion though no Indowment could be produced, 305
Injunction to ſtop a Suit brought by the Parſon againſt the Vicar for Tithes contrary to an ancient Compoſition, 307
Decree that a Vicar ſhall enjoy Tithes according to an ancient Compoſition notwithſtanding Preſcription alledged to the contrary, *ibid.*
Chancery relieves againſt a declaratory Statute, the Law before being dubious, 329
Tihtes ſued for in *Chancery*, 485

Chapel Vide Church.

Chaplain Vide Diſpenſation and Plurality.

Charges Vide Incumbent.

Chattels.

Grant of the next avoidance is a Chattel, and goes to the Executor, 58,177
Chattels cannot go in Succeſſion, 288
Right of Preſentation is a Chattel, 48, 58, 177
Preſentation to Churches of perſons outlawed is as Chattels in the King, and by what words to be granted, 69, 70
Tithes ſet out are a Chattel veſted in the Owner, 405,436,480,481,517

Churches and Chapels Vide Incumbents.

Churches by whom to be repaired, 129,130, 301,304
Tax for repairing of the Church, how to be made, and by whom, 302
Chancel, by whom to be repaired, 301, 302, 304
Chancel built for the uſe of the Pariſhioners, 301
Freehold of the Church, and Church-yard, in whom, 295,296,301,302,304
Church-yards, by whom to be fenced, 301
An Iſle may belong to a private perſon, yet the Freehold in the Incumbent, 296
In whom is the Intereſt of the Church in time of Vacation, 314
Property of the Goods of the Church, in whom, and how to be ſued for, 303,304
Superſtitious Pictures in Churches, who may deface them, 303
What Ornaments of the Church are to be uſed, 243
Property to Seats in the Church, how gained, 297, 298, 300
What Actions for Seats broken down, and for whom, 296,298,300
Seats in Churches, common to all the Pariſhioners, 296
Seats in Churches intended to be built at the Charge of the Pariſhioners, 299
Who may order the Seats in Churches, and Chancel, 296,297, *&c.*
Tenants in Common of a Seat in a Church, 300
Licence to bury within the Church, by whom to be given, 295, 303
Trees in Churchyards, by whom to be cut, and when, 295,296, 304
Property of winding Sheets, in whom, and who may have the Action for taking them away, 304
Impropriator, and his Farmer to have the chief Seat in the Chancel, 302
Preſcription for a Seat in the Chancel, 297, 298
One who receives the Profits off the Church without Title, to what Charges he is lyable, 316
Arreſt not to be made in Churches, or places dedicated, 260, 261
To what Churches and Churchyards the Statute of 5 *&* 6 *Ed. 6. cap.* 4. concerning quarrelling, *&c.* in Churches, *&c.* doth extend, 265
What ſhall not be ſaid drawing of a weapon in a Churchyard within the Statute of 5 *&* 6 *E. 6.* 266
To draw a weapon in the Churchyard, *&c.* in his own defence, puniſhable, *ibid.*

Ordinary

Ordinary may inhibit from making diſturbance in the Church, 266,298
Things neceſſary for the King, and Commonwealth, ought not to be ſaid prejudicial to the Church, 286
When a Church ſhall be ſaid *Plena & Conſulta*, 206
When a Church ſhall be ſaid litigious, 11, 74, 75, 158, 159
Valuation of a Church to make a Plurality, how to be accounted, 3
Diſturbances in the Church, and Church-yard reſtrained, 261, *&c.*
What things may be read, or publiſhed in Churches, 268, *&c.*
Chapel preſentable, 121
Chapel by Preſentation becomes a Church, 182
Chapel to be intended Temporal, and not to belong to the Ordinaries Juriſdiction, *ibid.*
Parſon bound to find a Chaplain in a Chapel of Eaſe within his Pariſh, may ſerve it himſelf, 255
One bound to ſay Divine Service in a Chapel ruinated, is excuſed till repaired, *ibid.*

Churchwardens.

Churchwardens not Spiritual Perſons, though their Office be Eccleſiaſtical, 406
Church-Wardens may be removed at any time by the Pariſhioners, 304
Preſcription for a Pariſh to chooſe Church-Wardens, to continue two years in their Office, *ibid.*
What remedy for Pariſhioners againſt their Church-Wardens, *ibid.*
Church-Wardens cannot diſpoſe the Goods of the Church, *ibid.*
Churchwardens may have an Action for taking away Seats in the Church, 296,300
Church-Wardens, if they may pull down and break the boards of Seats in the Church ſet up without Licence, 300
Action by Church-Wardens, how to be brought, 303, 304
Church-Wardens may hinder diſorder, *&c.* in the Church, 266
Church-Wardens may take off the Hats from perſons heads who irreverently keep them on in time of Divine Service, *ibid.*
Church Wardens not to ſuffer idle perſons to be in the Church-yard, *&c.* in time of Divine Service, 267
Church-Wardens to preſent the names of perſons behaving themſelves irreverently in time of Divine Service, 267
Church-Wardens if they may prohibit Strangers from Preaching, 256
Bread and Wine for the Sacrament, at whoſe charge to be provided, 239

Commendam.

What *Commendams* are allowable by Law, 141,142
What *Commendams* give a full Title, 141
Commendam recipere who may have it, *ibid.*
Difference between a *Commendam*, and a preſentation, *ibid.*
Commendam retinere is as a Preſentation 50, 368
Inſtitution not needful upon *Commendams*, 141,142
Commendam Semeſtris, what, where to be granted and by whom, 140,141
Commendam Semeſtris gives no Title, 140, 141
Commendam as a Diſpenſation, *ibid.*
Commendam cannot be to part of a Church, *ibid.*
No *Commendam* to a Church full, *ibid.*
If a Biſhop may hold a Benefice by *Commendam* within his own Dioceſs, 141,142
If Church lapſed may be granted in *Commendam*, *ibid.*
Commendam for Life, by whom to be granted, 141
He that holds a Church by *Commendam* is Incumbent, and may plead as ſuch, 16
Commendam to the Patron, by what words to be granted, 141
Patron's Conſent, when neceſſary to *Commendam*, and how ſuch Conſent may be given, *ibid.*
Dean by *Commendam*, his Authority, 368
Commendam to a Biſhop before and after Conſecration, the difference, 59
Biſhop hath a *Commendam retinere* of his former Benefice, if the Church ſhall be ſaid to have been void, 50

Common Prayer.

How the Common Prayer is appointed to be read, 233, *&c.*
Aſſent to the Book of Common Prayer, how to be declared, 33,111
At what time Incumbents reſident (keeping Curates) are bound to read the Common Prayer, 237
Whether other Prayers, being no part of the Book of Common Prayer, may be uſed, 234, 242
Common Prayers reviewed, *&c.* in the Reign of King *James* 1. 243
Laws againſt the abuſe, or neglect of the ancient Service, in force for the uſe of Common Prayer, 236,243,244,254
What Statutes in force for puniſhing offenders againſt Uniformity of Prayer, *&c.* 244

How

How offenders againſt the Statute of Uniformity may be puniſhed, 242,244,247
Every Miniſter bound to read Prayers on Holy-days, 234
Prayers for the 5th of *November*, &c. if any part of the Book of Common Prayer, *ibid.*
Neglect of reading Prayers on the 5th of *November*, &c. how to be puniſhed, *ibid.*
Parſon bound by Preſcription, or Covenant to read Prayers in a Chapel, what remedy to compel him thereto, 253,254
Book of Common Prayer to be tranſlated into, and read in the Welſh Tongue within *Wales*, 242
Canons concerning Prayers, &c. to be read on Sundays, and Holy-days, 236
Canon which directs the Form of Prayers before Sermon, 242
Archbiſhop of *Canterbury*'s advice concerning Prayer before Sermons, *ibid.*
Decency, and Order in time of Divine Service directed by Canon, 267

Confirmation.

What ſhall amount to a Confirmation, 374
Confirmations, how to be made, and by whom, 368, &c.
What Grants or Leaſes need Confirmation, 324,325,361,365,&c.
Where Confirmation for an hour is good for the whole Eſtate, 375
Where Confirmation of the Land, and of the Eſtate or Deed, the difference, 365,374
Where Confirmation may be part of the Eſtate only, or not, 374,375
What Leaſes or Grants may be made good by Confirmation, for what time, and againſt whom, 366, 371, &c.
Confirmation after the Eſtate determined is void, 375
No Intereſt paſſeth by Confirmation of Dean and Chapter, Patron and Ordinary, &c. 342, 370, 374, 376
Confirmation muſt be made during the life of the party, whoſe Grant, &c. is confirmed, 365,375
Confirmation by Tenant in Tail, for Life or on Condition, 372,373
Void Leaſe cannot be made good, 347,351
Confirmation, made before the Eſtate or Deed which is confirmed, 365,366,375
Confirmation of Patron, where neceſſary, 370, 371
Leaſes and Grants of Donatives, by whom to be confirmed, 371,373
Where the King's Confirmation to an Incumbent is good, or not, 49,79,87,156,176
Clerk in a void Preſentation, if capable of Confirmation, 30 49,
Confirmation or Releaſe by a common perſon to an Incumbent in by wrongful Title, when good, 176
Confirmations which ſhall endure no longer than the Eſtate of the party confirming, 372, 373
Confirmation by the ſucceeding Biſhop, or Patron, if good, 376
Confirmation by the Biſhop without, the Dean and Chapter, where good, 371
Biſhop, Dean and Chapter may confirm ſeverally, 374
Guardian of Spiritualties cannot confirm any Leaſe or Grant, 371
Two concurrent Leaſes, and the latter firſt confirmed, 376

Conſultation Vide Prohibition.

Continuances.

No Continuance after Judgment with a *Ceſſet Executio*, 200

Copyhold.

Copyolder is in by Cuſtom, not by the Lord, 366
Eſtates granted by Copy are Eſtates at Will, 353
Copyholds are of the Demeſns of a Mannor, 356

Corporation.

What things neceſſary to the Foundation of a Corporation, 134,377
Corporations ſole, Aggregate, Regular and Secular, 287
One Corporation both aggregate, and ſole, 133
Collegium, what comprehended thereby, 368
Members of Corporations, in doing Corporation acts, ought to be *capitulariter congregati*, 369
Aſſent of the Members of Corporations, how to be given, *ibid.*
Majority of the Members of a Corporation, binds the reſt, 368, 369
All the Members of a Corporation are but as one Body, 370
What acts Corporations aggregate muſt do by Attorney, 383, 287
What acts they cannot do without Deed, 383
Corporations aggregate, what Eſtates they may make, 324,326,365,366
What Offences Corporations aggregate cannot be ſaid guilty of, 287
What Corporations may be ſaid to have Succeſſors, &c. *ibid.*

Every

Every beneficed Clergy-man is a Corporation, or a part thereof, *ibid.*
Vicar, a Corporation by the Common Law, 134
Biſhop, Dean and Chapter, one Body, 370
The Head of a Corporation aggregate, cannot by his ſole act diveſt any Right, or do any act to bind the Corporation, 54,382,385
Corporations, what Lands they may have, and how they may purchaſe, 282, 288
Corporation without Lands or Poſſeſſions, 293
Corporation cannot be ſaid ſeiſed in Tail, 287, 288
What Corporations ſhall be ſaid ſeiſed in Fee, or not, 365,366,381,385,386
Corporations cannot be ſeiſed to an uſe, and how they ſhall be ſeiſed, no uſe being expreſſed, 288
Bond to a Corporation, and their Succeſſors, how it ſhall go, *ibid.*
What Corporations may have Chattels in their politick Capacity, *ibid.*
Corporations miſnamed, when it ſhall avoid their Grants, *&c.* 376, *&c.*
Miſnaming of Corporations in pleading, how helpt, 378
See Title Name.
Corporation diſſolved or changed, Penſions, *&c.* due from them are not determined, 467
What Corporations might grant or leaſe at Common Law without Confirmation, 324, 325,365,366
Where a Corporation ſhall take a Fee without the words *Succeſſors*, 289

Coſts Vide Damage.

Covenant.

Parſon leaſeth for 21 years and dies, the Leaſe is determined, Action of Covenant, lies againſt his Executors for not enjoyment of the Term, 361
Covenant, which ſhall go along with the Land, 253
Parſon bound by Covenant to read Prayers in a Chapel, what remedy to compel him thereto, 253,254

Courts and Juriſdiction.

Courts of Record, what Courts thereby intended, 29
Matters of Law ariſing upon Eſtates and Intereſt, to be adjudged by the Common Law Courts, 510, 511
All Deeds and Acquittances to be tried at Common Law, 509, *&c.*
Temporal Courts to give Credit to the Proceedings in the Courts Spiritual, 29
Tithes, when they may be ſued for in the *Exchequer*, 483,484
Eccleſiaſtical Juriſdiction ſaved by the Statute of 31 *Eliz. cap.* 6. 29
Juriſdiction Eccleſiaſtical, by whom to be executed, 351, 368
What Crimes not examinable in the Spiritual Court, 35
Spiritual Court to examine a Crime after Verdict at Law, *ibid.*
Spiritual Courts not to proceed for a Temporal Crime, till Conviction at Common Law, *ibid.*
If the Spiritual Court may diveſt a Freehold, 29
Spiritual Court may award Coſts, not Damages, 230,266, 296, 303
What damages to be recovered in the Spiritual Court in Suits for Tithes, 483, 486
No Suit in Spiritual Court after Induction, 4
What Cuſtoms triable in the Spiritual Court, 474,481,498,499,501, *&c.* 508, *&c.*
Patron, no remedy in the Spiritual Court for any diſturbance, 164
In Suit for Tithes between Eccleſiaſtical perſons, the Spiritual Court only to have Juriſdiction, how far to be extended, 481,506, 509
Spiritual Court hath the proper Juriſdiction of Tithes, 485, *&c.* 487,498,499
Perſon inhabiting in one Dioceſs, ſubſtracts his Tithes in another Dioceſs, in the Court of which Ordinary to be ſued? 498,499
Matters concerning Endowment of Vicarages between Parſon and Vicar, to be tryed in the Spiritual Court, 136, *&c.*
Lay perſons, no remedy for Tithes in the Spiritual Courts, till aided by the Statute, 470, 499
Modus Decimandi allowed in the Spiritual Courts, 515
Modus Decimandi, if to be ſued for in the Spiritual Courts, 498, 499, 500, 501, *&c.* 508, *&c.*
Suit in the Spiritual Court for hindring a way to carry Tithes, 479,504
Suit in Spiritual Court for cutting down Trees in the Church-yard, 295,304
Suit in Spiritual Court for taking away the Goods of the Church, in what caſe it may be, 303
How the Spiritual Count uſed to proceed to Purgation, after Clergy allowed, 36
Where Spiritual Court hath Juriſdiction of the Principal, ſhall have it of the Acceſſary, 504, 509, *&c.*

Curate.

Curates, how to be qualified, and amitted, 144, 235, 319, 320, 362
What beneficed Men ought to keep Curates, 235
Curates bound to read the Prayers, as Miniſters beneficed, *ibid.*
One cannot have a Benefice, and officiate as Curate, 233, 234
Executors of Curates, not chargeable for Dilapidations, 311
Leaſes by Parſons to their Curates, 362
Curates, who ſerve the Church in time of Vacation, how to be paid, 313, 319, 320
What Curates a new Incumbent ſhall be compelled to pay, 319, 320
Incumbent, if puniſhable for neglect of his Curate, 235, 270

Cuſtom Vide Preſcription.

Cuſtom, what, 401
Cuſtom *de Non Decimando*, where good, *Vide* Tithes, 402, *&c.* 424, *&c.* 446
Cuſtom and Preſcription, how they differ, 401

Damages and Coſts.

WHO ſhall recover damages in a *Quare impedit*, 190, 217, 218, 219, *&c.*
What damages in a *Quare impedit*, and how to be recovered, 190, 192, 217, 218
Where damages ſhall be recovered in *Quare impedit*, againſt the Biſhop, 219
Damages recovered in *Quare impedit*, if to be levied, upon one or all the Diſturbers, *ibid.*
Where in *Quare impedit* the Plaintiff ſhall recover damages for two years, tho' the Six Months be not lapſed, 218
Levar. fac. to the Arch-Biſhop to Levie damages recover'd in a *Quare impedit* upon the Biſhop and Incumbent, 229
If the Plaintiff recovering in a *Quare impedit* may have both a Writ to the Biſhop, and damages, 218
In an Action upon the Statute 2 *E.* 6 for not ſetting forth of Tithes, what Damages and Coſts ſhall be recovered in the Temporal Courts, and how thoſe Damages are to be aſſeſt. 487, 522
In Action upon Stat. 2 *E.* 6. for not ſetting forth Tithes, what damages ſhall be recovered in the Spiritual Courts, 486
Damages awarded in a Writ of Error upon a Judgment in *Quare Impedit*, 229
Damages recovered againſt a Parſon for not ſaying Divine Service to which he is bound 253, 254
Spiritual Courts may award Coſts, not Damages, 230. 266. 296. 303
Coſts in *Quare impedit*, if to be Aſſeſſed by the Jury, 209
Coſts and Damages for not proving a Suggeſtion, when to be given, and how, 488, 489, 490. 492, 493

Darrein Preſentment.

ASſize of *Darrein Preſentment* where it lies, and by whom, 166. 172, *&c.* 382
Aſſize of *Darrein preſentment*, how to be arraigned, 199
How the Defendant ought to plead in an Aſſize of *Darrein preſentment*, *ibid.*
Where it ſhall be taken by Default, *ibid.*
Proceſs in an Aſſize of *Darrein preſentment*, how returnable, *ibid.*
What ſhall be recovered by a Judgment in Aſſize of *Darrein preſentment*, 183, 199, 215
Darrein preſentment brought pending a *Quare impedit*, 174
Darrein preſentment, and *Quare impedit* did not lie at Common Law, after the Church fill'd, 90
Patentee of the King, where the Patent is void, gains ſuch right by preſentation, *&c.* as that he may bring a *Darrein preſentment*, 87
How many of the Jurors ought to have the view in an Aſſize of *Darrein preſentment*, 199

Deacon.

The Office of a Deacon, 103
What Offices, *&c.* he is capable of, 19, 34, 99, 144
Who capable of being Deacon, and at what Age, 99, 100
If two be allowed to adminiſter the Sacraments, 103
Forfeiture of a Deacon Adminiſtring the Sacraments, *ibid.*
Deacons admiſſion, *&c.* to a Benefice if void, or voidable, 34
None to be accounted Deacon, *&c.* or to Execute the Office of a Deacon unleſs admitted *&c.* according as preſcribed in the Book of Common Prayer, 100

Dean and Chapter.

Deanries preſentable, Elective and Donative, 49, 121, 122, 123
Layman not capable of a Deanry, 99

Dean hath no Negative voice in the Chapter, 368
Dean by *Commendam*, what Acts he may do, *ibid.*
Dean if to read the 39 Arcicles, Common prayer, *&c.* 5. 123
Dean accepting a Prebend in the ſame Church, makes the Deanry void, 5
Patronage of Deanries, to whom they belong *de jure*, 49, 370
Poſſeſſions of the Deans, *&c.* derived from the Biſhoprick, 49, 288, 370
Biſhop, Dean and Chapter, one Body, 370
Deanry, if Benefice with Cure, 5
Deputy Dean his Authority, and who capable of being ſo, 367,368
Deanry of *Wells* diſſolved, and a new one Erected, 371
Dean and Chapter without Poſſeſſions, 287
Chapter without a Dean, 288
Chapter cannot purchaſe, *&c.* without their Dean, *ibid.*
The Deanry of *Battel*, its Original, 110

Declarations Vide Pleadings.

Declaration that the Plaintiff is Seiſed *de Meditatie Eccleſiæ* without ſhewing ſpecially how, if good, 197
Preſentations if neceſſary, and how to be alledged in Declarations in *Quare impedit*, 195, 197
Declarations, when double, 196
Declarations, in *Quare impedit*, where the right of preſenting is by turns, 197
When in a *Quare impedit* one ought to declare of the whole Advowſon, and when of a Moiety, third part, *&c.* 197
The Plaintiff in his Declaration muſt ſhew his Eſtate, 195, 196
Declarations in a Prohibition upon a diſcharge of Tithes, 425
That the Incumbent, *&c.* Subſcribed the 39 Articles not needful to be ſhewn in a Declaration, 6
Declarations in *Quare impedit* where the Plaintiffs Eſtate in an Advowſon is gained by wrong, 196, 208
The King in *Quare impedit* declares of damage but recovers none, 219,220
Declarations in *Quare impedit*, where the Ordinary refuſeth one Clerk as inſufficient, and denyed to admit a Second, 197
Declarations on Statute 2 & 3 *E.* 6. for not ſetting forth of Tithes, how to be framed, 518,519
If the Declaration in *Quare impedit*, *&c.* be not good, altho' the *Barre* be nought, the Plaintiff ſhall not recover, 195

Deeds.

Deed what, and the ſeveral ſorts of them, 337
Intereſt in Lands, *&c.* not to be granted, *&c.* without writing, 340
Deeds of Corporations, if perfect without delivery, 383
Corporations, what Acts they may do without Deed, 346,383
A Biſhop, *&c.* may Command one to demand Rent, or diſtrain without Deed, 383
Preſentation to a Benefice in writing, no Deed, 105
Preſentation to a Benefice may be without writing, grant of next Avoidance not good without Deed, 56, 103, 105,106
Tithes, if grantable, *&c.* without Deed 337 *&c.* 521
Advowſons in groſs, not to be granted without Deed, 56
Pleading Advowſon granted by Deed, mentioning the Deed, is Surpluſage, 57

Default.

Default after Iſſue joined, 198
One Defendent appears, the other makes default, 199

Demand.

Leaſe to be void on Non-payment of Rent, the Rent muſt be demanded, 384
Demand of Rent, how to be made, *ibid.*
Penſion, if to be demanded before Sued for in the Eccleſiaſtical Court, 475

Deprivation.

Deprivation *ipſo facto*, for what Crimes, 32, 33,34,35
Clerk, Inſtituted, but not inducted, may be deprived, 317
Deprivation, where neceſſary to make void the firſt living on acceptance of a Second, 2, 4
How to proceed to Deprivation for accepting a Second Benefice, 3
What are cauſes of deprivation, 2 *&c.* 29, 33,357
Where Sentence of deprivation is neceſſary or not, 2, 31, *&c.* 106, 151
Where a Pardon ſecures an Incumbent againſt deprivation, 36,37,38
Viſitor by the King's Commiſſion, returns cauſe of Deprivation into the Chancery, 151
Spiritual Courts may deprive for Simony after a general pardon, 29
How to proceed in the Spiritual Court to deprive for Simony, 29
Whether a perſon incapable, be Incumbent till deprived, 34

A Churchman may be *Deprived* for committing Waſt, 357

Dignities.

What preferments in the Church are *Dignities*, 4

Dilapidation.

Gifts of goods, *&c.* to defraud Succeſſors of their remedy for Dilapidations made void, 311
Long leaſes, cauſe of Dilapidations, 328, 357
Money received for Dilapidations, how to be imployed, 311
Remedy for Dilapidations, in what Court to be ſued for, *ibid.*
Executors of *Curates* not Chargeable for Dilapidations, *ibid.*

Diſcent.

Advowſons, how they diſcend, 45
Poſſeſſio fratris, where it ſhall be, *ibid.*

Diſcontinuance.

Diſcontinuance what, and the Effects of it, 385
What Eccleſiaſtical perſons might have diſcontinued at Common Law, *ibid.*
Biſhops Leaſe not Warranted by the Statute, no diſcontinuance, 356

Diſpenſation, Vide Licence, Plurality, and Commendam.

The effect of a Diſpenſation, 16
At what time a Diſpenſation to hold a Church ought to be made, 13,14
What perſons the King may diſpenſe withal to be Non-reſident, 28,284
Diſpenſations to hold a Benefice, altho' deprived is repugnant, 13
Diſpenſation *retinere* for years only, 15
To hold a ſecond living *Modo ſit infra* ten Miles of the former if Condition, 13
When to be ſaid conditional, *ibid.*
What Diſpenſations are contrary to Law, 7
Commendam is a Diſpenſation, 142
Simoniſt cannot be diſpenſed with, 28
To a Biſhop to hold a Benefice, when good, 14,15,142
To hold Benefices, to what perſons good, 8,9, 14
If neceſſary to qualified perſons to hold pluralities, 11,12,13
What words neceſſary in diſpenſation for plurality, 13,14
Form of a *Diſpenſation* for Non-reſidence, 285
How many Livings the King's Chaplain may hold by diſpenſation, 142
Diſpenſations to take three Benefices, if good for two, 14
One diſpenſed with to take two Benefices, takes a third, *ibid.*
Diſpenſations for pluralities, to be expounded by the Canon Law, 13
Diſpenſation after Inſtitution, and before Induction, 3,13
If being made Biſhop, or Tranſlated from one Biſhoprick to another makes void diſpenſation before obtained, 14,15,142
Biſhop *Suffragan*, if he may hold a *Dignity*, or living without *Diſpenſation*, 15
Patrons right of preſenting, not to be taken away by *Diſpenſation*, 3
To a Biſhop of *Ireland*, to hold a Living in *England*, under what Seal to be granted, 15
To the Son, to hold the living of his Father 148
Who may diſpenſe with a Baſtard to be Ordained, 102
Diſpenſation prevents Voidance of Benefices, 7,50
Forfeiture for obtaining diſpenſations contrary to Law, 8
Diſpenſation *retinere Dignitatem Decanatus*, good, for the Deanry, 16
Biſhop cannot diſpenſe with the Statute that enjoins reading the Common Prayer, *&c.* 234
Diſpenſations againſt the Statute of 13 *Eliz. cap.* 12. void, 103
Reſidence of Chaplain diſpenſed with by the Statute of 25 *H.* 8. *cap.* 16. 282
The King's Profeſſor of Law in *Oxford* may hold the Prebend of *Clipton*, though a Lay Man, 32,100,146

Diſtreſs.

Where the Lord may diſtrain for not doing Divine Service according to tenure, 255
Tithes diſtrained damage feſant, for being ſuffered to remain too long upon the Land after ſet out, 482

Donatives.

Donatives why ſo called, 121
How conferred, 121,122,123
Who capable of Donatives, 99,122
Who may viſit Donatives, 123
No Lapſe of a Donative, 18, 67
Biſhopricks anciently Donatives, 122
Preſentation, *&c.* by a Stranger to a Donative, void, 81, 230
How it may become preſentable, 67, 122

Donatives though made preſentable, yet remain free from the Biſhops Juriſdiction, 71
Benefices to which Biſhops collate, are not Donatives, 121
Donatives preſentable, *&c.* 122
Free Chapels are Donatives, 71
What means to compel the Patron of a Donative to preſent, 18, 71
The Function of him who hath a Donative, if Spiritual, 99, 123
What Eccleſiaſtical Preferments are or may be Donatives, 71, 122
What remedy for the Patron of a Donative, if uſurped upon, 230
Given without limiting for what Eſtate, 122
How to be reſigned, 18
Reſignation of a Donative to the Patron and a Stranger, *ibid.*
Reſignation of a Donative to one Patron, where there are more, *ibid.*
Leaſes and Grants of *D*onatives, by whom to be confirmed, 371
*D*onative recovered, to whom the Writ of poſſeſſion ſhall be directed, 223
If he that comes into a donative ought to take the Oath, read the Articles, *&c.* 123

Dower.

Wife Endowed of two parts of the Manor to which an Advowſon is Appendant, ſhall have two parts of the Advowſon, 56

Duplex Querela.

Duplex querela, where it lies, before whom, and how to proceed therein, 163, *&c.*
Sued by the Patron, 215, 224
Allowed by the Common Law, 164
A ſafe courſe for Clerks to take, 166
Bringing a *Duplex Querela*, if it will abate a *Quare Impedit* brought by the Patron, 166
Clerk Inſtituted pending *Duplex Querela*, no Prohibition ſhall be granted, 165

Election.

What preferments Spiritual are had by Election, 123
Election of the beſt living of new Created Biſhops by the Archbiſhops of *Canterbury* and *York*, 50, 51
Electing an unfit perſon, *&c.* forfeits the power of Electing, 158
One preſents, and dies before the Clerk admitted, his Executors preſents another, the Biſhop may admit either at his Election, 48

Emblements, Vide **Incumbent** and **Tithes.**

Enqueſt.

What points the Enqueſt ought to enquire of in a *Quare impedit*, and how the ſame are to be Enquired, upon a *D*emurrer, 209
Verdict finds not when the Church became void, yet good, 209, 216
A Biſhop ought to have a Knight in his Enqueſt, 210
What damages the Verdict ought to find in an Action for not ſetting forth Tithes on Statute, 2 & 3 *E.* 6. 522

Entry.

Entry into Lands, how to be made, and by whom, 383
For a Forfeiture, when to be made, 384
Entry by a ſucceſſor for Forfeiture, or condition broken before his time, 385
No Entry where there is a *D*iſcontinuance, *ibid.*

Error.

Judgment againſt a *D*efendant dead, is Error, 194
Writ of Error brought by one as Heir and Executor, 228
No Writ of Error againſt the King without Petition, *ibid.*
The party ſhall not Aſſign matter for Error which is for his Advantage, 218
Bringing Writ of Error, if *Superſedeas* to Writ granted to the Biſhop, 229
Writ of Error if *Superſedeas* to the inquiry of *D*amages, *ibid.*
Verdict for Coſts and *D*amages where they ought not to be given, is Error, 230
Error brought by one who had no loſs, held good, 228
Error aſſigned in a *Scire Facias* brought to have Execution, 229
Error in one Judgment, if cauſe to reverſe another Judgment, 229, 230
Writ after Judgment directed to a wrong perſon, if Error, 223
Where ſpecial Entry of a Judgment may help an Error, 230
Biſhop may joyn in writ of Error, tho' claims nothing but as Ordinary, 228
To maintain the Incumbent in poſſeſſion, ſufficient cauſe for Writ of Error, 229
*D*amages for half a year, where they ought to have been for two years, Error, 218
Matter in abatement of the Writ not to be aſſigned for Error, 185
Judgment without a *Ceſſet Executio*, if it be Error or no, 199
Error in Execution, no Error to reverſe the principal Judgment, 223

Error in giving Damages, not Error to reverſe the whole judgment, 230

Eſcheat.

One ſeiſed of an Advowſon dies without Heir, to whom the Advowſon ſhall go, 47
What Advowſons will Eſcheat, and in what Caſe, 40,47,139

Eſſoin.

What Eſſoin allowable in an Action of *Quare impedit*, 199
Not adjourned, makes the Plaintiff become Non-ſuit, 198

Eſſoins how to be adjourned, *ibid.*
Eſſoin no Appearance, *ibid.*
May be caſt by a Stranger, *ibid.*
When the Defendent may appear after an Eſſoin, *ibid.*
Defendant may be Eſſoined upon the Summons or Attachment, *ibid.*
Several Defendants in *Quare impedit*, how they may Eſſoin, *ibid.*
The Plaintiff not to be Prejudiced by caſting an Eſſoin, 192
Caſting Eſſoin by a Biſhop Defendant in *Quare Impedit*, makes him as a Diſturber, 188
What Pleas cannot be pleaded after an Eſſoin, 188

Evidence.

Evidence to prove a Reſignation, 18
Non payment, Evidence of a diſcharge of Tithes, 409,425,522
That an Office hath been uſually granted in reverſion, 352
Evidence of a preſcription to be diſcharged of Tithes by real Compoſition, 408, 409, 425
Single witneſs not ſufficient Evidence by the Civil Law, 510, *&c.*
Grants for the Augmentation of Vicarages, how to be proved, 309
Evidence to prove the Retainer of a Chaplain, 9, 10
Evidence ſufficient to prove a Suggeſtion whereupon to have a Prohibition, 488, *&c.*
Evidence that the Advowſon of a Vicaridge is appendant, 41
Whether Incumbents need prove Reading and ſubſcribing the Articles, *&c.* 120,521
Evidence of Benefice with cure of Souls, 5, 6
Payment of Tithes to the Vicar, Evidence of an Endowment, 304,305,307
Evidence for the Defendant in Action on Statute for taking Farms, 279
In an Action for not ſetting forth of Tithes, and the general Iſſue pleaded, what may be given in Evidence, 520
What is neceſſary for the Plaintiff to prove in an Action brought for not ſetting forth of Tithes, 520, 521
What is neceſſary for the Defendant to prove, in an Action for not Setting forth of Tithes, 521,522
Evidence ſufficient to bar the Plaintiff in an Ejectment for a Rectory, and to put him to his *Quare impedit*, 521
Diſcharge of Tithes by Popes Bull or Compoſition, what ſhall be Evidence to prove ſuch diſcharge, 522
Depoſitions taken in Eccleſiaſtical Courts, no Evidence at Common Law, but Sentence given in the Eccleſiaſtical Courts, *contra*, 522

Exchange.

Spiritual Preferments not to be exchanged for Lay, 17
Exchange ſuppoſeth a Condition to be void, if not fully executed, *ibid.*
Patrons muſt preſent upon Exchange of Benefices, *ibid.*

Excommunication.

Excommunication *ipſo facto*, if Sentence be neceſſary, 265
No Excommunication for ſmiting in a Church *&c.* till Conviction of the Offence at Common Law, 265,266

Execution, Vide Writ to the Biſhop.

Executio Juris non habet Injuriam, 188
One recovers in *Quare Impedit*, and dies, the Executor not the Heir ſhall have Execution, 48

Executors.

Grant of Chattel to one and his Heirs ſhall go to the Executors, 56
Leaſe to a Biſhop and his Succeſſors, ſhall go to his Executors, 288
Grant of the next Avoidance is a Chattel which ſhall go to Executors, 48,56,148
Executors grant the next Preſentation before the Will proved, 48
Damages recovered in *Quare Impedit* by Executors ſhall be Aſſets, 177,193
If Executors of the Husband, or the Wife, ſhall preſent to a Church faln void in the Life of the Husband, 177
The King, and not the Executors of Biſhops ſhall preſent to Churches, void during the Biſhop

Biſhop's Life, 48
Executors may by Action remove a Clerk preſented by Uſurpation in time of the Teſtator, 48
One preſents and dies before the Clerk admitted, Executors preſent another, the Ordinary may receive either, 48, 157
Executors, how far bound by a void, or voidable Leaſe, 361,381
Action lies for, not againſt Executors upon the Statute of 2 & 3 *E.*6. for not ſetting forth Tithes, 486

Fines.

WHAT Corporations are bound by Fine and Nonclaim, 334,379
Eccleſiaſtical perſons not bound by Fine and Nonclaim, *ibid.*
Fine levied of Tithes, 472
Tenant in Tail grants the Nomination of a Clerk by Fine, if his Iſſue be bound thereby, 52
Fine levied by a Diſſeiſee during the diſſeiſin, 175

First-Fruits Vide Tenths.

First-Fruits, when payable, 316,317
First-Fruits and Tenths of Churches United, 125,126

Forceable Entry Vide Indictment.

Forfeiture, Vide Penalty.

Freehold.

Freehold of Church and Church-yard, in whom, 295,296,301,302,304
Patron gains no Freehold in the Church by Entry in time of Vacation, 128
Freehold of the Church in Abeyance, *ibid.*
Freehold not to commence from a day to come, 341

Grants Vide Leaſe.

ONE ſhall not derogate from his own Grant, 53
Ancient Grants, how to be expounded, 289, 306,307,308
Grants *in libera Elemoſina*, how expounded, 289
Expreſſing what the Law implies, alters nothing in Grants, 53
Every Grant to be taken moſt ſtrongly againſt the Grantor, &c. *ibid.*
Words in Grants to be conſtrued according to an eaſie not ſtrained Conſtruction, 57, 519
Corporations, how to be named in Grants, 376
What Corporations might at Common Law grant, or leaſe without Confirmation, 324, 365,366
Grant of the next Avoidance by a Biſhop, 360
What Eſtate Church-men might have made at Common Law, and what at this day, 324, &c. 334, &c. 359, &c. 365, &c.
Spiritual Benefice not to be granted for years, 122
Guardian of Spiritualties, if grantable during the Archbiſhop's Life, 351
Offices Rents and Annuities granted by Eccleſiaſtical perſons, 350, &c. 360
To *A.* Parſon of *D.* and his Succeſſors, and *A.* Parſon of *D.* and his Heirs, 288
By Dean and Chapter, not naming the Dean, if good, 376
To Dean and Chapter, *Habendum* to their Heirs and Succeſſors, 288
Of the Nomination of a Clerk, *Habendum* the Advowſon, 57
If the *Habendum* in a Deed may ſever that which was joint by the Premiſſes, 159
Grants of Copyholds not reſtrained by any Statute, 353,362,366
Of a Chattel to one and his Heirs ſhall go to the Executors, 57
Miſnaming Corporations, where it ſhall make Grants void, 376, 377
Patron grants his Advowſon the Church being void, 61,175
Void turn, if grantable over, 60, 61, 175
Of the next Avoidance, the Church being void, what ſhall paſs thereby, 64
Of the next Avoidance of a Church within the Duchy of *Lancaſter*, under what Seal to be made, 56, 156
Advowſon not grantable by a common perſon after an Uſurpation, 88,175
Patron grants his Advowſon after a void Preſentation, 153
What Grants are void againſt the Grantor, or not, 175,379
Name of Baptiſm changed by Confirmation, by what Name to purchaſe or grant, 377
Grant of *primam Veſturam*, what ſhall paſs thereby, 349
Grant of *Decimas Garbarum*, what ſhall paſs thereby, 519
Where Grants to Corporation may be without Deed, 289
By the King or Biſhop not to preſent to a Church by Lapſe, is void, 61
The King grants a Mannor with the Advowſon, the Church being void, if the void turn ſhall paſs, *ibid.*

By what words Advowſons will paſs from the King in the caſe of Reſtitution, 57
By what words the King may grant an Advowſon, 55
The King may grant the void turn of a Church, or a Right of Action, and how ſuch Grants are to be made, 88
The King's Grant not to be taken to two Intents, 133
The King may grant the Temporalties of a Biſhoprick in the Life of the Biſhop, 322
Non obſtante in the King's Grants, 133
By what words the King may grant the Preſentations to Livings of perſons outlawed, 69
Advowſon not mentioned in the Premiſſes of the King's Grant, will not paſs by the *Habendum*, 57
Grant of the Nomination or Preſentation, is Grant of the Advowſon, 57
Of an Advowſon, excepting the Preſentations during life, the Exception is void, 57
Of next Avoidance, how to be made, 58
By what words an Advowſon may be granted, 54 *&c.*
Void turn of a Church, not to be granted by a common perſon, 88
Of the third part of a Mannor *cum pertinentiis*, nothing of the Advowſon will paſs, 56
A Mannor to which an Advowſon is appendant, bargained and ſold, the Deed is not inrolled, the Advowſon will not paſs, 56
Appropriation will not be granted by the Name of an Advowſon, 57
Advowſon of a Church appropriate, appendant to a Mannor, by what words to be granted, 139
Grant of next Avoidance alters not the Right of Patronage, 66
Of an Advowſon, or the Mannor to which, *&c.* after Uſurpation, 88, 175
Termor grants the next Avoidance, if any happen during the Term, and Surrenders, 53
Grant to *A.* for life, ſo that he may preſent, if the Church void during life, is a limited Grant, 56
Executor grants before the Will proved, 8
Grant of a Portion of Tithes; Tithes belonging to a Rectory will not paſs thereby, 388
Grant of a Chapel, a Portion of Tithes belonging to the Chapel will paſs thereby, *ibid.*
Grant to three *& eorum cuilibet conjunctim & diviſim*, 159
Grantee of the next Avoidance relieved by the Statute of 13 E. 1. *cap.* 5. 93
Tenant in Tail grants the Nomination of a Clerk by Fine, if the Iſſue in Tail be bound thereby? 52
Tenant in Tail of an Advowſon grants, if to the Reverſioner in Fee, what Eſtate doth paſs by ſuch Grant, 51
Tenant in Tail, by what means he may grant an Advowſon to bind his Iſſue, *&c.* 51, 52
Tenant in Tail grants the next Avoidance and dies, the Grant is not void but voidable, 52
Tenant in Tail grants to the uſe of himſelf and Wife, void to the Wife, 51
Tenant in Tail and his Heir Apparent joins in a Grant, void as to the Heir, 51, 373
Grants in Mortmain void, 289
In what reſpect and againſt what perſons, Grants, *&c.* ſhall be ſaid void, 379, *&c.*
Grant to build Houſes on Church or College Land no Alienation, but as a Licence or Covenant, 334
Grant of a Seat in a Church to one and his Heirs, if good, 298
Gift of Goods without Tradition, void by the Civil Law, but contrary by the Common-Law, 513

Holy-days.

HOly-days, why ſo called, 248
What Holy-days to be obſerved, and for what reaſon, *ibid.*
Holy-days, how to be obſerved, 234, 236, 248, *&c.*
Canons which provide for the obſervation of Holy-days, 236
Statute concerning obſervation of Holy-days, if in force, 249
Puniſhment for not obſerving Holy-days, 298
What Evens of Holy-days to be kept with Faſting, 249
Notice of Holy days to be given by Miniſters, 253
The 29*th* day of *May*, 231, 268, 271
Diſcovery of the *Powder Treaſon*, 250, 268
The 30*th* day of *January*, 252

Hoſpital.

Hoſpital preſentable, 121
Leaſe by Maſter of an Hoſpital with the conſent of the Brothers and Siſters of the ſaid Hoſpital, if good, 370
Leaſe for forty years made good in *Chancery* againſt the Maſter of an Hoſpital, 347

Husband and Wife.

If the Executors of the Husband or the Wife ſhall preſent to a Church void, during Coverture or before, 177

If

If the Executors of the Husband or the Wife ſhall have an Action for Tithes ſubſtracted during the Life of the Husband, 517
Husband and Wife ſeiſed jointly, or in Right of the Wife, the Husband cannot grant an Advowſon to bind the Wife, 54
If they muſt join in bringing a *Quare Impedit*, 183
If Husband and Wife muſt join in a Preſentation, 47, 98
If the Husband and Wife ſhall join in Action for ſubſtracting Tithes held in Right of the Wife, 517

Impropriation, Vide Appropriation.

Incumbent, Vide Church.

WHat things required to qualifie a Clerk to be Incumbent of a Church, *Chap.* 14, & 15
What Methods an Incumbent is to take to be able to prove performance of all things required by Law to qualifie him to be Incumbent, 119, 120
He that holds a Benefice by *Commendam* is an Incumbent, and may plead as ſuch, 16
One cannot hold a Benefice and officiate as Curate, 233, 234
One cannot hold both a Church and a Chapel of Eaſe, *ibid.*
If a Miniſter may officiate at two Churches, *ibid.*
Incumbents may diſpoſe of Corn growing by them ſowed, 313,320
Where Incumbents ſhall have Corn on the Glebe, or not, 312,403,404
Parſon not to have an Action for taking away Seats in the Church, 296
For what things fixed to the Church, the Parſon may have an Action, 295
Spiritual perſons not to take Farms, ſell for lucre, keep Brewhouſes, *&c.* 276
Church void by Statute and by Canon, the difference, 3,315
When a Clerk ſhall be intitled to receive, or ſue for the Profits of the Church, 96, 109, 110, 314, *&c.*
In whom the Intereſt of the Church is in time of Vacation, 312,313, *&c.*
Who uſed to take the Profits of the Church in time of Vacation before the Statute of 28 *H.* 8. 312
He who receives the Profits in time of Vacation wrongfully, cannot detain for payments by him made, 319, 320
What perſons chargeable with treble value for not paying, *&c.* to the Incumbent the Profits received in time of Vacation, 313,318,319
What charges Incumbents ought to allow out of the Profits received in time of Vacation, 313,319,320
What remedy for the Profits received in time of Vacation, againſt whom, and how the Action is to be brought, 318, 319
From what time Incumbents are intituled to the Profits upon Voidances by Simony, Ceſſion, *&c.* 314, *&c.*
What Charges Incumbents are liable to, 312, 320
Incumbents, if puniſhable for neglect of their Curates, 235,270
Clerk of an Uſurper removed, if he ſhall retain the Profits, 314
Parſon misbehaving himſelf in Preaching, or otherwiſe, bound to his Good Behaviour, 266
The ſeveral Duties of Miniſters, *Chap.* 31, 32, 33, 34, 35. *p.* 233, *&c.*
Neglect of not performing what part of the Service a Miniſter is puniſhable by the Statute of 14 *Car.* 2. 233,236,237
Parſon Imparſonee, 205,206,385
Two pretending to be Incumbents, in what Actions their Rights may be examined, 155, 170,224
What remedy for Incumbents wrongfully put out by the King's Preſentee, 152

Indicavit.

Writ of *Indicavit*, where it lies, 138

Indictment.

Indictment of forcible Entry for keeping poſſeſſion, &c. of a Church, 27
Upon the Statute of 5 & 6 *E.* 6. *cap.* 4. for drawing a Weapon in Church, *&c.* 266
For indecent Behavior in the Church, *ibid.*
No Indictment for not reading or ſubſcribing the Articles, 33
Indictment on Statute, not to be made good by Common Law, *ibid.*

Induction.

Induction, what, and how to be made, and the effects of it, 96, 109, 110, 314, *&c.*
Induction, by whom to be made, 109, 110
Induction a temporal Act, 4
Poſſeſſion had without Induction, 110
Induction by a wrong perſon, if void, 109
No Induction to a Donative, 121, 122
What remedy againſt the Archdeacon, if he refuſe to induct, 230
No Seiſin, or Right to take the Profits till Induction, 96, 314, *&c.*
Parſon cannot grant the Profits of his Church, or ſue for them before Induction, 317,323

Authority to induct given by the Guardian of the Spiritualties, determines by the making of a new Biſhop, 231
Church not full againſt the King till Induction but againſt a Common Patron by Inſtitution, 18,48,77,110,150,155,317
Parſon Imperſonee by Induction, 205, 206, 385

Informations.

Information for Non-Reſidence, how to be brought, and in what Court, 286
Two Informations brought at the ſame time for the ſame matter, *ibid.*
Information upon the Statute of 2 & 3 *E.* 6. for not ſetting forth Tithes, 518

Inſtitution and Admiſſion, Vide Biſhop, Ordinary, and Jus Patronatus.

Admiſſion of a Clerk, what, 109,317
Admiſſion and Inſtitution removed into *Chancery* for to prevent being loſt, *&c.* 177
If the Biſhop may admit a Clerk once refuſed, 148
What remedy againſt the Biſhop for refuſing to inſtitute, 163,170
Biſhop not bound to admit inſtantly, 160
Clerk to be examined before Admiſſion, 106
Biſhop not to admit on Condition, 17
Two Patrons ſeverally preſent one Clerk, how the Biſhop ought to admit, 160
One Jointenant, *&c.* preſents alone, the Biſhop may admit or refuſe, 158,159
Biſhop not to refuſe a Clerk for want of Teſtimonials, *&c.* or for not ſhewing his Orders, 146,147
Where the Preſentation is void, the Biſhop may refuſe to admit, 157
Admiſſion, *&c.* on a void Preſentation, to what purpoſes it ſhall fill the Church, 30, 153,154,155,
What perſons the Biſhop may refuſe to admit, and for what cauſe, 73.99,146, *&c.* 156, *&c.*
Having another Benefice no cauſe of refuſal, 148
The Biſhop may refuſe to admit where the Church is litigious, or full, 74, 159, 160, 189,191
Biſhop, if he may admit after Preſentation revoked, 147,155, *&c.*
What ſhall be ſaid a refuſal to admit, 147
What refuſal of a Clerk will make the Biſhop a diſturber, 160
The Biſhop ſafe, if he admit the Clerk firſt preſented, 160, 161,
The King's Title to be examined before his Clerk admitted, 152
Biſhop to admit the Patron's Clerk, tho' himſelf hath collated wrongfully, 151
Patron preſents, and dies before Admiſſion, the Executors preſents anothe, the Biſhop may admit either, 48,157
Admiſſion and Inſtitution, where neceſſary to be made, and by whom, 106,109
Inſtitution, what, and how to be made, 109
Inſtitution not neceſſary to be made within the Dioceſs, *ibid.*
What remedy againſt the Biſhop for refuſing to inſtitute, 163,170
Inſtitution upon a void Preſentation, is but as a Collation, 73,153,154
What right is gained by Inſtitution before Induction, 110
Church in what reſpect full by Inſtitution, 13, 14,18,110,150,151,155 204,205,283,317
Clerk inſtituted puniſhable for neglect of Cure before Induction, 18,317
Commendaory may enter into the Church without Inſtitution, *&c.* 142,143
Inſtitution after Judgment in *Quare Impedit*, and before Writ to the Biſhop, no Superinſtitution, 220 221
Superinſtitution, when void, or not, 150,221
Biſhops uſed to delay Inſtitution until they had received the Tithes, *&c.* 312
Inſtitution by the Guardian of the Spiritualties, 371
Inſtitution to a Donative, 122

Intendment.

A Parſon ſhall be intended reſident upon his Benefice, 28
An Incumbent ſhall be intended to have performed all things required by Law to qualifie him to hold his Benefice, 120, 521
Seats in Churches intended to be built at the Charge of the Pariſhioners, 299
Ancient Appropriations intended ſufficiently made, till the contrary appear 135

Jointenants.

Preſentation by one Jointenant makes title for the reſt, 85
One Jointenant preſents alone, the Biſhop may refuſe to admit his Clerk, or not, at Election, 158,159
One Jointenant preſents his Companion, 'tis good, and the Biſhop cannot refuſe him, 159
Jointenants, *&c.* if they ſhall join in bringing an Action for Subſtraction of Tithes, 518
Jointenants of an Advowſon, one grants all his Intereſt, 'tis good for his part, and ſhall bind his Companion, 54
One Jointenant compelled in Chancery to join in Plea with his Companion, 183
Jointenancy ſevered by Partition, 384

Journeys

Journeys Account.

When a Writ by Journeys Account may be brought, and the advantage of bringing such Writ, 194
Where a *Quare Impedit* may be brought by Journeys Account, *ibid.*

Judgment.

What to be recovered by Judgment in *Quare Impedit*, 183,210,215,217
What to be recovered by Judgment in *Assise of Darrein Presentment*, 183,199,215
Judgment to stand in force till reversed by Error *&c.* 90
Judgment in a Writ of Right, binds not Usurpations after made, 85
Judgment not to be confessed on Condition, 17
Joint Judgment not to be given on several Titles, 183
Judgment, that an Incumbent severed shall be restored, 228
Church if void by Judgment in *Quare Impedit* 215, *&c.*
Who bound by Recovery and Judgment in *Quare Impedit*, 83,84
Judgment in *Quare Impedit* may be at Common Law, or upon the Statute, 210
Judgment without a *Cesset Executio*, where it ought to be, if Error, 199
Successors of Ecclesiastical persons not bound by Judgments, 336
Action on Statute 2 *&* 3 *E.* 6. for not setting forth Tithes against several Defendants, one is found guilty, the rest are acquitted, if the Plaintiff shall have Judgment, 522
Action on Statute of 2 & 3 E. 6. for predial and other Tithes, and a Verdict for the Plaintiff for the whole, no Judgment shall be given, 523
Judgment on the Statute of *E* 6. for not setting forth of Tithes, shall be *Quod Defendens sit in misericordia*, 523
Judgment for Plaintiff in Action for not setting forth Tithes, is a Bar to any other Suit for the same Tithes, 523
Constitution of *Lateran* concerning Pluralities a general Judgment, 21,82,315,429
Judgments to be given according to the Writ, 183
Plaintiff in *Quare Impedit* to make Title against all the Defendants, else cannot have Judgment, 213
Who may falsifie a Judgment, 286

Jure-Patronatus.

To what purpose provided and awarded, 64 167,178
How to proceed in a *Jure Patronatus*, 168
At whose Costs to be sued, *ibid.*
Second *Jure Patronatus*, where it may be awarded, 160
Bishop, if bound to award a *Jure Patronatus* without request of the Party, 74,160,168
Enquest in *Jure Patronatus*, how to be summoned, and punished for non-appearance, 168,169
Several *Jure Patronat.* awarded, and contrary Verdicts found, 160
Awarded where one Clerk is only presented, and the Church not litigious, 160, 168
He for whom the Right is found by *Jure Patronatus* presents not within Six Months, but a Stranger, if the Bishop be bound to admit his Clerk, 75, 160, 168
Bishop, how he ought to admit after a *Jure Patronatus*, 160, 167
Clerk, if he ought to request Admittance after a *Jure Patronatus*, 74,160
A Stranger found to have Title by the *Jure Patronatus*, 74,167
Institution, *&c.* pending a *Jure Patronatus*, 167
Church, how litigious after Verdict in a *Jure Patronatus*, 161
Action against the Bishop for not admitting a Clerk according to Verdict in *Jure Patronatus*, 167
New Presentation not necessary after *Jure Patronatus*, 75
Commissioners in *Jure Patronatus* neglect, or refuse to act, 169

Juris Utrum.

The Writ of *Juris Utrum*, 141

Jurisdiction, Vide Courts.

King.

THE King not bound by the general Words of Acts of Parliament, 72,93
Is *persona mixta*, 405
Is the Head of the Law, 289
Can do no wrong, 150
No Plenarty against the King, 175
Is supposed always present in Court, 206
Nullum tempus occurrit Regi, 72,78,96,175
Presents to Livings of Persons utlawed, 216
The King shall not do an act as Servant to another person, 56
What Presentations the King shall have by the Temporalties of Bishops being in his Hands, 48

The

The King Founder and Patron of all Biſhopricks, 49,326
King Supream Ordinary and Patron, 47, 49, 76,131,141
Church not full againſt the King till Induction 18,48,110,155
The King's Turn of preſenting not ſerved till Induction, 77
Temporalities granted to a Biſhop before Conſecration, prevents the King's Right of Preſenting, 49
All Juriſdiction exerciſed by the Pope, acknowledged in the King, 131
What acts will prejudice the King's Right of preſenting where he hath but one Turn, 78, 79,86,87
If bound by the Statute of *Weſtminſter* 2. *cap.* 5. 93
All Lands and Advowſons held of the King 131
Grant of next Avoidance to the King, ſhall have the next turn only, 59
Seiſing two parts of a Mannor to which an Advowſon is appendant, ſhall have two parts of the Advowſon, 56,66
Not bound in his Right of preſenting by Compoſition made by the Patrons, 49
The King not to be intended ignorant of the Law, 133,289
The King preſents to Livings, the Incumbent being made Biſhop, 49,50
If the King's Turn of preſenting, the Incumbent being made Biſhop, be ſatisfied by a *Commendam retinere*, 50, 59
Where the King hath loſt his Turn by not preſenting for Simony, 63
If the King ſhall preſent again, where the Clerk doth loſe his Living by ill Pleading, 79
Grant of the next Avoidance of a Church within the Duchy of *Lancaſter*, under what Seal it ought to be, 56,153
If the King may revoke his Preſentation, 155, *&c.*
Cannot collate without preſenting to the Biſhop, 18
The Queen as a Feme ſole, and may preſent to Churches, *&c.* 98
The King not confined to any Court wherein to ſue to recover his Right, 485

Lapſe.

Lapſe, what, 77
To whom it ſhall go, and how, 75,76, 77
From what time to be accounted, 1,2,18,72, 149
In what manner the ſix Months ſhall be accounted, 72
Lapſe, not grantable, 61
Quare incumbravit prevents Lapſe, 75
Infants and Femes Covert bound by Lapſe, 72
No Lapſe of a Donative, 18,72
If Lapſe incurs of Recuſant's Livings given to the Univerſities, 65
Clerk refuſed lawfully, Lapſe incurs, 9,10,74, 75,160
No Lapſe where the Biſhop delays Examination of the Clerk till after the ſix Months, 74
Patron preſents ſo near the end of the ſix Months, that the Biſhop hath not time to examine the Clerk, Lapſe incurs, 190
Naming the Biſhop in the Action, if it prevents Lapſe, 72,75,189,190,191
Biſhop not named in the Action, Lapſe incurs, 75,186, *&c.*
No Lapſe to a new Biſhop, where the preceding Biſhop was named in the Action, 75
No Lapſe without Notice, where notice ought to be given, 18,74
Church void for not paying of Tenths, Lapſe incurs without notice, 34
No Lapſe where Biſhop refuſeth to award a *Jure Patronatus*, 74
Lapſe pending a *Jure Patronatus*, 75,160
Lapſe pending a Writ of Error, 75
No Lapſe, where the right of preſenting is in the King, and the reaſon of it, 71,72,202, 205
Inſtitution, *&c.* declared void, no Lapſe, 74
If Lapſe ſhall go to the King or Metropolitan, where the immediate Ordinary could not preſent, 75,76
Void Preſentation, if it prevents Lapſe, 73
Wrongfull Collation if it prevents Lapſe, 73, 77,78
Collation by Lapſe, is in the Patron's right, and muſt be mentioned in the Declaration, 77, 197
Lapſe incurred to the Ordinary, Metropolitan, or King, if the Patron may preſent, 77, 78, 141,151
Biſhop dies before he takes the benefit of a Lapſe, who ſhall preſent, 76
Biſhop preſents by Lapſe after a wrongful Collation by himſelf, 73,77
Lapſe, not on voidance by reaſon of Orders, Inſtitution, *&c.* had Simoniacally without notice, 31
Writ to the Biſhop to admit not taken out within ſix monthes, Lapſe ſhall incurr, 75
Who ſhall have the advantage of Lapſe during the Archbiſhop's Viſitation, 76
Lapſe, not where the Biſhop is a diſturber, 74
Ordinaries neglect, if it may prevent Lapſe to the Metropolitan and King, 76
Church lapſed, if grantable in *Commendam*, 141,143

Leaſe Vide **Grants.**

Leaſe void, cannot be made good, 347,351,380 381,382
What ſhall be ſaid to be Lands uſually letten, 353,354,355
What Leaſes ſhall be void, or voidable, and againſt what perſons, 52,53,380,381
What perſons ſhall take advantage of voidable Leaſes, 380
By what means a Leaſe voidable may be made abſolutely void, 53,54,381,382
What Acts ſhall affirm and make good a Leaſe voidable, 54,380,381
From what time Leaſes ſhall be ſaid to be void by Act of Parliament, *&c.* 364
Leaſes ſhall not be good for part of the Term, and void for the reſidue thereof, 340,345
Bonds and Covenants for enjoyment of Leaſes contrary to Law, made void, 337, *&c.* 362, 363
Leaſe of Tithes, where good, or not, 337, *&c.* 521
Leaſe from henceforth, or from the making, 340, 341
Leaſe not ſaying from whence it ſhall commence 340
Leaſe for lives to commence from a day to come, not good, 341
The day whereon a Leaſe is made, when to be taken excluſive, or not 340
Leaſe for twenty one yeares, and for twenty one years from a day paſt, 342
For three years, and ſo from three years to three years for 21 years, or life. 347,348
From three years to three years for ten years, 348
For above three years not good without writing, 340
No remedy for Rent reſerved on void Leaſe, 380
Leſſee by voidable Leaſe, may puniſh Treſpaſſors till his Leaſe actually made void, 381
Executors how far bound by void, or voidable Leaſe, 361,381
Leſſee for anothers life dies, who ſhall have the Leaſe, 348
Leaſe of a Mannor *cum pertinentiis*, if an Advowſon will paſs thereby, 56
To two, *& diutius eorum viven'*, who make Partition, and one of them dies; if the Leſſor may enter into his part, 383
Leaſe by a Corporation out of poſſeſſion, how to be made, *ibid.*
Parſon leaſeth his Parſonage, if the Advowſon of the Vicarage will thereby paſs, 41
Leaſes and Grants by Parſons, Vicars, *&c.* where good, or not, 328, *&c.* 359, *&c.*
Leaſe made by a Parſon *de facto*, 359
Leaſe of a Parſonage, what ſhall paſs thereby, 295
Leaſes by Parſons *&c.* void, and voidable, 53, 54, 360, *&c.*
Leaſes made by Incumbents to their Curates, how long they ſhall endure, 360
Leaſes made by Incumbents preſented *&c.* Simoniacally, 64
What Leaſes by Biſhops good to bind their Succeſſors, 53,54,349
What Leaſes by Biſhops are good againſt the King, 53,54,321
Lands of Biſhops to be leaſed to the Dean and Chapter in time of Vacation, 321
Succeſſors of Biſhops have election to make Leaſes void, or not, and by what means, 53
Leaſes and Grants by Biſhops *&c.* void againſt the Succeſſors, but good againſt the Biſhops, *&c.* themſelves, 53,379
Leaſe to Biſhop and his Succeſſors ſhall go to his Executors, 288
The King during the Temporalties in his hands cannot confirm a void Leaſe to bind the ſucceeding Biſhop, 53,54
Advowſons appendant leaſed with the Mannor to which they are appendant, 56
Leaſes without Impeachment of waſt not to be made by Eccleſiaſtical perſons, Colleges, *&c.* 357
Leaſes without Impeachment of Waſte, how made, 358
Leaſes by Eccleſiaſtical perſons, how to be made, and where good or not, 52,53,337, *&c.*
What Eſtates Churchmen might have made at Common Law, and what at this day, 52, 53,323,334 *&c.* 359, *&c.* 365. *&c.*
Leaſes and Bargains to, and with Spiritual perſons made void, 276, *&c.*
Appropriations reſtrained to be leaſed by the Statutes which concern Eccleſiaſtical perſons, 362
What Corporations might grant or leaſe without Confirmation or not, 324,325,365, *&c.*
Leaſes in Reverſion and concurrent Leaſes, what, 344, 345
Concurrent Leaſes by Biſhops, when good or not, 341, *&c.* 366
Concurrent Leaſes by Eccleſiaſtical perſons other than Biſhops, where good, or not, 343, *&c.* 366
Concurrent Leaſes, when they ſhall take effect, 345
Two concurrent Leaſes, the latter firſt confirmed, 376
Building terms in *London*, made by Parſons, *&c.* 333
Leaſe of *Newgate* Market in *London*, *ibid.*
Leaſe of *Mounken Barn* and Tithes in *Southweak* by *Maudlin* College in *Oxford*, how to be made, 358

Leaſe by St. *Johns* College in *Oxford* to the heirs of Sir *Thomas White*, 359
Commiſſion out of the *Exchequer* to take a leaſe, 375

Lecturers.

Lecturers, who are ſo called, 100
How to be admitted and qualified, and what Penalties they are liable to, 144
Lecture Sermons in the Univerſities excepted from the Penalties of the Statute of 14 *Car.* 2. 145
The Clauſe in the Statute of 14 *Car.* 2. concerning Lecturers licenſed to Preach, *&c.* to whom it extends, 256

Licence, Vide **Diſpenſation.**

Licence to preach where neceſſary, and from whom to be obtained, 104
Licence to build, no Alienation, 334
Licence to bury within the Church, by whom to be granted, 295, 303
Licence to purchaſe in Mortmain, 289, *&c.*
Licence of Appropriation, how to be made or given, and by whom, 131,132,134
Licence *perinde valere*, 3

Limitation.

Eccleſiaſtical perſons not bound by any of the Statutes of Limitaton, 336
Action for ſubſtracting of Tithes, not within the of Statute of Limitations, 520
Statute Limitation extends not to Actions grounded on Acts of Parliament, *ibid.*

Livery and Seiſin.

If it ought to be in the Life of the Parties or not, 383

Mannor.

A Parſonage may be a Mannor, 362
Copyholds are of the Demeſns of a Mannor, 356

Midwifes.

Midwifes, why licenced by the Biſhop, 240
Midwifes uſed to baptiſe weak Infants, *ibid.*

Monaſteries Vide **Abbies.**

Mortmain.

Grants in Mortmain void, 289,290
What Purchaſes of Corporations ſhall be ſaid Mortmain, 290, *&c.*
The King may purchaſe in Mortmain, 289
What ſhall be a ſufficient Licence to purchaſe in Mortmain, 289, *&c.*
What Corporations are within the Statutes of Mortmain, 290,291
Who ſhall enter for Mortmain, and within what time, 289, *&c.*
Statutes againſt Mortmain, *ibid.*
Appropriation without Licence, if Mortmain, 131
Grant to the King to grant over in Mortmain, not good, 294
What Uſes at this day are not within the Statutes of Mortmain, 293
What Eſtates are within the Statutes of Mortmain, 290,291
Biſhop preſents by Uſurpation, if the Advowſon thereby be become in Mortmain, 71
Citizens of *London* may deviſe in Mortmain, 293
If Lords, who enter for Mortmain, be bound by Lapſe of ſix Months, that they cannot preſent, 83

Mortuaries.

What anciently called, 475
Where to be paid, and by whom, and by what Law due, 462,474,475
If an Action of Debt will lie for Mony payable for a Mortuary, 475
If a Mortuary may be ſeiſed, *ibid.*
Upon what reaſon Mortuaries are ſaid to be firſt paid, *ibid.*
Mortuaries in *Wales*, 463,474
What Duties payable to the Clergy in *Richmondſhire*, by perſons dying there, 464
Where to be ſued for, and by what Action to be recovered. 473,474,504
Mortuaries within the Archdeaconry of *Cheſter*, 463,473
Penalty for taking more for Mortuary than by Law is limited to be paid, 462, *&c.* 475

Name.

WHAT ſhall be a Name ſufficient whereby to deſcribe a Church in a *Quare Impedit*, *&c.* 182
Biſhop holds a Church by *Commendam*, how to be named in Suits concerning that Church, 142.286
Miſnaming in an Act of Parliament ſhall not prejudice, 65
Name of Baptiſm changed by Confirmation, 377
Name of Corporation, is as the Name of Baptiſm, *ibid.*
Corporations miſnamed, when it ſhall make void their Grants, *&c.* 376,377

In

In what caſe the proper Name of the Head of a Corporation ought to be uſed, 377
How the miſnaming of a Corporation in pleading may be helpt, 378
Action for not ſetting forth Tithes brought by a Parſon, if he need to be named Parſon in the Writ, 518

Ne Admittas.

Ne admittas, where it lies, and when to be ſued out, 171

Notice.

Notice of Refuſal of a Clerk, how to be given, and within what time, 1,149,*&c.* 203
Voidance of a Benefice by Act of God, no Notice neceſſary to be given, 1
No Lapſe without Notice, where Notice is neceſſary, 74
Where no Lapſe ſhall be without Notice, 2,3, 18,81,82
Where Notice is neceſſary, or not, upon Voidances of Benefices by Act of Parliament, 3, 19, 33
Notice not neceſſary upon Refuſal of the Clerk preſented by an Eccleſiaſtical Patron, Lay Patron, *contra*, 74
Notice of Revocation of the King's Preſentation, if neceſſary to be given, 156
Notice of not ſubſcribing the Articles, if neceſſary to be given, 30,33
Notice of the Church being void, to what purpoſe neceſſary, 2,3,73,83
Of Reſignation if neceſſary, 18,82
Of the Church being void, how to be given, and at what time, 33,34,38,39,149,*&c.* 203
Ordinary dies before Notice given by whom Notice is to be given, 18
Notice to the Vicechancellor of the Uuiverſities, of the Voidance of livings of Recuſants and diſabled perſons, how to be given, and at what time, 68
Church to what purpoſes void by deprivation without notice, 82,315
Notice to be given of Holy-days, *Vide* Holy-days.
Notice of the ſetting out of Tithes, to what purpoſes neceſſary to be given, 482

Oaths.

OATH of Supremacy, by whom to be taken, and at what time, 102, 108
Oath of Obedience, by whom to be taken, 101,102,108
Oath againſt Simony, if to be taken, 108
Oath *ex Officio* taken away, 108
Perſons refuſing to take the Oath of Supremacy, *&c.* diſabled from having any Spiritual Promotion, *ibid.*
An Oath taken, declared void by Parliament, 368

Oblations, Offerings, Obventions.

Oblations and Obventions, what, 388, 464, 468
Oblations, Offerings and Obventions all the ſame, 464
Offerings, where to be paid, and how recovered, 464,468,473,484,489,503

Obligation, Vide Bonds.

Occupant.

Occupancy, what, and where it ſhall be, 348

Offices.

Offices, how grantable by Eccleſiaſtical perſons to bind their Succeſſors, 350, *&c.*
Offices granted in Reverſion when good to bind the Succeſſors of a Biſhop, *&c.* 351
Offices Judicial not grantable in reverſion, Miniſterial, *contra*, 351

Option Vide Biſhop and Election.

Ordinary Vide Biſhop and Inſtitution.

Who ſhall be ſaid to be the Ordinary, 187
Ordinary when he ought to admit the Uſurpers Clerk, 89,94
If the Ordinary may give Titles to Seats in Churches, 298,299
Ordinary inhibits perſons from making diſturbance in the Church, or Chancel, 266

Ordination.

Orders at what time to be given, 100
Ordination Lawful, what ſhall be ſaid to be ſo, 99
None to be taken to be a Prieſt, or Deacon that is not Ordained according to the form preſcribed in the Book of Common Prayer, 100
None to Execute the Office of a Prieſt or Deacon, *&c.* that is not Ordained, 100
Prieſts and Deacons Orders, who capable of them, 99,100
One Ordained Prieſt, if he may Preach without Licence, 104 256
What cauſe ſufficient to refuſe giving Orders, 100,102

Archdeacons to be in holy Orders, 121
Baſtard not to be Ordained without Diſpenſation, 102

Outlawry.

The King preſents to the Livings of perſons Oulawed, 69,99,216
Perſon Outlawed, Pardoned, yet the King preſents to his Livings void, 69
To what Preſentations perſons Outlawed ſhall be reſtored by reverſal of the Outlawry 69,216

Papiſts, Vide Recuſants.

Pardon.

TO what time Pardons relate, 37
To what matters they extend, 33
Pardon Prevents Depravation, 37,38
Diſchargeth Suits in the Spiritual Court *pro Salute animæ, &c.* 36,37
Cannot reſtore one diſabled by act of Parliament, 28,37
Cannot reſtore to a Church void, 6,33
Pardon of Simony the effect of it, 8
Pardon of a Recuſants Conviction if it takes, of the diſſability of preſenting, 69

Parceners and Partition.

Parceners compellable to make Partition, 45
Parceners, how they ought to preſent, *ibid.*
If privilege of firſt preſenting in the eldeſt Coparcener, ſhall go to her Iſſue, Aſſignee, *&c.* 45,84
Compoſition by Parceners to preſent, how to be made, 45
When an Advowſon ſhall be ſaid held in Copracenary, or not, *ibid.*
Partition of an Advowſon in Groſs, *ibid.*
Partition made in Chancery avoided, 84
Partition if it ſever the Inheritance, or the Poſſeſſion only, 45,95
Partition made, ſome of the Coparceners being under Age, if good, *ibid.*
Three Coparceners of an Advowſon, all muſt Confirm the Incumbents Leaſe, 373
Coparceners, if they ſhall joyn in a Writ of Right after Partition, 45,95
One Coparcener recovers in a *Quare Impedit* after Summons and Severance of her Companion, 'tis in the right of both, 84

Parſon, Vide Incumbent.

Patron, Vide Advowſon.

The King Supreme Patron, 47,49,76
The Rector is Patron of the Vicarage of Common Right, 41
Patrons Right of Preſenting not to be taken away by Diſpenſation, 3
Patron no remedy in the Spiritual Court for any Diſturbance, 164
What remedy for a Patron upon a Diſturbance, 170
Recovery by the King, reſtores the Right of the true Patron, 86
Collation by lapſe is in the Patrons Right, and makes a title for him, 178
If Patron and Ordinary may charge the Glebe in time of Vacation, 314
What Patrons are aided by the Statute of *Weſtminſter* 2, 90, *&c.*
When Patrons are ſaid to be diſturbed, 170
Biſhop Patron of the Deanry, 49
The King Patron of all Biſhopricks, 49,326

Penalties and Forfeitures.

What forfeitures the King ſhall have, 482
Forfeiture of a Deacon Adminiſtring the Sacrament, 104
For Adminiſtring the Sacrament in private, except to the Sick, 239
For obtaining Orders corruptly, 31, 103
For obtaining Diſpenſations contrary to Law, 8, 10
For obtaining Unions contrary to Law, 7
Appropriations without the King's Licence, what is forfeited thereby, 70, 131
Forfeiture for Simony, and who ſhall have it, 25, 26, 28, 29, 31
Forfeiture of double value of the Church for Simony, how to be accounted, 28
For taking, *&c.* more for a Mortuary than is due by Law, 463, 475
Forfeiture of Incumbents not reading the Common Prayer, *&c.* 33, 237.
Miniſters not reading Divine Service at the times appointed, how to be puniſhed, 253
Of Incumbents making Leaſes, and after being Non-reſident 80 daies, and who ſhall have ſuch forfeiture, 330, 360, 362
Penalty for not obſerving Holy-days, 249
Penalty for moleſting, *&c.* any Preachers, or Miniſter ſaying Divine Service, 264, *&c.*
Preſentation forfeited by Attainder, 70
Penalty of Perſons Preaching being by Law diſabled, 145
Perſons prohibited to Preach liable to the ſame Penalties, as perſons diſabled to Preach, 145
Penalty for irreverently handling or ordering the Sacraments, pulling down or defacing Altars, *&c.* 262
Penalty for arreſting a Miniſter officiating in Divine Service, 261

For

For Preaching, Teaching, *&c.* that eating Fiſh, or forbearing Fleſh is of neceſſity, 259
For extolling a Foreign Juriſdiction, 257
For Brawling, Fighting, *&c.* in any Church or Church-yard, 265
Penalty for being Non-reſident, 279,280
Penalty upon the Pariſhioners, where the party moleſting Miniſters, *&c.* cannot be apprehended, 264
Penalty for reſcuing an Offender, arreſted for moleſting Miniſters, *&c.* 264
For Preaching againſt or depraving the bleſſed Sacrament,or Common Prayer, 257
For preaching Doctrine contrary to the 39 Articles, 256
For not ſubſcribing the 39 Articles, 30
For uſing ſcandalous Words in Sermons, 257
Penalty on Spiritual Perſons, for buying, ſelling, or taking Farms, 276
Penalty not ſetting forth Tithes who ſhall have it, and in what Court to be ſued for, 477, *&c.*
For not reſtoring to an Incumbent the profits received in time of Vacation of the Benefice, 313, 318, 319
For giving an Oath that the greater part of a Corporation ſhall not bind the leſs, 369
Penalty on Truſtees or Mortgagees of Papiſts,or diſabled Perſons preſenting to Livings, 68
Leſſee for life of an Advowſon, how he may forfeit it by Alienation, 70
Penalty for not proving a Suggeſtion made for the obtaining of a Prohibition, 488, *&c.*
For a Biſhop refuſing to admit a Clerk upon a Writ to him directed, and making an ill return to ſuch Writ, 223, 227

Penſions, Proxies, and Synodals.

Penſions, Proxies, Synodals, *&c.* how to be recovered, in what Court, and againſt whom the ſuit is to be brought, 465, 475, 476, 504
Penſion if to be demanded before ſuit brought for it, 475, 504

Pictures and Images, Vide Church.

Pleadings and Pleas, Vide Declarations and Replications.

All Pleas pretending innocency muſt be pleaded the firſt day, 188
How to plead an Advowſon to be appendant, 40
Every ones right to be taken as pleaded, 341
Diſcharge of Tithes by Statute 31 *H.* 8. c. 13. how to be pleaded, 325, 427, 428
Defendant in *Quare Impedit*, not to counterplead the Plaintiff's Title without making a Title to himſelf, 207, 208
When the Defendant in a *Quare Impedit* ought to make a Title to himſelf, 204,205
Plaintiff to recover by his own ſtrength not by the weakneſs of the Defendant's Title, 195, 207
The Defendant muſt either confeſs and avoid or traverſe the Plaintiff's Title, 195, 203, 207
Miſnaming a Corporation,how helpt by pleading, 378
What Plea may be uſed againſt Unity of poſſeſſion in diſcharge of Tithes, and how Unity ought to be pleaded, 427,428
What may be pleaded as *Amicus Curiæ*, 209
Sentence in the Eccleſiaſtical Court, how to be pleaded, 29
Where pleading an Advowſon paſſed by deed, mentioning the deed is ſurpluſage, 57
Incumbent muſt plead of whoſe preſentation he is in, 207
Incumbent cannot plead himſelf in of the preſentation of one Patron, and make Title by another, 207
Biſhop pleads he claims nothing but as Ordinary, how to be underſtood, 190
Biſhop pleads he did not diſturb, how to be underſtood, 188
By what Law Incumbents may Counterplead the Plaintiff's Title, and what Incumbents may ſo Counterplead, 184, 202, 205, 207, 208
If the Patrons Plea ſhall prejudice the Incumbent, or the Incumbents Plea the Patron, 205, 206
Pleading plenarty as at Common Law, taken away by Statute, *Weſtm.* 2. *cap.* 5. 209
Where the Incumbent ought to plead himſelf inducted, 206
Incumbent may loſe his living by ill pleading, 207
What Pleas the Ordinary may, and ought to plead, 185, 186, 187, 188, 199, 200, 208
Ordinary who hath Collateral by lapſe if he may counterplede the Plaintiff's Title, 200 208
The Defendant ought to gain-ſay the diſturbance and Title of the Plaintiff, elſe the Plaintiff ſhall recover, 194, 203, 207
Statutes miſrecited in pleading makes the Plea ill, 363
Plea to avoid a Bond or Covenant upon Statute 13 *Eliz. c.* 20. 362, 363
Refuſal of a Clerk by the Biſhop, how to be pleaded, 201, 202, 203
Incumbent before Induction, or in of a void preſentation, what Plea he may plead, 206, 208

What plea in *Quare Impedit* is the general iſſue, 209
Upon what pleas in a *Quare Impedit* the Plaintiff ſhall have Judgment, and a Writ to the Biſhop, 203
Collation by Lapſe, how to be pleaded, *ibid.*
What pleas will charge the Ordinary to be a diſturber, 188, 201
In Actions for not ſetting forth Tithes, what pleas the Defendants may or ought to plead, 520
What plea is the general iſſue in Actions for not ſetting forth of Tithes, 520
Miſtake of a Name may vitiate a plea, 207
One Jointenant, *&c.* compelled by Bill in Chancery to join in plea with his Companion, 183
Non-reſidence to avoid a Leaſe, how to be pleaded, 363

Plenarty.

Plenarty by whom it may be pleaded, 209
No Plenarty till after ſix Months, and from what time the ſix Months ſhall be acounted, 73, 83, 204
No Plenarty againſt the King, 86, 87, 204, 209
Plenarty by Collation when pleadable, 204
Church in what reſpect full by Inſtitution, 18, 77, 155, 204
Wrongful Collation, to what purpoſes it makes a Plenarty, 73, 77, 78, 79, 80, 151, 170, 204.
Plenarty without notice, where it ſhall be, 73, 81, 82
Inſtitution, *&c.* on void preſentation, to what purpoſes it makes a Plenarty, 151, 154, 204
What preſentations do not fill the Church, 30, 150, 151, 208
Void preſentation by the King to what purpoſes it fills the Church, 153, 154

Plurality, Vide Diſpenſation.

What Perſons qualified to have Pluralities, 8, *&c.*
Valuation of Benefices to make a Plurality within the Statue, 21 *H.* 8. how to be accounted, 3
Plurality of Benefices, not to be without Diſpenſation, 11, 12, 13, 142
Qualifications for Pluralities, how determined, 11
What Retainer good to qualifie for plurality, 8, 9, *&c.*
More Chaplains retained then the Statute allows, which of them are qualified to hold a Plurality, 10
The Lord, *&c.* of a Pluraliſt dies, if he ſhall retain his livings, 11, 284
Chaplain cannot take Plurality after death, *&c.* of him who qualified, 11
Perſons qualified may retain Pluralities, altho' diſcharged of being Chaplains, 10
What perſons may qualifie Clerks to hold Pluralities, and how many they may ſo qualifie, 8, *&c.*
The Statute againſt Pluralities to be conſtrued ſtrictly, 10
Conſtitution for Pluralities a general Judgment, and how it binds, 2
Procuring a Church to be united, if within the Statute of Pluralities, 128
Two Benefices in one Church, if a Plurality, 4
Perſons having one living, diſabled to be preſented by the Univerſities, to the livings of Papiſts, *&c.* 64, 68
Dean holding a Prebend in the ſame Church makes a Plurality, 5

Poſſeſſion.

The effects of a legal Poſſeſſion, 287
Legal poſſeſſion of a Benefice, when it ſhall be ſaid to be obtained, 287
Setting forth of Tithes puts the Owner in poſſeſſion of them, 405, 436, 480, 481, 517
Judgment in *Quare Impedit* puts all perſons out of poſſeſſion, 83
Incumbent not named in the Action removed by Writ to the Biſhop, if the Patron be thereby out of poſſeſſion, 83
Poſſeſſio Fratris, where it ſhall be, 45

Prebends.

Prebends by whom to be given, and how, 121, 122, 374
Layman not capable of a Prebend, 5, 99
Prebend no Benefice with Cure, 5, 122
Induction into a Prebend, by whom to be made, and how, 121
Biſhop, Dean and Chapter have intereſt in the Prebends, 374

Prerogative vide King

Preſcription.

Preſcription, what, 402
Difference between Preſcription and Cuſtom, 401
Preſcription to have a way through a Church, or Church-yard, 295
Pariſh preſcribes to choſe two Church-wardens to continue in their Office two years, 304
Preſcription to ſit in the upper part of a Seat, 298

Preſcription to have the chief Seat in the Chancel, 302
One cannot preſcribe for a Seat as belonging to a Perſon, but to a Houſe, *&c.* 297,298
Preſcription for a Seat in *Nave Eccleſiæ*, 277, 278
If Tenants in Common of a Seat may preſcribe jointly, 300, 301
Parſon cannot preſcribe againſt the Endowment of the Vicarage, 307
Preſcriptions concerning Tithes, *Vide* Tithes.

Preſentation.

Preſentation what, 104, 105
The form of a Preſentation, 105
Right of Preſentation, how at firſt gained, 44 45
Collation and Preſentation how they differ, 30, 105, 121
What perſons may preſent, or not, 65, 67,69, 99, 148
What preſentations are void and do not fill the Church, 30, 150, 151, 208
Void preſentation by the King to what purpoſes fills the Church, 153, 154
Preſentation by word of Mouth only, if good, 105, 106, 153, 208
Void preſentation is as none at all, 30, 150, 208
Wrongful Collation to what purpoſes it fills the Church, 73, 77, 79, 151, 170
Wrongful preſentation by the King, how to be avoided, 152
Nomination and Preſentation, how they differ, and when to be taken for the ſame, 52,57, 60,105
One hath the Nomination, another the Preſentation, in whom ſhall the Advowſon be ſaid to be, 57,77
One hath the Nomination, another the Preſentation, by whom the Clerk ſhall be ſaid to come in, *ibid.*
He that hath the Preſentation, not Nomination, preſents, if the Biſhop be bound to admit, 77
One hath the Nomination, another the Preſentation, and the right of Preſentation comes to the King, 57
Preſentation obtained from the King by Fraud, void, 156
How a Clerk preſented ought to be qualified, 146
Leſſee for Life of a Mannor, with an Advowſon appendant commits a Forfeiture, the Reverſioner may preſent to the Church before Entry into the Mannor for the Forfeiture, 51,52,70
A Diſſeiſee of a Mannor to which an Advowſon is appendant, may preſent to the Advowſon before his Entry into the Mannor, *ibid.*
If Patron may preſent to a Church after ſix Months lapſed, 77,78
Patron preſents to the Ordinary after Church lapſed to the Metropolitan, 77,106
Preſentation by a Corporation, how to be made, 106,154
Preſentation to the Archbiſhop the immediate Ordinary being inhibited, 106
Who ought to preſent, where the Clerk hath obtained Orders ſimoniacally, 103
Patron preſents as Attorny to another perſon, 96,97
If Patron may preſent himſelf, 80,154,159
Corporations preſent their Head, void, but one of their Members, good, 80,154,208
Grantee preſents his Grantor, 154,159
Executor preſents his Companion, 159
Who ſhall preſent upon Unions, 129
Preſentation to a Church ſimoniacally, to what purpoſes void, 151
Two bring *Quare Impedit*, one is ſummoned, and ſevered, the other recovers, he that was ſevered ſhall not preſent, *ibid.*
If Patrons may vary in their Preſentations, 74,155,*&c.*
Patron varies in his Preſentation, the Biſhop may admit either Clerk, 157,158
New Preſentation not neceſſary after Recovery in *Quare Impedit*, *&c.* 157
The King's Clerk not to be received, where the Church is full, till Recovery, 152
Preſentation by the King under what Seal to be made, 58, 105, 153
Preſentation by the King in another's Right without Title, how to be avoided, 152
Preſentation to Livings belonging to the Duchy under what Seal, 58, 105,153
To what Livings in Value the Lord Chancellor preſents, 50,98,154,155
The King may preſent to Livings under the value of 20 *l. per ann.* 50,98
Lord Chancellor preſents to Livings above the value, if void, 154, 155
Difference between Preſentations made by the King, and the Lord Chancellor, 154
How the value of Livings, to which the Lord Chancellor preſents, ſhall be accounted, 50, 98,154
The King miſtakes his Title, his Preſentation is void, and where the King ſhall be ſaid to miſtake his Title, 153,154
The King's turn of preſenting not ſerved till his Clerk inducted, 77
The King may preſent to a Church lapſed to any of his Predeceſſors, *ibid.*
The King may revoke his Preſentation at any time before Induction, 155
The King cannot collate without preſenting to the Biſhop, 18

The King ſhall not preſent anew, where his Clerk hath loſt his Living by ill pleading, 79
The King preſents upon Lapſe, as ſupream Ordinary and Patron, 76,78
The King's Preſentation by reaſonof the Temporalties of Biſhops in his Hands, 48,49
Preſentation by the King without Right, when it ſhall make an Uſurpation, 30
The King by his Preſentation ſuppoſeth a Right where he hath none, 'tis void, 44
What Preſentations by the King make an Uſurpation, *ibid.*
How the Church is to be ſupplied, till the King preſents, 72
The King preſents after the Temporalties granted out of his hands, to a Voidance faln before, 48
The King preſents the Incumbent being made Biſhop, 49,50
The King preſents to Livings of perſons outlawed, 99,216
The King preſents upon Simony, and where the King's Right of Preſenting in ſuch is caſe loſt, 20,46,62.63
The King preſents to Livings of Aliens, after Office found, 70
The King preſents *ratione Lapſus*, having no Right, it Lapſe to the Ordinary be thereby barred, 73
Preſentation by the King, of a perſon diſabled by Law, void, 154
Eccleſiaſtical Patron preſents one who is refuſed as inſufficient, he ſhall not preſent another, 158
Executors, where they ſhall preſent, 48,60
One appoiuts by Will, who his Executors ſhall preſent, 60
One Jointenant, or Tenant in Common, preſents his Companion, 85,155,159
One Jointenant, or Tenant in Common, *&c.* preſents alone, the Biſhop may admit or refuſe the Clerk, 158,159,161
Preſentation by one Jointenant, or Tenant in Common, if it ſhall put the others out of poſſeſſion, 84,85
Church being void, the Advowſon is granted over, who ſhall preſent, 175
Mortgagee of an Advowſon is paid off, the Church becomes void, then the Mortgagee reconveys, who ſhall preſent to the Avoidance, 175
Preſentation by one Jointenant alone makes Title for all, 85
Lords preſent to Livings of their Villains, 170
Preſentation in time of War void, and makes no Title, 82, 155
Lapſe during the Archbiſhop's Viſitation, who ought to preſent, and to whom the Preſentation ſhall be made, 76, 106
Where Preſentation by one perſon ſhall veſt a Right in another, 45,46,59,63,95,96
Layman preſented, if the Church be thereby full, 19,46
If the Guardian, or Heir being Infant, ſhall preſent, 98
Guardian marries one Coparcener, and preſents, in whoſe Right it ſhall be, 45
Incumbent having one Benefice under value accepts a ſecond, if the Patron may preſent, 2
Incumbent in by Uſurpation dies within ſix Months, the true Patron may preſent, 83 97
Patrons adviſed to preſent before ſix Months near expired, and for what reaſon, 72
Patron preſents and dies, his Executors preſent another Clerk, the Biſhop may admit, either, 48,157
Two Patrons ſeverally preſent one Clerk, how the Biſhop ought to admit, 160
Uſurper preſents after Deprivation, and before Notice of it to the true Patron. 315
Grantee of the next Avoidance loſeth the Fruit of his Grant, where the Incumbent is made Biſhop, 59
Compoſition to preſent in Turns made by Tenants in Common, 45
Incumbent being convict of extolling Foreign Juriſdiction, who ſhall preſent, 257
Patrons muſt preſent upon exchange of Benefices, 17
Where the Plaintiff after Recovery in *Quare Impedit*, may preſent without a Writ to the Biſhop, 221
Corporation preſents by a wrong Name, 376
New Preſentation not neceſſary after *Jure Patronatus*, 75
Tenant in Dower to preſent to every third turn, 47
Husband and Wife, how they ought to preſent, 47,98
Husband and Wife preſents jointly having no Right, the Wife gains nothing, 81
If Husband, or Executors of the Wife ſhall preſent to a Church void in the life of the Wife, 47,48
If the Wife, or the Executors of the Husband, ſhall preſent, *ibid.*
Husband grants the third turn, and dies, his Wife is endowed, the Wife, not the Grantee ſhall preſent, to the third turn, 47
What ſhall be a ſufficient Preſentation by the Grantee of the next Avoidance to ſatisfie his turn, 59
Simoniacal Preſentation by a Stranger, the Patron, and not the King, ſhall preſent, 81
Where a Biſhop may preſent by Lapſe, pending a *Quare Impedit* againſt him, 187, *&c.*

Biſhop dies before he takes the Benefit of a Lapſe, who ſhall preſent, 76
Archbiſhop of *Canterbury* preſents to the beſt Living of every new Biſhop, by what Law; how Option of ſuch Living is to be made, and whether the Archbiſhop of *York* hath the ſame Priviledge, 50,51
To what Livings of Papiſts, *&c.* the Univerſities ſhall preſent, and what perſons they may not preſent, 64,65,67
Feoffment to uſe before the Statute of 27 *H* 8. and after, who ought to preſent, 98
Preſentation not to be recovered after ſix months plenarty, 175
What means to compel the Patron of a Donative to preſent, 18,71
Donatives preſentable, and how they may become ſo, 122
Preſentation by a Stranger to a Donative, void, 81,231
Difference between Preſentation, and *Commendam*, 141
Deanry preſentable, *&c.* 121,122,123
Chapel preſentable, 121

Proclamation.

Proclamation for preventing and puniſhing Immorality and Prophaneſs, 272,275

Prohibition, Vide **Suggeſtion.**

Prohibitions to be granted *ex debito Juſtitiæ*, 27
Prohibition, the King's Writ, and any one may pray to have it, 27
When to be granted after Conſultation, 492, 493
Defendant in the Prohibition dies, the Executors may proceed till new Prohibition granted, 492
If a new Prohibition be grantable upon the ſame Libel after an Appeal, 493
Prohibition in a Suit for Tithes, how to be had, 488
To Suit for treble value of Tithes in the Spiritual Court, 408,480,*&c.*
Suit in Spiritual Court for a *Modus*, or upon a Cuſtom, when to be prohibited, *Chap.* 54,55,56
Where ſhall be to the Spiritual Court for the Coſts, as well as for the Principal, 473
To a Suit for a Penſion, when grantable or not, 475,476,505
Prohibition, if grantable to Suit for Mortuary, 473,504
Spiritual Court adjudging contrary to the Common Law, if cauſe for Prohibition, 307,479,510,*&c.*
Suit in the Spiritual Court between Parſon and Vicar, no Prohibition, 136,140,307,481, 506,507
Prohibition to Suit for Tithes of a Mill, 461
To Suit for the Tithes of Rakings, and how the Suggeſtion ought to be, 437
Parol Agreement to diſcharge the payment of Tithes during life, if ground for Prohibition, 337,338
If Prohibition ſhall be granted, where the Spiritual Court hath proper Juriſdiction, 509, *&c.*
Plea, that Tithes were truly ſet forth, refuſed in the Spiritual Court, a Prohibition granted, 478,479
Land barren or not, prohibited to be tryed in Spiritual Court, 434
Suit for Dilapidations, not to be prohibited, 311
Prohibition to ſtay proceedings in the Spiritual Court upon a Spoliation, 232
Spiritual Court awards damages for ſtriking in the Church, *&c.* Prohibition granted, 266
Clerk removed by Judgment in *Quare Impedit*, and another inſtituted, the firſt libels in the Spiritual Court, a Prohibition ſhall be granted, 221
Suits in Spiritual Court concerning the Titles of Advowſons, ſhall be prohibited, 164
Biſhop inſtitutes the Clerk of a Stranger, pending *Duplex Querela*, no Prohibition, 165
If Spiritual Court proceed after Induction, Prohibition ſhall go, 162,165
Where Prohibition ſhall go to ſtop a *Duplex Querela*, 164,165,170
Spiritual Court refuſing Proof by one Witneſs, if cauſe for Prohibition, 499,511,*&c.*
Suit in the Spiritual Court for diſturbance to Seats in Churches, when to be prohibited, 296, *&c.*
Preſentee refuſed, and another preſented, *&c.* if the firſt libels againſt the Second in the Spiritual Court, Prohibition lies, 148,158
Prohibition to the Spiritual Court, if it ſhall be before Plea there pleaded, 434,515,516
Oath to be made of the truth of the Suggeſtion before Prohibition granted, 516
Suit in the Spiritual Court to compel Pariſhioners to come to a Church united, Prohibition lies, 127
Prohibition to the Spiritual Court upon denial of a Plea of Simony, 26
Where Prohibition ſhall go notwithſtanding variance between the Suggeſtion, and libel, or in the proof of the Suggeſtion, 488,496
Where any matter is prohibited by Statute, Prohibition lies to any Court that proceeds contrary thereto, 508
Prohibition to hinder Waſte, 27,357
Prohibition to ſuit for cutting down Trees in the Church-yard, 296, 304
Suggeſtion for obtaining a Prohibition, how, and when to be proved, 488, *&c.*
Suit in the Spiritual Court upon the Statute of 2 & 3 *E.* 6. for not ſetting forth of Tithes

against an Executor, no Prohibition lies, 486

Proof, Vide Evidence.

Purchaſor.

Where the Purchaſor of an Advowſon is without remedy by Uſurpation, and plenarty of ſix months, 94,96

Quare Incumbravit.

Quare Incumbravit, where it lies, and what may be pleaded thereto, and in what County to be brought, 171,172,192
If it lies after Writ of Error brought of a Judgment in *Quare Impedit*, 229
A ſecond *Quare Incumbravit* after the Plaintiff hath been non-ſuited in a former, 172
The effect of a Recovery in *Quare Incumbravit*, *ibid.*
Quare Incumbravit prevents Lapſe, 75

Quare non Admiſit.

Quare non admiſit, where it lies, 169,226, 227
In what County to be brought, and what ſhall be a good Return, or Plea thereto, 192,227
What to be recovered by *Quare non Admiſit*, 192
Judgment in *Quare non Admiſit* depends on the Judgment in the *Quare Impedit*, 230

Quare Impedit, Vide Declarations and Pleadings.

Quare Impedit, where it lies, by whom, and for what, 166,169,170, *&c.*
Writs of *Quare Impedit*, how to be framed, teſted, *&c.* 180,182
The Effect of a *Quare Impedit*, 175
What to be recovered by Judgment in it, 210, 215,217
Quare Impedit, a Writ of Poſſeſſion, 177
'Tis of higher nature and of more general uſe than *Darrein Preſentment*, 174,183
When a *Quare Impedit* ſhall be ſaid depending, 171,174
What days of Return in it, 198
What Proceſs in it, *ibid.*
No damages to be recovered in a *Quare Impedit* at Common Law, 167
No *Quare Impedit* againſt the King, 185,216
Who ought to join in the Writ, and againſt whom to be brought, 183, *&c.*
Where the Patron ought to be named in the Writ, or not, 184
Who ſhall be ſaid Patron againſt whom the Writ ſhall be brought, *ibid.*
Naming of the Patron, for whoſe benefit, 185
Ordinary named in the Writ, to what purpoſe, 186
Ordinaries anciently rarely made parties in *Quare Impedit*, 190,191
Plaintiff and Defendant when both actors in *Quare Impedit*, 204
What Seiſin ſufficient to bring a *Quare Impedit*, 177, 178, 195, 205
Quare Impedit in what County to be brought, 192
Age protection, *&c.* not allowable in *Quare Impedit*, &c. 199, 227
Incumbent not named, ſhall not be removed by *Quare Impedit*, 30, 153, 186
Quare Impedit abating for falſe Latin, *&c.* the Plaintiff may have a new Writ, 179,180
What ſhall be a name ſufficient to deſcribe a Church by in a *Quare Impedit*, 182
Church hath two names, how the *Quare Impedit* ſhall be brought, 182
Quare Impedit by the King, by reaſon of a Biſhop's Temporalties in his hands, what plea the Defendant may not plead, 49
Quare Impedit upon the Incumbents accepting a ſecond living under value, 2
Husband and Wife if they muſt join in *Quare Impedit*, 174, 183
Where a Patron is not put to his *Quare Impedit*, 170, 171
What pleas Incumbents might plead at Common Law, 184, 202
Who ſhall be ſuch an Incumbent as to plead by the Statute, 25 *E.* 3. c. 5. 184,202,205, 207, 208
Incumbent wrongfully put out by the King's Preſentee, what remedy, 152
Compoſition by Fine to preſent by turns, what remedy thereupon, 170,171
Compoſition by Tenants in Common to preſent, when to be ſhewed in *Quare Impedit*, 45
Nonſuit or diſcontinuance in one *Quare Impedit*, if barr in another, 175, 194
Judgment in one *Quare Impedit*, if barr in another, 212
Judgment in one *Quare Impedit*, if barr to another, *ibid.*
There ſhall not be two *Quare impedits*, *&c.* of the ſame diſturbance, 174, 175
Darrein Preſentment brought pending a *Quare Impedit*, *ibid.*
He that recovers in *Quare Impedit*, and removes the Incumbent, ſhall not have the meſne profits, 221
The Biſhop's refuſal to admit, and not the Diſturber's preſentation intitles, the Patron to his *Quare Impedit*, 189
One Coparcener recovers after Summons, and ſeve-

severance, if it ſhall be in right of both, 84
To what purpoſes a Church is void or full after Judgment in *Quare Impedit*, 220, 221, 314
One brings *Quare Impedit* after the Church full of his preſentation, 194, 217
Judgment in *Quare Impedit* puts all perſons out of poſſeſſion, 83
What Judgment in *Quare Impedit* ſhall put a Patron out of poſſeſſion, *ibid.*
Executors bring *Quare Impedit* upon an Uſurpation in the life of the Teſtator, 48
What pleas the Ordinary may, or ought to plead, 185, 186, 187, 188, 199, 200, 208
Ordinary maintained to be a Diſturber after plea that he claims nothing but as Ordinary, 187, 200, 201, 212, 219
Where preſentation by one perſon ſhall make title to another, 178, 179
Quare Impedit by Executors, how to be brought, 177
Quare Impedit of Church new Erected before any preſentation, 177, 195
Within what time the Lord ought to bring his *Quare Impedit* upon an Alienation in Mortmain, 83
Quare Impedit by the Patron after ſix Months, an Uſurper having preſented by Simony, 62
What preſentations ſhall be ſufficient to make title in *Quare Impedit*, 182, 194, 195
Diſturbance laid after date of the Writ, 187, 203
The Defendant in *Quare Impedit* not to counterplead the Plaintiff's title without making title to himſelf, 195, 204
Quare Impedit how to be brought after Union, 129
Quare Impedit of a Vicarage, 180
Quare Impedit, if it lies on preſentation to a Church appropriate, 176
Quare Impedit of a Church in *Wales* where to be brought, 192
Quare Impedit not to be brought within liberty or franchiſe, 192, 193
Quare Impedit by him that hath the Nomination, *&c.* only, how to be brought, 57, 60, 180
Quare Impedit of a Chappel, 180
Quare Impedit by a Chapter againſt their Dean, 177
Quare Impedit of a Donative, the form thereof, 172, 180, 230, 231
Quare Impedit præſentare ad medietatem, tertiam partem, &c. where it ſhall, or may be, 95, 181, 197
Quare Impedit præſentare ad Eccleſiam, where right to a moiety only, 95, 180, 181, 197
Quare Impedit againſt a Sheriff for refuſing to give poſſeſſion of a free Chappel, 230
No *Quare Impedit*, or Darrein preſentment at Common Law after the Church full, 90

Recuſant.

Popiſh Recuſants convict diſabled to preſent, *&c.* 64, 65, 66, 67
Truſtees of Popiſh Recuſants diſabled to preſent, 68
Penalty of Truſtee of Popiſh Recuſant preſenting without giving notice to the Univerſities, 68
Popiſh Recuſant before Conviction diſabled to grant the next Avoidance, 65
Fraudulent Grants made by Popiſh Recuſants are void, 66
Preſentations of Popiſh Recuſants veſted in the Univerſities, 64, 65, 67
Preſentations made by Recuſants, if void, or voidable, 65
What intereſt the Univerſities have in Recuſants livings, 66
What Intereſt Recuſants have in their livings after Conviction, *ibid.*
What grants by Recuſants ſhall bind the Univerſities, *ibid.*
Recuſant not to leaſe his Advowſon in truſt, 65
Where the King and not the Univerſities ſhall preſent to Recuſants livings, *ibid.*
Recuſant conformeth himſelf after a right of preſenting is veſted in the Univerſities, 65
Perſons refuſing to make repeat and ſubſcribe the Declaration according to Statute 1 *W.* & *M. c.* 26. diſabled to preſent, *&c.* as Popiſh Recuſants, 67

Refuſal vide Inſtitution.

Relation.

Relation a Fiction in Law and ſhall not work a wrong, 196
To what time Pardons ſhall relate, 37
To what time Acts of Parliament ſhall relate, 37, 414

Releaſe.

Releaſe of one Coparcener, *&c.* to an Uſurper, ſhall not prejudice his Companion, 176, 193
Leaſe to Chantery Prieſt and his Succeſſors, the Leſſor releaſes all his right to him and Succeſſors, what is gained by ſuch releaſe, 288
The King releaſeth to an Uſurper, if void, 87
Releaſe to the Patron in time of Vacation, to what purpoſe good, 314
Releaſe of all right to Land, will not extinguiſh Tithes, 402
Grantee of the next Avoidance cannot accept a Releaſe of the Advowſon, 66

Releaſe from one Jointenant to another, where good, 60

Remitter.

Where one ſhall be remitted to an Advowſon after Uſurpation, 97

Rent.

Out of what things a Rent may be reſerved, or not, 349.380
Rent which ſhall not be incident to the Reverſion, 349
What remedy for Rent reſerved out of a Fair, or other ſuch incorporeal thing, 349,380
Rent, how to be reſerved by Eccleſiaſtical perſons in their Leaſes, 355
Biſhop reſerves Rent payable to the Dean and Chapter in Vacation of the Biſhoprick, void, 321
Rent reſerved payable at the uſual Feaſts during the term, or ten days after, 357
Leaſes by Colleges, what Rent to be reſerved thereby, 358
Where the uſual Rent ſhall be ſaid to be reſerved, or not, 355,356
Accuſtomed Rent, what ſhall be ſaid to be ſo where different Rents have been reſerved on ſeveral Leaſes, 355
Rent reſerved by concurrent Leaſe, when it becomes payable, 345

Replication.

An inſufficient Plea may be made good by the Replication, 203
Plaintiff by Replication maintains the Biſhop a diſturber, after Plea that he claims nothing, but as Ordinary, 187,200,201,212,219

Requeſt, Vide **Notice.**

Reſidence.

What ſhall be ſaid Non-reſidence, or not, 284, 285
What ſhall excuſe from Reſidence, 285,286
What beneficed perſons may be Non-reſident, 279, *&c.*
Non-reſidence, how puniſhed, 279,280,284
Biſhops if required to reſide, and by what Law, 285
What ſhall be Non-reſidence to avoid a Leaſe, and how to be pleaded, 360,362,363
Every Parſon intended reſident upon his Benefice, 287
Sixty days abſence by Parſons preſented by the Univerſities to Livings of Papiſts, *&c.* makes the Livings void, 68
Qualified Chaplains, if they may be Non-reſident without Diſpenſation, 284,285
Informations for Non-reſidence, how to be brought, 286
Two Informations for Non-reſidence, brought at the ſame time for the ſame Offence, *ibid.*

Reſignation.

Reſignation, how to be made, to whom, and by what words, 16,17,18,25
Reſignations, why to be made to the Biſhop, *&c.* 25
Reſignation to the King, 17,18
Corrupt Reſignation, how puniſhed, 19
Reſignations conditional, when good, 17
Reſignation not effectual till accepted, 17,18
Patrons muſt preſent upon Reſignations, 17
Biſhop cannot reſign to the Dean and Chapter, 18
Evidence to prove a Reſignation, *ibid.*
Reſignation Bonds held good, but the ill uſe of them reſtrained, 24
Reſignation after Inſtitution and before Induction, 18
Incumbent after Recovery in *Quare Impedit*, may reſign, 221
Reſignation of Donatives, how to be made, 18
Reſignation of Donative to the Patron and a Stranger, or to one Patron only, *ibid.*

Reſtitution.

By what words Advowſons will paſs from the King in caſe of Reſtitution, 56
To what Preſentations a perſon outlawed ſhall be reſtored upon reverſal of the Utlawry, 69
What is comprehended under the word *Iſſues*, in the King's Reſtitution, 61

Return, Vide **Writ to the Biſhop.**

What ſhall be a good Return to a *Quare non Admiſit*, 227
What ſhall be a good Return to a Writ directed to the Ordinary upon Recovery in *Quare Impedit*, 223, *&c.*
Archbiſhop returns upon a Writ, *&c.* that 'tis not within his Juriſdiction, 222
Biſhop fined, if he make a bad Return, 223 225,227

Revocation.

Preſentation revoked, 155, *&c.*
Where the King may revoke his Preſentation, and what ſhall be ſuch a Revocation, 155, *&c.*

Notice

Notice that the King has revoked his Preſentation if neceſſary, 156,158
Lord Chanchellor, &c. if he may revoke his Preſentation, 158
If Inſtitution may be revoked, and by what Act, 156
Death of Patron, if it revoke the Preſentation, 157
What Patrons may revoke their Preſentations, 155,&c.
Mandat to the Archdeacon to make Induction revoked, 156

Sacralidge.

SAcralidge, what, 303

Sacrament.

The Miniſters power in admitting, or refuſing of perſons to the Sacrament, 237,238
The Miniſters Duty in adminiſtring the Sacrament, 237,&c.
Canons for the more regular adminiſtration of the Sacrament, 238,239
A common Error in ſome perſons receiving the Sacrament to qualifie them for Offices, 238
Sacrament, to be adminiſtred to the Sick, 239
How many perſons to be preſent at receiving the Sacrament, *ibid.*
Notice to be given of adminiſtring and receiving the Sacrament, 238,239

Scire Facias.

Scire Facias by the party that recovers in *Qnare Impedit*, againſt the Incumbent in poſſeſſion, 217,224
Scire Facias upon an Agreement by Fine to preſent by turns, 170

Seats in Churches, Vide Church.

Seiſin.

Preſentation the only Seiſin of an Advowſon, 205
Seiſin of an Advowſon once had, not defeated by Uſurpation, 96

Sequeſtration.

Sequeſtration of a Benefice by reaſon of the Incumbents offending againſt the Statute of 13 *Eliz.* 331,361,362
Sequeſtration of an Impropriate Parſonage for not repairing the Chancel, 320
Ordinary may ſequeſter the Profits of the King's Church till he preſent, 72
Profits of Church to be ſequeſtred where the Title is in controverſie, 232
If they, who are to receive the Profits of a Church by Sequeſtration, may ſue for them, if detained, 318
If the Sequeſtrators ought to pay, &c. the profits received to the Ordinary, *ibid.*
Profits not diſpoſed of, to be reſtored in *ſpecie* after Sequeſtration taken of, 232
What remedy againſt the Sequeſtrators, &c. 232
Profits of the Church ſequeſtred, where the Incumbent is abſent above eighty days in one year, 331

Simony.

Simoniacal Contract, how it may be made, 20,&c.
Clerk preſented ſimoniacally without his knowledge, if diſſabled to hold that living, 27, 28,30
Simony in taking Orders, 31,103
In Admiſſion, Inſtitution, &c. 31
Oath againſt Simony, if to be taken, 108
Forfeiture for Simony, 25,27,28,103
Clerk how diſabled, by taking Orders Simoniacally, 103
Who ſhall preſent, where the Incumbent obtained Orders Simoniacally, 102,103
To what Purpoſes a Church ſhall be ſaid full by a Simoniacal Preſentation, 46,59
Church, to what purpoſes void by Simony, 26,151,316
Simony makes Admiſſion, &c. void, 6,26,29, 316
Bonds given upon Simoniacal Contracts, if void, 25
Simony not to be diſpenſed withal, 28
Bonds to reſign if Simoniacal, 23,24
Bond that the Clerk ſhall reſide, not Simoniacal, 23
Bond to pay Ten pounds yearly to the Son, or Widow of the laſt Incumbent, if Simony, 23
Averment, if allowable, and where neceſſary to make Bond ſimoniacal, *ibid.*
Simoniacal Contract made, and afterwards the ſame perſon preſented *gratis*, 26,27
Simony to buy the next Preſentation, the Church being void, 22
To buy the next Preſentation, the Incumbent being old or ſickly, 21
Simony, where the Clerk and Patron are ignorant of it, 22,23,26,61
Simony in the Father by purchaſing the next Preſentation for his Son, 21,27
To procure the Grantee of the next Avoidance to ſurrender his Grant, and the Grantor to preſent a certain perſon, 20
One buyeth the next Preſentation with intent to preſent *A.* who is preſented accordingly, if Simony, 21

How the next Preſentation may be bought to prevent Simony, 21
Advowſon bought pending *Quare Impedit*, if Simony, 23
To buy the next Preſentation, the Church being full, to pay the Purchaſe Mony, when the Church is void, if Simony, 21
Forfeiture of double value of the Church for Simony, how the value is to be accounted, 28
If the King may preſent upon Simony, 25, 26, 28,36,62
Where the King hath loſt his turn by not preſenting for Simony, 63
Simoniacal Preſentation by a Stranger, the Patron, and not the King ſhall preſent, 62,81
Pardon will not enable a Simoniſt, but diſchargeth the Forfeiture only, 28,29
Nomination in one, Preſentation in another, the Simony of the one ſhall not forfeit the right of the other, 62
Simony diſables the Party from having that Living, 27, 28
Simoniſt continues in poſſeſſion by aſſent of parties after Judgment againſt him, how he may be removed, 27
No Acceſſaries in Simony, 29
Simoniacus and *Simoniace Promotus*, 28

Spoliation.

Spoliation, where it lies, and againſt whom, 4,16,138

Statutes.

Statutes to what time they ſhall relate, 37,414
No Statute till the King's Aſſent, 414
Statutes to be expounded according to the meaning of the Law makers, 65
Affirmative Statutes take not away ahe Common Law, 128
Statutes which are to be read Churches, 268, *&c.*
Where the King ſhall be bound by a Statute or not, 71,72,93,219
Statutes which give Recuſants Livings to the Univerſities, are private Statutes, 65
Stat. 5 *Eliz.* for tranſlating the Bible into *Welſh* Tongue, is a private Statute, 147
Private Statutes muſt be pleaded, or the Judges will not take notice of them, 65
Statute miſrecited, makes a Plea vitious, 363
Statutes which begin with perſons of an inferior Rank, not to be extended to thoſe who are ſuperior, 328, 429, 431, 432
Where matter is prohibited by Statute, Action lies for doing of it contrary to the Statute, though no Action be given, 261

Stat. Tempore Regis H. 3.

9 *H.* 3. *c.* 5. Temporalties of Biſhops, *&c.* how to be uſed in the King's hands, 321
9 *H.* 3. *c.* 36. No Lands to be given in Mortmain, 290
52 *H.* 3. *c.* 12. Concerning proceſs in *Quare Impedit*, &c. 198, 199, 212

Stat. Tempore Regis E. 1.

7 *E.* 1. Of Mortmain, 290
13 *E.* 1. *c.* 5. Of Advowſons, 83,171,190, 191,202,204,215,219
What perſons relieved by the ſaid Statute, 62, 90, *&c.*
What Feme Coverts relieved by the ſaid Statatute, 92
What Heirs relieved by the ſaid Statute, and how, 91, *&c.*
What Spiritual Perſons relieved by the ſaid Statute, and how, 93
What reverſioners relieved by the ſaid Statute, 91
13 *E.* 1. *c.* 32. Of Mortmain, 291
13 *E.* 2. *De Circumſpecte agatis*, 504,505
35 *E.* 1. *Ne Rector proſternat acbores in Cœmiterio*, 295, 296

Stat. Tempore Regis E. 2.

9 *E.* 2. *c.* 5. No Prohibition were Tithes are demanded of a new Mill, 460
9 *E.* 2. *c.* 8. Clerks in the King's ſervice to be diſcharged of Reſidence, 286
9 *E.* 2. *c.* 13. Examination of Clerks preſented to Benefices, belongeth to the Spiritual Judge, 147
17 *E.* 2. *c.* 8. Lapſe of ſix Months,not to prejudice the King, 71
17 *E.* 2. *c.* 14. The King to have the Eſcheats of Biſhops Tenants, during the Vacation, 321
17 *E.* 2. *c.* 15. Advowſons, *&c.* not to paſs from the King without ſpecial Words,54,55

Stat. Tempore Regis *E.* 3.

4 *E.* 3. *c.* 7. Executors ſhall have an action of Treſpaſs for a wrong done to their Teſtator, 48, 177, 487
14 *E.* 3. *c.* 4, 5. How the temporalties of Biſhops ſhall be uſed in the time of Vacation, 321
18 *E. c.* 3. Prelates not to purchaſe Lands in Mortmain, 289
18 *E.* 3. *c.* 7. No *Scire facias* to be awarded againſt a Clerk for Tithes, 468
25 *E.* 3. *c.* 1. The King not to preſent to a Church

Church in anothers right, by title faln in time of his progenitors, 77
25 *E.* 3. *c.* 3. Where the King preſenteth to a Benefice in anothers right, his Title ſhall be examined, 152
25 *E.* 3. *c.* 7. Ordinaries, *&c.* may counterplead the King's Title, 152, 184, 202, 205, 207
45 *E.* 3. *c.* 3. Prohibition to a ſuit for the Tithes of *Silva Cædua*, 443
50 *E.* 3. *c.* 4. No prohibition ſhall be allowed after Conſultation duly granted, 492
50 E. 3. *c.* 5. None ſhall arreſt Prieſt, *&c.* doing Divine Service, 260

Stat. Tempore Regis R. 2.

1 *R. c.* 14. In an action for goods taken away, the Defendant makes Title for Tithes, 469
1 *R. c.* 15. Penalty for arreſting Prieſts doing Divine Service, 260
13 *R.* 2. *c.* 1. The King's preſentee not to be received, until he hath recovered by Law, 152
15 *R.* 2. *c.* 5. Aſſurance of Lands to certain perſons, *&c.* adjudged Mortmain, 292
15 *R.* 2. *c.* 6. In Appropriation of Benefices, proviſion to be made for the Poor, and the Vicar, 133

Stat. Tempore Regis H. 4.

2 *H.* 4. *c.* 4. Penalty for purchaſing Bulls to be diſcharged of Tithes, 425
4 *H.* 4. *c.* 12. In appropriation of Benefices, proviſion to be made for the Poor and Vicar, 134, 135
4 *H.* 4. *c.* 22. Remedy, where by the King's preſentation, any Incumbent is put forth, 152
7 *H.* 4. *c.* 6. The Penalty of him that purchaſeth a Bull to be diſcharged of Titles, 426

Stat. Tempore Regis H. 5.

1 *H.* 5. *c.* 7. Frenchmen diſabled to have Benifices in *England*, 148

Stat. Tempore Regis R. 3.

1 R. 3. *c.* 1. All Acts made by, or againſt *Ceſtuy que uſe*, to be good, *&c.* 98

Stat. Tempore Regis H. 7.

3 *H.* 7. *c.* 10. Coſts, *&c.* awarded to the Plaintiff, if the Defendant ſue a Writ of Error, 229

Stat. Tempore Regis H. 8.

6 *H.* 8. *c.* 15. Second Letters Patents making no mention of the firſt, made void, 155, 158
21 *H.* 8. *c.* 6. Where Mortuaries ought to be paid, and for what perſons, *&c.* 463, 473, 475
21 *H.* 8. *c.* 13. Spiritual perſons abridged from plurality of livings, and taking of Farmes, *&c.* 7, *&c.* 128, 142, 276, 277
How the ſaid Statute is to be expounded, 7, *&c.*
The ſaid Statute of is a general Law, 8
23 *H.* 8. *c.* 9. For citing Perſons out of the Dioceſs, wherein they inhabit, 498
23 *H.* 8. *c.* 10. Feofments of Lands to the uſe of a Church, ſhall be void, 295
25 *H.* 8. *c.* 16. What Perſons may have a Chaplain beneficed with Cure, 281
26 *H.* 8. *c.* 3. For the payment of firſt Fruits, *&c.* 33, 34
26 *H.* 8. *c.* 15. What duties Spiritual Men in *Richmonſhire* ſhall take after the deceaſe of any perſon, 404
27 *H.* 8. *c.* 10. Of Uſes, 98, 99, 176
27 *H.* 8. *c.* 20. Tithes to be paid according to the Cuſtom of the Pariſh, 469, 489, 498, 501
27 *H.* 8. *c.* 28. Monaſteries under the value of two hundred pounds, *per ann.* given to the King, 413, 414, 416, 423
28 *H.* 8. *c.* 11. Profits received during the Vacation of Benefices, to be reſtored to the next Incumbent, 141, 312, *&c.*
28 *H.* 8. *c.* 13. Non-reſidence by reaſon of Study in the Univerſities, reſtrained, 283
31 *H.* 8. *c.* 13. Monaſteries diſolved, and their Lands given to the King, 414, 416, 423, *&c.*
32 *H.* 8. *c.* 7. How Tithes ought to be paid, and how to be recovered, if not paid, 471, 475, 480, 489
32 *H.* 8. *c.* 24. The Lands, *&c* of St. *Johns* of *Jeruſalem* veſted in the King, 429, 430, 431
32 *H.* 8. *c.* 28. Leaſes to be made by perſons ſeiſed in the right of their Churches, *&c.* 56, 324, 366
32 *H.* 8. *c.* 36. Of Fines, 52
33 *H.* 8. *c.* 27. Leaſes of Hoſpitals, *&c.* good with conſent of the major part, 369
33 *H.* 8. *c.* 28. Non-reſidence of certain Chaplains, diſpenſed with, 283
34 & 35 *H.* 8. *c.* 19. Concerning payment of Penſions, Proxies, *&c.* 465
37 *H.* 8. *c.* 4. Chantries, *&c.* veſted in the King, 432

37 *H.* 8. *c.* 21. Concerning the Union of Churches, 124, 127
37 *H.* 8. *c.* 12. Concerning payment of Tithes, in *London*, 390

Stat. Tempore Regis E. 6.

1 *E.* 6. *c.* 1. Penalty for unreverend ſpeaking againſt the Sacrament, *&c.* 239, 257
1 *E.* 6. *c.* 14. Chauntries given to the King, 432
2 & 3 *E.* 6. *c.* 13. In what manner Tithes ought to be paid, 425, 433, 456, 458, 459, 464, 477, *&c.* 487, *&c.* 501, 508. When the ſaid Parliament commenced, 478
2 & 3 *E.* 6. *c.* 20. concerning the payment of Tenthes, 33, 34
5 & 6 *E.* 6. *c.* 3. Which days ſhall be Holy-days, *&c.* and if in force, 248
5 & 6 *E.* 6. *c.* 4. Penalty for ſtriking or drawing a weapon, in the Church or Church-yard, 265

Stat. Tempore Regis & Regine Phil. & Mariæ.

1 *M.* *c.* 3. Penalty for diſturbing Preachers, and Miniſters in the Church, 262
4 & 5 Phil. & Mariæ *c.* 1. Confirmation of Letters Patent, *&c.* 55

Stat. Tempore Regine Eliz.

1 *Eliz.* *c.* 1. Ancient Juriſdiction reſtored to the Crown, *&c.* 35, 100, 123, 257
1 *Eliz.* *c.* 2. for Uniformity of Prayer, *&c.* 233, 244, 258
1 *Eliz.* *c.* 19. Leaſes and other aſſurances of Biſhops Lands reſtrained, 52, 53, 87, 326, 327, 337, 376, 378, 380, 401, 426
5 *Eliz.* *c.* 1. Aſſurance of the Queens power over all Eſtates, 100, 259
5 Eliz. *c.* 5. Statute for tranſlating the Bible into the Welſh Tongue, 147
5 *Eliz.* *c.* 5. Preaching, *&c.* that the eating or forbearing to eat Fiſh is of neceſſity, 259
13 *Eliz.* *c.* 10. Leaſes by Eccleſiaſtical perſons, and the Expoſition of the ſame, 52, 53, 87, 311, 328, 329, 337, 376, 379, 380, 401, 426, 432
13 *Eliz.* *c.* 10. Deeds of Gift, by Spiritual perſons to defraud their Succeſſors of remedy for Dilapidations, 311
13 *Eliz.* *c.* 12. Reformation of diſorders in the Miniſters of the Church, *&c.* 19, 30, 33, 35, 99, 100, 103, 106, 121, 123
13 *Eliz.* *c.* 20. How long Leaſes of Eccleſiaſtical Benefices, ſhall continue in force, *&c.* 360, *&c.*
This Statute a general Law, 361
14 *Eliz.* *c.* 11. Concerning Leaſes by Eccleſiaſtical perſons of Houſes in Cities, *&c.* and Leaſes made by them to their Curates, 329, 331, 334, 344, 345, 360
14 Eliz. *c.* 11. concerning Bonds and Covenants given to enjoy Leaſes, and of Leaſes made by Curates, 360, 362, *&c.*
The ſame is a general Statute, 330
14 Eliz. *c.* 12. Money received for Dilapidations, how to be employed, 311
18 Eliz. *c.* 6. Concerning Colledge Leaſes, 358
18 Eliz. *c.* 7. Clerk's convict having had their Clergy, to be delivered without purgation, 36
18 Eliz. *c.* 11. Concerning Leaſes by Spiritual perſons, 330, 331, 332
This Statute a general Law, 333
27 Eliz. *c.* 5. Judgments to be given after Verdict, *&c.* notwithſtanding any defect in proceſs or pleading, 201
29 Eliz. *c.* 6. Certain aſſurances made by Recuſants to be void, 66
31 Eliz. *c.* 6. Of Simony, and the Expoſition of it, 19, 20, *&c.* 32. 60, 61, 81, 103, 151, 316

Stat. Tempore Regis Jac. 1.

1 *Jac.* 1. *c.* 3. Aſſurances made to the King of Biſhops Lands, void, 326
3 *Jac.* 1. *c.* 1. Concerning the Powder-Treaſon, 250
3 *Jac.* 1. *c.* 4. For the diſcovery, and repreſſing of Popiſh Recuſants, 66, 101
3 *Jac.* 1. *c.* 5. To prevent dangers which may grow from Popiſh Recuſants, 64, *&c.*
21 *Jac.* 1. *c.* 16. Of Limitations, 336, 520

Stat. Tempore Regis Car. 2.

12 *Car.* 2. *c.* 14. For a Perpetual Anniverſary Thankſgiving on the 29th day of *May*, 251, 268
13 *Car.* 2. *c.* 12. Concerning the Oath *ex Officio*, 108
14 *Car.* 2. *c.* 4. Of the Uniformity of Prayer, 32, 35, 99, 103, 107, 111, 121, 123, 145, 146, 233, 234, 237, 242, 244, 249
14 *Car.* 2. *c.* 25. Rents and Sums of Money granted for Augmentation of poor Vicarages, confirmed, 310
15 *Car.* 2. *c.* 6. For Explanation of part of the Act of Uniformity, 145
17 *Car.* 2. *c.* 3. For Uniting of Churches in Cities, *&c.* 125, 294
22 *Car.* 2. *c.* 11. For Rebuilding the City of *London*, 333
22 & 23 *Car.* 2. *c.* 15. For the Settlement of the Maintenance of the Parſons, *&c.* in the Pariſhes of the City of *London*, burnt by the late dreadful Fire, 395, *&c.*
29 *Car.* 2. *c.* Of Frauds and Perjuries, 347, 348

29 *Car.* 2. *c.* For the better Obſervation of the Lord's-day, 261,262
29 *Car.* 2. *c.* 8. For Confirming, *&c.* Augmentations made to ſmall Vicarages, 308

Stat. Tempore Regis W. & Regine M.

1 *W. & M. Seſſ.* 1. *c.* 8. For Abrogating the Oaths of Supremacy, *&c.* and Appointing new Oaths, 102,108
1 *W. & M. c.* 16. Simoniacal Promotion of one perſon, may not prejudice another, 63
1 *W. & M. c.* 18. Againſt diſturbing any Congregation in time of Divine Worſhip, 267
1 *W. & M. c.* For Exempting Proteſtant Subjects from the Penalties of certain Laws, 103,104,235
1 *W. & M. Seſſ.* 1. *c.* 26. To veſt in the Univerſities the Preſentation of Benefices belonging to perſons refuſing to ſubſcribe the Declaration, *&c.* 67
3 & 4 *W. & M.* For the better Aſcertaining the Tithes of Hemp and Flax, 448,449
4 & 5 *W. & M. c.* 12. Pariſhioners of Churches united to contribute to the Repairs and Ornaments, *&c.* of Churches to which they are united, 129
6 & 7 *W.* 3. *c.* 11. For the more effectual Suppreſſing prophane Curſing and Swearing, 269
7 & 8 *W.* 3. *c.* 6. For the Recovery of ſmall Tithes, 494
7 & 8 *W.* 3. *c.* 34. That the Solemn Affirmation of Quakers ſhall be accepted inſtead of an Oath, 497
8 & 9 *W.* 3. *c.* 11. Coſts given in Action for not ſetting out Tithes, 487
7 & 8 *W.* 3. *c.* 37. For the Encouragement of Charitable Gifts and Diſpoſitions, 294
10 & 11 *W.* 3. *c.* 15. For the continuing the Act for the more eaſie recovery of ſmall Tithes, 497

Subſcription, Vide Articles.

Suggeſtion, Vide Prohibition.

Suggeſtion to have a Prohibition, how and when to be proved, and by what Witneſſes, 488, *&c.*
Six Months for proving a Suggeſtion, how to be accounted, 492
Coſts, *&c.* for not proving a Suggeſting, when to be given, and how, 488, *&c.*

Summons and Severance.

Summons and Severance, where it ſhall be, 183,193,228
Judgment for an Incumbent ſevered to be reſtored, 228
Summons in *Quare Impedit*, how to be made, 198
Where a Writ of Deceit lieth upon a Summons unduly returned, *&c.* 198

Superſedeas.

Writ of Error if *Superſedeas* to the Enquiry of damages, after Judgment in *Quare Impedit*, 229
If Writ of Error be *Superſedeas* to a Writ awarded to the Biſhop, 229

Surpluſage.

Pleading an Advowſon granted by Deed, mentioning the Deed, is Surpluſage, 57

Surrender.

Surrenders in Deed, and in Law, 345,346
Acceptance of a voidable Leaſe, Surrender of a former good Leaſe, 346
Aeceptance of a new Leaſe at a day to come, is a preſent Surrender, *ibid.*
An Infant, if he may ſurrender, *ibid.*
Acceptance of a leſſer Term, Surrender of a greater, *ibid.*
Leſſee of an Advowſon accepts a Preſentation from his Leſſor, is a Surrender of his Term, 71
Leſſee of an Advowſon grants the next Avoidance, if any happen during the Term, and then ſurrenders, 53
Surrender to an Eccleſiaſtical Perſon, whereby a new Leaſe is to be made, ought not to be conditional, 346

Tenants in Common.

TEnants in Common of an Advowſon, 45
Tenants in Common of a Seat in a Church, 300,301
Tenants in Common of a Seat, cannot preſcribe jointly in an Action concerning it, 300,301
Preſentation by one Tenant in Common, or Jointenant alone, if it ſhall put the others out of poſſeſſion, 84,85,86
Compoſition to preſent, how to be made by Tenants in Common, 45

Tenant by the Curteſie.

Husband ſhall be Tenant by the Curteſie of an Advowſon, 45,47

Tenant in Tail.

Tenant in Tail, by what means he may grant an Advowſon, 51

Tenant in Tail grants the next Avoidance and dies, if the Grant be void or voidable, 51
Tenant in Tail grants the Nomination of a Clerk by Fine, if the Iſſue be thereby bound, 52
Tenant in Tail, and his Heir aparent join in the grant of an Advowſon, 51
Tenant in Tail grants to the uſe of himſelf and Wife, *&c.* void as to the Wife, 51
Tenants in Tail how relieved by the Statute, *Weſt.* 2. *c.* 5. 93

Tenths, Vide First Fruits.

Tenths by what Law payable, how to be demanded, and by whom, 33, 34
Certificate for Non-payment of Tenths, how to be made, 34
Parſon in by wrong, if liable to pay Tenths, *&c.* 314, 317
Tenths paid into the Exchequer after being demanded by the Biſhop, 34

Tenures.

Adowſons in Groſs, if held by Tenure, 47
Tenure in Franckalmoign, and by Divine Service, the difference, 254, 255
He that holds by Divine Service, ſhall do fealty, 255
Ancient Tenures by Divine Service ſuperſtitious, now to be performed according to the Book of Common-Prayer, 11
Statutes for Uniformity, take not away ancient Tenures, 254
One bound to ſay Divine Service in a Chappel ruinated, excuſed til the Chappel be repared, 255
All Lands and Advowſons held of the King, 131

Teſtimonial.

Teſtimonial of Inſtitution, &c. if neceſſary, 109
Teſtimonal that an Incumbent performed all things required by Law, 119
Biſhop not to refuſe a Clerk for want of Teſtimonials, 146,147

Tithes.

Tithes of what things payable, 387, *&c.* 400, *&c.* 435, *&c.*
Tithes, in what manuer they ought to be paid, 438, *&c.* 450, *&c.*
Cuſtom in the manner of Tithing to be obſerved, 436, 438, 450
Who capable of Tithes at Common Law, 402, 405, 406, 431
Tithes to be paid as they uſually have been paid, *&c.* 425, 433
Tithes not iſſuing out of Lands, 402, 403, 405
Double Tithe, what ſhall be ſo ſaid, 438, 439, 451, 452, 456
Eccleſia decimas ſolvere Eccleſiæ non debet, 404
Glebe Land in another Pariſh, ſhall pay Tithe *ibid.*
Parſon of one Pariſh hath Tithes within another Pariſh, *ibid.*
Portion of Tithes, what, 338, 410
Decimam Garbam and *Decimas Garbarum,* the difference, 408
Preſcription to have *decimam Garbam,* no diſcharge of Tithes, *ibid.*
Where the Parſon ſhall pay Tithe to the Vicar, or the Vicar to the Parſon, 404
Where Executors of Parſon, or his Leſſee, ſhall pay Tithe for Corn ſown upon the Glebe, 403, 404
Parſon lets his Rectory, reſerving the Glebe, he ſhall pay Tithe to his Leſſee, 404
Parſon ſells the Corn ſown on the Glebe, the Vendee ſhall pay Tithe, 404, 405
Tithe of two years, not to be accounted together, 450
Leaſe or Grant of Land free from all Exactions, will not diſcharge Tithes, 403, 405
Where the Leſſee of Land diſcharged of Tithes, ſhall pay Tithes, or not, 403, 404, 405, 424, 429, 430
Tithes in Lay hands, is Lay Fee, 481
Tithes ſevered, are a Lay Chattel, 405, 436, 480, 481, 517
Fine may be levied of Tithes, 472
Tithes, if grantable without Deed, 337, *&c.* 521
Tithes *de communi Jure,* belong to the Parſon 305, 405
Tithes diſtrained Damage feaſant for being ſuffered to remain too long on the Land, after ſet out, 482
Tithes by whom to be ſet out, 436, 479
Tithes not parcel, or appendant to a Mannor, 408
The owner of Tithes bound to carry them away in reaſonable time, 478, 482
Who to take care of Tithes after ſet forth, 436 521
Corn carried away by a Stranger, Tythe not forth, 480, 517
Non-payment, Evidence of a diſcharge of Tithes, 408, 409, 425, 522
Diſcharge of Tithes, intended perſonal, not real, 415
Lay perſons, in what manner they may preſcribe not to pay Tithes, 406, *&c.*
Lay perſons, how capable of Tithes, 406, 408
What remedy for Tithes detained, and carried away after ſet forth, 470, *&c.* 479, *&c.* 517, *&c.*

Action

Action of Treſpaſs, or *Detinue* lies for Tithes taken away after ſet out, Action of Account, *contra*, 480,481

Tithes not to be recovered by Action, but a recompence for them only, 412,518

One poſſeſſed of Tithes by ſeveral Titles, may bring one Action for them, 518

If Jointenants and Tenants in Common, muſt join in Action for not ſetting forth Tithes, 518

An Action of *Ejectione Firmæ* may be brought of Tithes, 472,480,519

Tithes, by whom to be ſet out, 477,478,479

What ſhall be a ſufficient ſetting forth of Tithes, 478,479,517

What power the Owner hath to ſet out his Tithes, or carry them away, *&c.* 430, 479

Notice of the ſetting forth of Tithes, if neceſſary, 482

Eccleſiaſtical Courts have the proper Juriſdiction of Tithes, 485,*&c.* 487,499

In the Court of what Ordinary, *&c.* Tithes may be ſued for, 498

Lay perſons could not ſue in the Eccleſiaſtical Court for Tithes, till aided by Statute, 406, 470,499

When Tithes may be ſued for in the *Exchequer*, and what value to be there recovered, 483,484,485

Tithes ſued for in the *Chancery*, 485

What remedy to compel Tithes to be ſet forth according to Cuſtom, 436

Action on the Statute of 2 & 3 *E.* 6. for not ſetting forth of Tithes, is perſonal grounded on the contempt, 486,518

If Action for not ſetting out of Tithes lies for, or againſt Executors, 486

Action for not ſetting out Tithes, lies not by *Juſticies*, 485

One hindred of his way, to carry his Tithes, what remedy, 479,480

Two Tenants in Common, one ſets forth the Tithes, the other carries them away, againſt whom the Action ſhall be brought, 519

Fraud to deceive the Parſon of his Tithes due by Cuſtom what remedy, 436, 450, 483, 485

What damages to be recovered In the Spiritual Court in a Suit for Tithes, 483,*&c.*

A Parſon,*&c.* may have his Action of the Caſe, if he be diſturbed to order his Tithes after ſet forth, 441

No Action for ſmall, or mixt Tithes upon the Statute of 2 *E.* 6. 478,523

No Tithes of Marriage Goods in *Wales*, 456

The ſeveral ſorts of Tithes, 435

Predial Tithes, what, 435,441,447,448

Mixt Tithes, what, 435,449,*&c.*

Small Tithes, what ſhall be ſo accounted, 305, *&c.*

Perſonal Tithes, what, and by whom to be paid, 435,458,*&c.*

Payment of Tithes to the Rector, no diſcharge againſt the Vicar, 409

By what means Lands may be diſcharged of Tithes, 400,414

Diſcharge of Tithes, is contrary to common Right, and to be taken ſtrict, 425

Real Compoſition for the diſcharge of Tithes, what, how made, and who bound thereby, 400,407,408,414,426

What Orders priviledged from the payment of Tithes, 429

What Bulls of the Popes, may be ſufficient to diſcharge Tithes, 426

To what Abbey Lands the Statute of 31 *H.* 8. doth extend, 414,*&c.*

Abbey Lands how anciently diſcharged of Tithes, and how at this day, 413,*&c.*

Priviledge of Abbies to be diſcharged of Tithes, is perſonal, 413,414

Priviledge of Abbies to be diſcharged of the payment of Tithes, not to be waived by the Abbots, *&c.* 429

Priviledge of Abbies to be diſcharged of Tithes, how veſted in the King, 413,*&c.*

Preſcription, that Fermors, and Occupiers, *&c.* ſhall be diſcharged of Tithes, to whom it ſhall exrend, 425,430,*&c.*

Preſcription to pay leſs than the whole Tithes, when good, or not, 436,*&c.* 459

Preſcription for diſcharge of Tithes, to what Tithes it ſhall extend, 409,411

Lord of a Mannor preſcribes to have Tithes, 407,408

Preſcription for diſcharge of a Garden, which is enlarged, 447

Biſhop preſcribes to have the Tithes of his Copyholders, 403

Preſcription to ſet forth Tithes, *ſine viſu vel tactu* of the Parſon, if good, 452

Preſcription to be diſcharged of Tithe-wool, 453

Cuſtom, *&c. de non decimando*, where good, and by whom, 402,405, 424, *&c.* 441

Two hundreds preſcribes in *Non decimando*, if good, 461

Modus decimandi what, 407

Every *Modus* ſuppoſeth an Original agreement, 461

Modus, how loſt, or deſtroyed, 402,410,*&c.* 440

Things not Tithable, given in diſcharge of Tithes, 412

A *Modus* ought to be to the benefit of him who has the right of Tithes, 406,*&c.* 409, 435, *&c.* 440

What ſhall be a ſufficient Conſideration for a *Modus*, 441, *&c.* 450, 454, 456

Modus in diſcharge of Tithe-Milk, 450

No *Modus* for Tithe Hops, 448

Modus, in diſcharge of Agiſtment, 453
Modus, for the Tithe of Colts, Calves, *&c.* 450
Modus, for Houſes, how to be intended, 388
Modus to pay ſo much by every Occupier, or the Inhabitant of an Houſe, not good, 388,389
Cuſtom for a Baker to be Tith-free for all Corn ground for the uſe of his Family, 461
Modus Decimandi, if allowed in the Spiritual Courts, 515
Modus, when ſuable for in the Spiritual Courts, 499, *&c.* 501, *&c.* 508, *&c.*
Modus, that the Inhabitants ſhall pay the tenth part of the value of their Land, and Houſes good, 389
Modus, to pay ſo much for every days plowing, if good, 389
Medus to pay part in kind only, when good, 436
Modus for all the Demeſnes of a Mannor, if a Mill erected thereupon ſhall be thereby diſcharged, 461
Barren Land how diſcharged of Tithes, and what ſhall be ſaid ſuch barren Land, 433
Modus for a Park which is diſparked, if Tithes ſhall be paid, 411
Tithes of Lands lying Fallow, 438
Lands in the King's hands pay no Tithes, 403, 405, 430
Land diſcharged of Titles by preſcription in the King's hands, the preſcription is deſtroyed by granting them out of the Crown, 430
The King's Leſſee not grantee, *&c.* ſhall be diſcharged, 403, 430
What preſcription ſhall diſcharge the King's Farmers, 403
What Unity of Poſſeſſion, *&c.* ſufficient to diſcharge payment of Tithes, 427, *&c.*
Unity of Poſſeſſion in diſcharge of Tithes, how to be pleaded, 427
What Pleas may be uſed againſt Unity of Poſſion, in diſcharge of Tithes, 427, 428
Houſes if they ought to pay Tithes, 387, *&c.* 400
What Houſes in *London* are diſcharged of Tithes, 392, *&c.*
Tithes in *London*, how paid, and how to be recovered, 387, *&c.*
Tithe of Mills what ſort of Tithe it is, and how to be paid, 460, 561
For what Mills, Tithes ſhall be paid, 460
Modus for all Mills erected, or to be rected, 461
Tithe of Herbs, *&c.* in a Garden, 447
No Tithe of Quarries of Stone, *&c.* 387
Lime not Titheable, but by Cuſtom, *ibid.*
Brick not Titheable, *ibid.*
Tithe of Eggs, 457
Tithe of Pigeons, 458
Rabbits Titheable only by Cuſtom, 501
Sheep, *&c.* eaten in the Family if Titheable, 452, 453, 458
Tithe of Beaſts *Feræ Naturæ*, 457
Tithe of Fiſh taken in the Sea, *&c.* 459
Fiſh Titheable only by Cuſtom, 450, 451
Tithe of Colts, Calves, *&c.* how to be paid, 449, 450
Tithe Milk, how to be paid, 451
Tithe of Hemp and Flax, how to be paid, 448
Tithe of Bees and Honey, *ibid.*
Tithe of Fowles, 457
Tithe of Heath, Turf, and Broom, 387, 441
Tithe of Green Tares, and Corn ſown on head Lands cut for Cattle, *&c.* 439
Tithes for Agiſtment of Cattle, and by whom payable, 440, 453, *&c.*
Cattle for the pale and plough, *&c.* diſcharged of Tithe, 454, 455
Tithes of Gueſts Horſes, agiſted by Inkeepers, 440, 455, 456
Servants in Husbrandry to pay no Tithes, 458
Tithe of Rape, Saffron, *&c.* 448
Tithe of Clover Glaſs, who ſhall have it, 448
Tithe of Hay cut to feed Deer, 436
Tithe of Stubble, or the after Crop, or for Cattle fed thereon, 438, 456
Tithes if payable of Rakings, 438
Cattle fed in divers Pariſhes, how Titheable, 453
Tithes of the Profits and giain of an Innkeeper, 455, 458
Tithe *de animalibus utilibus & inutilibus*, 451
Tithe of a new Seed, not before known, who to have it, 306, 307
Tithe of Wool, how to be paid, 451
Tithe paid of the Wool of Sheep, no Tithe for their herbage, 452
Tithes of the Fruits of Trees planted in a Nurſery, 446
Tithe of the Fruit of Trees, no diſcharge of the Soil, 446
Tithe of Hops how to be paid, 448
Wood titheable by Cuſtom only, 447
Tithe of Wood, when firſt paid, 447
Tithe of Wood, how to be paid, 441
For what wood Tithes are payable, 441, 443
Loppings of Trees when titheable, 444, 445
Silva cedua, what, 443
Wood to burn Brick for repairing or enlargement of an Houſe, *&c.* if Titheable, 442 443
Where wood not Tithable, ſhall priviledge wood which ought to pay Tithes, 445
Tithe of the Fruit of Trees which are after cut down, no Tithes to be paid for the Trees, 447
Wood cut for Hedge or Fuel, *&c.* if Titheable, 441, *&c.*
Wood cut to make Hop-poles, if Tithable, 442
Preſcription in diſcharge of the Tithes of Wood, 442. 446

Tra-

Traverſe.

Where a Traverſe may be taken upon a Traverſe, 195
The Plaintiff cannot forſake his own Title, and traverſe the Title made by the Defendant, *ibid.*
Where the King may forſake his own Title, and traverſe the Title of the Defendant, *ibid.*
Of whoſe Preſentation the Incumbent is in, if traverſable, 207
Cauſe of refuſing a Clerk by the Biſhop, traverſable, 201
Suggeſtion of Plea refuſed in the Spiritual Court, if traverſable, 516
Certificate for non-payment of Tenths, if traverſable, 34
Several Defendants in *Quare Impedit*, every one of them may traverſe, or confeſs and avoid the Plaintiffs title, 187

Trees.

Trees in Churchyard, by whom to be cut, and when, and in whom is the Property, 295, 304

Trial, Vide Courts.

Church full or not, or void or not, how to be tried, 166
Cauſe of refuſal of a Clerk by the Biſhop, how to be tried, 166,201
Ability or Diſſability of a Clerk, how to be tried, 166
Unions ſhall be determined in the Spiritual Court, 129
Divine Service performed, or not, how to be tried, 255
Matters concerning the Endowment of Vicarages between Parſon and Vicar, triable in Spiritual Court, 136,140
Barren Land, or not, where triable, 434
Church or Chappel, how to be tried, 182

Variance.

WHat ſhall be ſaid a Vriance from the name of a Corporation, 376,377
Where a Prohibition may be granted, notwithſtanding a Variance betwern the Suggeſtion and the Libel, 488,490,491
A Leaſe upon Condition, and a Leaſe abſolute, or Leaſe for 21 years, and a Leaſe for 21 years from a day to come, not intended the ſame Leaſe, 342

Vicarage.

Vicars in Cathedral Churches, not properly Vicars, 284
Vicarage, how created, and endowed, 134
Vicarage not to be created without aſſent of the Patron, *ibid.*
Vicarage derived from the Parſonage, 41
What Intereſt the Vicar hath in the Church, 304
If the Vicar, or Parſon hath the Cure of Souls, 136, 235
Who Patron of the Vicarage of Common Right, 135
Vicarage appendant to the Parſonage, 41
Vicar can claim nothing but according to the Endowment, or by Preſcription, 405
Vicarage endowed without the King's aſſent, 134
If Vicarage be united to the Parſonage by Preſentation, 137,139,182
Vicarage, how to be reſtored to the Parſonage, 136, *&c.*
Poverty of the Parſonage, reaſon to reſtore the Vicarage, *&c.* 140
Charge on Vicarage to be recompenced by the Parſonage, 140
Biſhops power to augment, *&c.* the Vicarage, 140,405
Vicarage reſtored before the Statutes of Diſſolutions, how made good to the King, and his Patentees by thoſe Statutes, 137
Vicarage united to another Church, 135
Endowment *de decimis Garbarum*, what ſhall paſs thereby, 306
Vicar endowed by the word *Alteragium*, 307
Vicar endowed of white Tithes, 308
Preſcription by Vicar to have certain Tithes, doth ſuppoſe an Endowment, 305
Vicar ſhall not have Tithes of the Parſons Glebe, without ſpecial Endowment, 308
Tithe of new Seed not before known, if the Parſon, or Vicar ſhall have it, 306,307
Lands uſually ſowed with Corn, is ſowed with Saffron, Woad, *&c.* if the Tithes belong to the Parſon, or Vicar, 305
Parſon leaſeth his Parſonage, if the Advowſon of the Vicarage is leaſed thereby, 41
Compoſition between Parſon and Vicar, and Endowments of Vicarage, how to be expounded, 306,307
Endowment of Vicarages, to be expounded by the Judges of the Common Law, 306
Matters concerning the Endowment of Vicarages between Parſon and Vicar, may be tried in the Spiritual Court, 136,140
Vicar, a Corporation by the Common Law, 287
Augmentations of Vicarages confirmed and continued, and remedy given to recover the ſame by Stat. 29 *Car.* 2. 308,309,310
What Augmentations of Vicarages are confirmed by Stat. 29 *Car.* 2. 309

Grants for Augmentation of Vicarages, to be Regiſtred and made as Records, 309

Vi laica removenda.

Vi laica removenda, where it lies, how to be ſued out, to whom to be directed, and what may be done thereupon, 27,231

Unions.

Unions of Churches, how to be made, 124, 127,*&c.*
What Churches may be united, and by whom, 127
Union of a Church full, may be, by apt words, 128
The effect of Union of Churches, 125
Churches in Cities,*&c.* how to be united, *ibid.*
Who ought to preſent upon Unions, 129
Unions of Churches, how to be made void by the Pariſhioners, 125
Unions made upon falſe Surmiſes, if void, 127
Unions not reſtrained, but limited by the Stat. 37 *H.* 8. *c.* 2. 127
Biſhop cannot unite a Church of his own Patronage, without conſent of the Dean and Chapter, 128
Chappel united to a College, 129
Church united to a Prebend in another Dioceſe, 129,372
Union of the profits of a Prebend, doth not unite the Office,*&c.* 129
What Clerk capable of Churches united by virtue of the Stat. 17 *Car.* 2. *c* 3. 127
Advowſon of the Church united, how it is affected by the Union, 128,129,181
Two Churches Appendant, or the one Appendant, the other in groſs, united, how the Advowſons ſhall be ſaid to be, 40,42
Pariſhioners of the Church united, to contribute to Repairs and Ornaments of the Church to which the Union is made, 129
Penalty for obtaining Unions contrary to Law, 7, 8
Unions to be determined in the Spiritual Court, 129

Unity of Poſſeſſion.

Unity of Poſſeſſion,*&c.* what, 403,426
Unity of Poſſeſſion in diſcharge of Tithes, how to be pleaded, 428
What Unity in the Abbots,*&c.* ſufficient to diſcharge the payment of Tithes, 427,*&c.*
Unity of Poſſeſſion, doth not extinguiſh Tithes, 416,426,428

Univerſities.

To what Livings of Recuſants,*&c.* the Univerſities ſhall preſent, 65,66
What Intereſt the Univerſities have in Recuſants Livings, 66
What Grants of Advowſons by Recuſants,*&c.* ſhall bind the Univerſities, *ibid.*
When a Preſentation ſhall be ſaid veſted in the Univerſities, 65
Preſentation veſted in the Univerſities, not to be diveſted by Conformity,*&c.* 65,66
Notice of the Avoidance of Livings of Recuſants, *&c.* how to be given to the Univerſities, and within what time, 67
Lecture Sermons in the Univerſities, excepted from the Penalty of the Stat. 14 *Car.* 2. 145

Void and Voidable.

Bonds, Covenants, and Judgments for Enjoyment of Leaſes, *&c.* made by Eccleſiaſtical Perſons, void, 362,363
What Leaſes,*&c.* ſhall be ſaid void, or voidable, 53,379,*&c.*
Leaſe void cannot be made good, 380,382
No remedy for Rent reſerved upon a void Leaſe, 381
Leaſes and Grants,*&c.* to Spiritual Perſons made void, 53,54,276
By what means a Leaſe, *&c.* voidable may be made abſolutely void, or good, 380,*&c.*
Where an Eſtate ſhall be ſaid to be abſolutely made void, or not, 372,373,380
The King cannot affirm, or make void a Leaſe to bind the ſucceeding Biſhop, 53
What perſons ſhall take advantage of a voidable Leaſe, 380
Tenant in Tail grants the next Avoidance, and dies, the Grant is not void, but voidable, 51
Leaſe to be void on non-payment of Rent, the Rent ought to demanded, 384
Freehold Eſtate not void before Entry, 381
In what reſpect, and againſt what perſons, a Grant or Leaſe,*&c.* ſhall be ſaid void, 378, 379,*&c.*
Church void by taking Orders Simoniacally, 46,103
To what purpoſes a Church is void by Simony, 6,26,46,103,151,316
To what purpoſes a Church is void by Judgment in a *Quare Impedit*, 20,215,*&c.*
To what purpoſes a Church is void by Canon, 6,7,82,315
By what means Churches become void, 1, 2, *&c.*
Church void by the Act of God, 1
Church void by the Act of the Party, 2,*&c.*
Layman admitted to a Benefice, if void, 34,104
Incumbent made Biſhop in *Ireland*, makes his Benefice void; Suffragan, or Titular Biſhop *contra*, 15
Incumbent extolling foreign Juriſdiction makes his Living void, 257
Preſentation, where it ſhall be void, 150

Inſtitu-

Inſtitution, *&c.* upon a void Preſentation, if void, 30,151,*&c.*
Not reading,or ſubſcribing the Articles, how it makes Benefice void, 6,33,106
Church, when void by Ceſſion, and to what purpoſes, 2,4,5,14,15,315
He that hath one Living accepts a ſecond, and and contends to keep both, both ſhall be void, 2
He that hath a Benefice under the value of 8 *l. per ann.* accepts a ſecond, to what purpoſes the firſt is void, *ibid.*
Voidance by accepting a ſecond Living, to what time it ſhall relate, 3
Firſt Living, if void by Inſtitution into a ſecond, *ibid.*
Where Deprivation is neceſſary to make an Avoidance, 2,34,35
To what purpoſe a Church is void by Deprivation, before Notice given, 315
Parſon incapable inſtituted, *&c*, if the Church be void before Deprivation, 34,35
When a Church ſhall be ſaid to become void by Deprivation, or not, 2,35
Sixty days abſence makes Livings of Recuſants preſented to by the Univerſities, void, 67
Church made void by Statute, void to all purpoſes, 34,314
Church void by not paying the Tenths, 33,34

Uſurpation.

The effect of an Uſurpation, 32,55,88,175
What Eſtate is gained thereby, 80,84
Uſurpation that makes a Plenarty, 83,175
No Uſurpation till Inſtitution had, 83
Preſentation by Simony makes no Uſurpation, 81
No Uſurpation by preſenting to a *Donative*, 81
No Uſurpation upon a Church Appropriate, 81, 138
By what means a Right gained by Uſurpation, may be regained, 89, *&c.*
What Acts will make an Uſurpation, 80 *&c.* 154,196
If an Uſurpation puts the King out of poſſeſſion, 86,204
What Preſentations by the King make an Uſurpation, 30,44,81,86,153
Where an Uſurpation by the King ſhall be avoided, 97,98
Uſurpation made upon him, who hath the Nomination, by him who hath the Preſentation, 52
Rightful Patron preſenting after Uſurpation, and Plenarty of ſix Months, is an Uſurper, 93,94
Wrongful Collation,to what purpoſes it is an Uſurpation, 77,78,80,204
Uſurpation by the Conuſor of a Fine before the Fine executed, 85
What Preſentations will put the rightful Patron out of poſſeſſion, 80,*&c.* 204
Leſſor uſurps upon his Leſſee, what is gained thereby, 85
No remedy at Common Law after Church full by Uſurpation, but by Writ of Right, 90,94,96,97
Uſurpation on Vicarage,not avoided by avoiding Uſurpation upon the Parſonage, 95
No Uſurpation, but where the Church was void at the time of the Preſentation made, 81
One preſents to his own Church, as Procter or Attorney to another perſon, is an Uſurpation upon himſelf, 71,81
Uſurpation by preſenting in the Right, or Name of another perſon, 81
Leſſee preſented by the Leſſor to the Church leaſed, if an Uſurpation, 96
Preſentation by colour of a Grant determined, makes an Uſurpation, 86
Uſurpation upon the Grantee of the three next Avoidances, the effect of it, 85
Super-inſtitution makes no Uſurpation, 315, 318
Uſurpation by one Coparcener upon the other, 84
Uſurpation upon the turn of one Coparcener, is no Uſurpation upon the reſt, *ibid.*
Uſurpation after Judgment in a Writ of Right, 85
If the Dean may uſurp upon the Chapter, 86
Husband and Wife preſent jointly, having no Right, no Uſurpation by the Wife, 81
The effect of an Uſurpation upon a Biſhop, or other Eccleſiaſtical perſon, 87
Notice of a Church being void, not neceſſary to make an Uſurpation, 73,81,82, *&c.*
What perſons relieved upon Uſurpations by by the Statute of *Weſtm.* 2. 89,90,*&c.*204, 205
How the Statute of *Weſtm.* 2. relieves againſt Uſurpations, 88,89,90,*&c.*
Purchaſe, by Uſurpation and Plenarty of ſix Months,is without remedy, 96,97,*&c.*175
Biſhop by denying or delaying a *Jure Patronatus*, is a diſturber, 190

Wales.

Bible and Common Prayer Book,to be tranſlated into the *Welſh* Tongue, 147,242
Common Prayer in *Wales*, to be ſaid in the *Welſh* Tongue, 242
Quare Impedit for a Church in *Wales*, where to be brought, 192
Cauſes of refuſal to admit a Clerk to a Church in *Wales*, 147

Warranty.

Warranty collateral binds the Iſſue in tail, 52

Waſt.

Leaſes diſpuniſhable of Waſt, 358
Attornment with Proteſtation, to ſave the Priviledge not to be puniſhed for waſte, 188
Leaſes diſpuniſhable of waſte not to be made by Eccleſiaſtical perſons, Colleges, *&c.* 357
Prohibition to hinder waſte, 27,357
Waſte not to be committed on Biſhops Temporalties, in time of Vacation, 321

Wills and Teſtament.

Laſt Wills and Teſtaments to be taken according to the intent of the Parties, 65
Incumbents may by Will diſpoſe of Corn growing, by them ſowed, 313
One may appoint by Will what perſon his Executors ſhall preſent to a void Church, 61, 62, 159
Incumbent having the Advowſon, may deviſe the ſame, or the next avoidance, by Will, 61, 62

Writ of Right of Advowſon.

Writ of Right of Advowſon where to be brought, and of what ſeiſin, *96, &c.*
Tryal in a Writ of Right, *ibid.*
Writ of right *de medietate advocationis*, 181
Writ of Right by him who hath the nomination, or preſentation only, 58
The Lord in Mortmain cannot have a Writ of Right of Advowſon, 83
Judgment in a Writ of Right of Advowſon, how it binds, 85

Writ to the Biſhop.

When a Writ to the Biſhop, after recovery in *Quare Impedit*, *&c.* ſhall be awarded, 210, *&c.* 218. 220, *&c.*
For whom to be awarded, 210, *&c.*
To whom it ſhall be directed, 221, *&c.* 228
At what time it ſhall be granted, 199, 200, 213
Where the Plaintiff ſhall have a Writ to the Biſhop, 187, 189, 199, 203
Where the Defendant ſhall have it, 204
Where both Plaintiff and Defendant may have writ to the Biſhop, 187, 204, 212, 213
Where neither Plaintiff or Defendant ſhall have it, 213
Who to be removed by it, 69, 75, 187, 188, &c. 215, 217, 224, 225, 226
Writ to the Biſhop, not to be awarded for a Stranger, 210, 214
If a Writ may be directed to Biſhop, without title made, 187, 204, 210, 211, *&c.*
If the Plaintiff may have both a Writ to the Biſhop and Damages, or either at Election, 218
Writ to the Biſhop if returnable, 223, 224, 225
What the Biſhop ought to do upon a Writ to him directed to admit, and what return to ſuch Writ ſhall be good, 223, &c.
Writ directed to a wrong perſon, if it make the Judgment Erroneous, 223
Where the writ to the Biſhop ſhall not have the Clauſe, *Non Obſtante Reclamation'*, &c. 188
Iſſue found againſt the King, yet a VVrit to the Biſhop awarded for him, 215
VVrit to the Biſhop awarded for the King, being no party to the Suit, 206, 207, 214
If the Patron may have a VVrit to the Biſhop, where his Clerk pleads himſelf to be inducted, &c. 206
Donative recovered, to whom the VVrit for poſſeſſion ſhall be directed, 223
In *Quare Impedit*, Plaintiff hath Judgment againſt ſome of the Defendants, and barred as to the reſt, no writ to the Biſhop, 212, 213
VVrit awarded to the Guardian of the Spiritualties and a Biſhop is made before the ſame Executed, 223
VVhere the Plaintiff after Judgment, may preſent without any VVrit to the Biſhop, 220
VVhere writ to the Biſhop ſhall be awarded, with a *Ceſſet Executio*, 199, 200, 203, 210, 212
VVrit once directed to the Metropolitan, ſhall not after go to the Imediate Ordinary, 222
Biſhop making an ill return or no return of the writ, ſhall be fined, and a *Sicut alias* awarded, 223, 225, 227
If the Juſtices of the Seſſions in *Wales*, may ſend a writ to the Biſhop, to admit, &c. 192, 223
VVhat remedy for a Clerk after Inſtitution, &c. upon a VVrit to the Biſhop, where another Incumbent keeps the poſſeſſion, 224, 225
VVhere VVrit to the Biſhop ſhall be awarded, upon Non ſuit, Abatement, &c. 210, &c.
Two Defendants, one makes default at the Grand diſtreſs, VVrit ſhall be awarded for the Plaintiff by the Statute of *Marlbridge*, 213
No VVrit to the Biſhop, till VVrit of Inquiry of Damages be returned, unleſs the Damages be releaſed, 213

FINIS